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THE SUPREME COURT'S THEORY OF PRIVATE LAW

NATHAN B. OMAN[†] AND JASON M. SOLOMON^{††}

ABSTRACT

In this Article, we revisit the clash between private law and the First Amendment in the Supreme Court's recent case, Snyder v. Phelps, using a private-law lens. We are scholars who write about private law as individual justice, a perspective that has been lost in recent years but is currently enjoying something of a revival.

Our argument is that the Supreme Court's theory of private law has led it down a path that has distorted its doctrine in several areas, including the First Amendment–tort clash in Snyder. In areas that range from punitive damages to preemption, the Supreme Court has adopted a particular and dominant, but highly contested, theory of private law. It is the theory that private law is not private at all; it is part and parcel of government regulation, or “public law in disguise.”

Part I is a brief overview of how that jurisprudential view came to be, as well as a sketch of a competing view of private law as individual justice. In Part II, we briefly trace the development of the doctrine surrounding the tension between the First Amendment and private law, particularly tort law, and how it helps lead to the view of private law as government regulation displayed in Snyder. We also point out how the intentional infliction of emotional distress tort, the main

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claim at issue in Snyder, is a particularly poor vehicle for the Court's theory of private law. A relatively recent tort, it was developed by scholars and judges as a means of redress for plaintiffs who had been wronged, but were left without a remedy.

Part III presents the central claims of the Article. We argue that the conception of private law as government regulation in Snyder arises from a combination of (1) the doctrinal tools that judges use in First Amendment cases, (2) the unitary nature of the state-action doctrine, and (3) the influence of instrumentalism, specifically in obscuring the plaintiff's agency and the state interest in redress, and in privileging a particular view of compensation. In Part IV, we present some normative or prescriptive implications of our analysis, and then conclude.

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INTRODUCTION

*Snyder v. Phelps*¹ was *the* blockbuster case of the Supreme Court's October 2010 Term, and for good reason. It had vivid facts: the father of a slain Marine sued protesters from a church whose mission was to disrupt funerals of soldiers around the country in order to spread their message of the dangers of homosexuality.² It featured the sexiest amendment in the Bill of Rights—the First—and perhaps *the* central principle in American political culture: freedom of speech. But with all of the First Amendment hype, less noticed was the underlying nature of the lawsuit itself, which had nothing to do with freedom of speech. It was the kind of lawsuit brought every day in courts around the country: a private party files a complaint, demands an answer, and alleges that the defendant has wronged him.

When the case went to trial, the particular claims that went to the jury were for intentional infliction of emotional distress and invasion of privacy: common-law torts.³ *Snyder* was, fundamentally, about *private* law. And it wasn't just media coverage and commentators that missed this point: the Supreme Court itself failed to appreciate the private-law nature of the case.

In this Article, we approach the tension in *Snyder* between private law and the First Amendment through the lens of private law as individual justice.⁴ When invoking the term “private law,” we do not mean to suggest that certain areas of law are pre-political, or exist somehow apart from the state. We simply mean to refer to common-law subjects like torts, contract, and property (and their statutory counterparts) that involve primary rights by individuals that can be

1. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

2. *Id.* at 1213.

3. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 570 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). A claim of civil conspiracy—based on the two tort claims—also went to the jury. *Id.*

4. *See generally*, e.g., Nathan B. Oman, *The Honor of Private Law*, 80 *FORDHAM L. REV.* 31 (2011); Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 *NW. U. L. REV.* 1765 (2009) [hereinafter Solomon, *Equal Accountability*]; Jason M. Solomon, *Judging Plaintiffs*, 60 *VAND. L. REV.* 1749 (2007) [hereinafter Solomon, *Judging Plaintiffs*].

enforced by the rights-holders themselves against other individuals and entities.⁵

We argue that the Supreme Court's theory of private law—one that follows the dominant view of private law as a species of government regulation—has distorted its decisions in several areas, including the First Amendment–tort clash in *Snyder*.

Much of the Court's approach to “speech torts” like defamation, invasion of privacy, and the intentional infliction of emotional distress tort at issue in *Snyder* can be explained by the particular circumstances in which the Court has interpreted the First Amendment in modern cases. Before *New York Times Co. v. Sullivan*⁶ in 1964, the Supreme Court had not applied the First Amendment to state common-law actions.⁷ But *Sullivan* was a uniquely appropriate vehicle for doing so. After all, cases in which government officials seek to suppress criticism lie at the core of virtually any theory of free speech.⁸ In *Sullivan*, as we discuss, this is clearly what the ostensibly private lawsuit was intended to do.

From the inception of the tort-versus-First Amendment doctrine, therefore, the Court treated private law as a tool used by government to suppress and punish speech.⁹ The fact that the cases decided immediately after *Sullivan* involved public figures surely contributed to this trend.¹⁰ By the time the Court decided *Snyder*, nearly fifty years later, the assumption that tort law served to suppress speech had become so pervasive that it scarcely needed to be articulated, and even an action by a private individual who was in no sense a

5. See John C.P. Goldberg, Symposium, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012) (referring to private law as that which “defines the rights and duties of individuals and private entities as they relate to one another”).

6. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

7. *Id.* at 299–300 & n.3 (Goldberg, J., concurring in the result) (pointing out that the Court was “writing upon a clean slate”). But see Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249, 250 (2010) (arguing that “constitutional constraints on speech-based civil liability have deep roots”).

8. See Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 918 (2010) (noting that the First Amendment was “designed to serve a quite limited purpose in preventing government suppression” of speech).

9. See *Sullivan*, 376 U.S. at 269 (“Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.” (footnotes omitted)).

10. See, e.g., *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 134 (1967); *Rosenblatt v. Baer*, 383 U.S. 75, 77 (1966).

government official or public figure¹¹ was conceptualized as an attempt to suppress offensive speech rather than an action seeking private redress.¹²

To understand why the Supreme Court currently holds this view of private law as a form of state regulation, it is necessary to look beyond the development of First Amendment doctrine. A widely held view of private law that has taken hold during the course of the twentieth century has influenced the Court's approach to tort law. What follows in Part I is a brief overview of how that view came to be, as well as a sketch of a competing view.

In Part II, we briefly trace the doctrine navigating the tension between the First Amendment and tort law, showing how the Court's decisions have led to the view of private law as government regulation displayed in *Snyder*. We also point out how the intentional infliction of emotional distress tort, the main claim at issue in *Snyder*, is a particularly odd vehicle for the Court's theory of private law. The tort was developed by scholars and judges as a means of redress for plaintiffs who had been wronged, but were left without a remedy. Seen in this context, intentional infliction and *Snyder* fall squarely in the wrongs-and-redress conception of private law.

Part III presents the central claims of the Article. We argue that the conception of private law as government regulation in *Snyder* arises from a combination of (1) the doctrinal tools that judges use in First Amendment cases, (2) the unitary nature of the state-action doctrine, and (3) the influence of instrumentalism, specifically in obscuring the plaintiff's agency and the state interest in redress, and in privileging a particular view of compensation.¹³ In Part IV, we

11. Doctrinally the Supreme Court treats public figures and government officials the same in the context of defamation. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (“[T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. . . . [P]rivate individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.”).

12. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (arguing that the outrageousness standard for speech in the intentional infliction of emotional distress tort carries a high risk that the jury will become an instrument for “suppression of . . . expression” (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984)) (internal quotation marks omitted)).

13. Benjamin Zipursky has pointed to this last factor as one that has led the Supreme Court astray in the areas of punitive damages and preemption. See Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 125 *Harvard Law Review* 1757, 1760, 1770–71 (2012) (arguing that “[i]f scholars, lawyers, or judges insist on treating the common law of torts as simply a form of public law that delegates enforcement to individual plaintiffs, they will be

present some normative implications of our analysis. First, we conclude that—in a way that it did not in *Snyder*—the Court should find ways of protecting First Amendment values by containing the right to civil recourse rather than cutting it off altogether. Second, the Court should be more attentive to the nature of state involvement in litigation and the importance of the state's interest in providing private parties with a means of redress for private injuries. Finally, the Court should pay more attention to the identity of the plaintiff and the way that the litigation is being used. There is a difference between a government official seeking to quash criticism and a private individual seeking redress for a wrong in which he was uniquely victimized.

I. COMPETING THEORIES OF PRIVATE LAW

A. *Private Law as Government Regulation*

Modern thinking about private law began on January 8, 1897. Picking such dates is always arbitrary, of course, but this day's claim is at least as good as any other. On that date, Oliver Wendell Holmes, Jr. gave a lecture at Boston University Law School, later published in the nascent *Harvard Law Review* as "The Path of the Law."¹⁴

Holmes's lecture came at a moment of tremendous creativity in private law. The decades after the Civil War saw the common law transformed by two pressures, one internal and one external. The internal pressure was the final collapse of the common-law writ system.¹⁵ As the old writs lost their grip on procedure and with it legal thought, it became necessary for judges and commentators to construct, for the first time, general bodies of doctrine governing tort and contract. This resulted in a huge burst of legal creativity as whole areas of the law were reimagined for the post-writ universe.¹⁶

The external pressure came from the massive economic and industrial expansion witnessed in the United States in the years after

doing torts with their eyes shut and stumbling at every turn," and pointing to punitive damages and preemption as areas where the Supreme Court has made this mistake).

14. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

15. See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 8–12 (1980) (describing the collapse of the writ system).

16. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 335 (2d ed. 1985) ("It is not hard to argue that American law between 1850 and 1900 underwent revolutionary change.").

the Civil War.¹⁷ In part this was technological. Improvements in the efficiency of steam engines dropped freight costs by sea and by rail.¹⁸ Instant, long-distance communication became widely available via telegraph and then telephone. Industrialization, especially increased mechanization, dramatically decreased production costs, creating the first truly national and international markets for manufactured goods, especially consumer goods.¹⁹ All of these economic developments, in turn, required private law to grapple with whole new categories of disputes, such as industrial accidents and complex corporate contracts.²⁰

Holmes thus wrote at a moment when private law in the United States was in profound doctrinal and intellectual upheaval, adapting itself to a radically new environment. In this context, Holmes provided a bracing new vision of the law, one based on a hardheaded functionalism and a strong distaste for moralizing jurisprudence.²¹ Rather than understanding the law in terms of some internal logic or the underlying structure of moral obligations, Holmes insisted on viewing the law purely in terms of a system of incentives.²²

This emphasis on law's functional reality, in turn, required that one think of law in terms of social aggregates and public policies. Having banished the language of morality from the law as so much sentimentality, Holmes offered a vision in which legal outcomes were

17. See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 11 (2000) (alluding to the "rapid and tumultuous changes" during the late nineteenth century that resulted in the transformation of the United States from a "rural, agricultural, and decentralized society into an urbanized and industrialized nation in the process of centralizing").

18. See JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 1 (2001) (noting that the "sweeping changes in American economic life" were driven by "developments in the field of transportation").

19. See James A. Henderson, Jr., *Judicial Design of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1544 (1973) (discussing the "rapid growth of technology in consumer products" that led to the first set of tort claims involving such products at the beginning of the twentieth century).

20. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

21. See Holmes, *supra* note 14, at 461 ("It does not matter . . . whether the act to which it is attached is described in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow it.").

22. See *id.* at 459 ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . .").

to be justified purely in terms of social utility.²³ On this point it is striking that Holmes, surely one of the most sophisticated legal thinkers of his time, turned away from the most complex body of interdisciplinary work on law at the close of the nineteenth century, namely history. “It is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV,” he wrote.²⁴ History, Holmes conceded, is necessary to expose the reality of law. However, he went on:

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.²⁵

In short, according to Holmes, private law should be divorced from noninstrumentalist moral philosophy, studied as a mechanism for social control through incentives and organized to advance particular social goods.²⁶

The century of private-law thinking since the publication of “The Path of the Law” can be usefully understood as an attempt to tame the dragon exposed by Holmes—the unruly historical accident that is the common law—and render the dragon useful. Above all else, usefulness has been understood in terms of enlightened regulation.²⁷ Writing a generation after Holmes, for example, Felix Cohen, a leading legal realist, dismissed traditional legal reasoning as so much

23. See *id.* at 467 (“I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage.”).

24. *Id.* at 469.

25. *Id.*

26. See WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 23 (1996) (describing the instrumentalist perspective as emphasizing “private law’s reflexive qualities as a mirror and facilitator of basic social processes, most importantly capitalist development”).

27. See Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 167 (2006) (defining the “instrumentalist thesis” as “the proposition that the outputs of legal decision-making processes (paradigmatically, appellate adjudication) are, and should be, determined by extralegal considerations—that is, by (extralegal) considerations of policy or principle” (emphasis omitted) (footnote omitted)).

“transcendental nonsense.”²⁸ Legal realists like Cohen were profoundly skeptical of the reasons traditionally given by common-law judges in support of their decisions and, like Holmes, longed for a legal discourse that would focus on the public policies at stake rather than obfuscating issues with the language of legal doctrine or individual moral responsibility.²⁹

Although private-law scholarship has fractured in many directions since the time of the legal realists, by and large it has accepted the realists’ basic rules of discussion. Rather than looking to the structure of legal doctrine for normative inspiration, the theorist should treat judicial rhetoric with suspicion.³⁰ The virtuous judge is one who refuses to hide behind legal rules and forthrightly takes policy choices and consequences into account.³¹ Private law in particular should not be understood as resolving private disputes but rather as a mechanism for public regulation.³² To be sure, there has been a range of opinions as to what constitutes desirable public

28. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811 (1935). The attempt to understand legal arguments in terms of the structure of legal concepts and their underlying normative logic, he insisted, was the equivalent of engaging in a meaningless scholastic debate over how many angels can dance on the head of a pin. *Id.* at 810. The panacea to our jurisprudential ills, Cohen insisted, was “the functional approach.” *Id.* at 822. Legal doctrine should be specified in terms of social aggregates and the effect of legal rules on social outcomes. *See id.* at 812 (“[S]ocial forces . . . mold the law and the social ideals by which the law is to be judged.”).

29. The work of the prominent legal-realist tort scholar Leon Green is a good example of this. Green’s torts casebook took a functional approach to considering the implications of various doctrinal choices for public policy. *See WHITE, supra* note 15, at 77 (discussing LEON GREEN, *THE JUDICIAL PROCESS IN TORTS CASES* (1931)).

30. *See, e.g.*, Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 450 (1930) (suggesting that “one lifts an eye canny and skeptical as to whether judicial behavior is in fact what the . . . rule purports (implicitly) to state”); *see also* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 476 (2003) (“[Reformist American legal thinkers] created a single impressive and threatening bogeyman, Holmes’s fallacy of logical formalism, Pound’s ‘mechanical jurisprudence,’ Cardozo’s ‘demon of formalism,’ and Felix Cohen’s ‘transcendental nonsense.’” (citations omitted) (quoting Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 *passim* (1908); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921); and Cohen, *supra* note 28, *passim*)).

31. *See* BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 231 (2006) (associating this view of judging with both pragmatists like Judge Richard Posner and purposivists like Justice Stephen Breyer).

32. *See* RICHARD A. POSNER, *OVERCOMING LAW* 391 (1995) (“‘The final cause of law’ . . . is the welfare of society.’ . . . Legal rules should be viewed in instrumental terms.” (quoting CARDOZO, *supra* note 30, at 66)) (internal quotation mark omitted).

regulation, but all sides have agreed that this is what private-law categories such as tort and contract are doing.³³

On this view, tort law should be seen in terms of safety regulation and social insurance. A primary purpose of making tortfeasors liable is to police their conduct by imposing fines on certain undesirable activities.³⁴ The modern law-and-economics movement has pursued this basic approach with the greatest tenacity and rigor. Money damages, on this view, force actors to fully internalize the cost of their own decisions, pushing them toward optimal levels of investment in precautions and the like.³⁵ Even those who have not adopted the law-and-economics framework continue to see tort law in terms of shifting losses from plaintiffs to defendants in order to achieve distributionally desirable outcomes by, for example, transforming corporate actors into insurers for those that they harm.³⁶ In either case, the law is a way of regulating conduct so as to achieve particular social outcomes.

In short, despite the diversity of modern thinking on torts and contracts, virtually all commentators assume that private law is a form of public regulation.³⁷ Writing more than one thousand years ago, Tribonian opened the *Institutes*³⁸ by writing, “There are two aspects of the subject: public and private. Public law is concerned with the organization of the Roman state, while private law is about the well-being of individuals.”³⁹ For much of Western legal history this distinction was taken as basic.⁴⁰ The century of legal thought since Holmes, however, has made the distinction invisible if not

33. See, e.g., *id.* at 109–44; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 *passim* (1976).

34. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 86 (2002) (describing this as one way tort liability may affect well-being under a welfare-economics framework).

35. For the leading account of this view, see generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

36. See Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 219 (2000).

37. See TAMANAHA, *supra* note 31, at 132 (“All [legal academics] construe law in fundamentally instrumental terms.”).

38. J. INST. (Peter Birks & Grant McLeod trans., Cornell Univ. Press 1987) (533).

39. *Id.* at 1.1.4.

40. See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 99 (2003) (noting “the massive classification and systematization of the rules of public and private law” in the wake of the Lutheran reformation).

incomprehensible.⁴¹ From Holmes's "bad man" to the complex theories of incentives promulgated by the economically inspired thinking that dominates contemporary views about torts, private law is something that the state does to its citizens. It is ultimately regulatory in precisely the same way that Occupational Safety and Health Administration (OSHA) regulations or Federal Trade Commission (FTC) rules are regulatory.⁴²

B. Private Law as Individual Justice

In opposition to the instrumentalist paradigm of private law, an alternative view has arisen in the past few decades. It is a view that might be described as old-fashioned, though it prevailed before Holmesian thinking took over.⁴³ It holds that private law is about individual justice. The rise of this view results from several trends. The first is a reaction to the dominance of instrumentalism in legal reasoning and legal theory, particularly utilitarianism and its main variant, law and economics.⁴⁴ A second and related trend is the revival of formalism, or "neoformalism," as a legitimate and desirable way of thinking about legal reasoning.⁴⁵ A third trend is a revival of what

41. See Duncan Kennedy, comment, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1357 (1982) (arguing that one cannot take the "distinction seriously as a description, as an explanation, or as a justification of anything"); Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004) (stating the realist view that the public-private distinction was conceptually impossible, given the fact that "private" rights inevitably depend on the existence of state power to enforce them). *But see* Goldberg, *Pragmatism and Private Law*, *supra* note 5, at 1640–41 (resisting the idea that "all law is public law"); Christian Turner, *Law's Public/Private Structure*, 39 FLA. ST. U. L. REV. 1003, 1008 (2012) (arguing that the distinction "provides a lens into the fundamental structure of legal culture," and that a two-stage taxonomy mapping the public-private nature of law creation and prosecution describes some of the fundamental choices for any legal system).

42. See John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1641 (2002) ("[O]n the deterrence view, safety regulations issued by agencies such as OSHA or [the Environmental Protection Agency] are even closer relatives to tort than criminal laws: They set standards, backed by fines or other sanctions that, in theory, will deter socially undesirable conduct.").

43. Solomon, *Equal Accountability*, *supra* note 4, at 1772.

44. See TAMANAH, *supra* note 31, at 1 ("An instrumental view of law—the idea that law is a means to an end—is taken for granted in the United States, almost a part of the air we breathe."); *see also supra* note 26.

45. For a good overview of the "new formalism" or "neoformalism," see Symposium, *Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999).

some have called “rights talk” in the legal academy and in legal practice.⁴⁶ We briefly review each of these developments in turn.

The rise of instrumentalism occurred over time, but by the 1960s and 1970s, its dominance in legal thinking was complete.⁴⁷ It is not just that it was unfashionable to think about law in any other way. It was nearly impossible to be taken as a serious practitioner or academic when articulating a different view.⁴⁸ Such complete paradigm shifts, as Thomas Kuhn and others have explained, inevitably lead to reactions and swings in the other direction.⁴⁹

Eventually, however, legal scholars from different vantages began to criticize instrumentalist thinking.⁵⁰ Some of this movement came from those trained in philosophy, where a similar reaction to utilitarianism was taking place.⁵¹ Legal thinkers on the left thought that instrumentalist thinking, particularly in the hands of economists,

46. For a critique from the academy, see MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 1–17 (1991) (taking stock of and critiquing this revival of “rights talk”). For an exposition and defense from leading judges, see generally Aharon Barak, Foreword, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002); and William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986). These judicial accounts are cited in Grey, *supra* note 30, at 480 n.24.

47. See TAMANAHA, *supra* note 31, at 116 (concluding that by the 1970s, “[t]he view that law is in essence an instrument had won over the legal academy”); see also Solomon, *Judging Plaintiffs*, *supra* note 4, at 1754–55 (“Since the publication of Oliver Wendell Holmes’ *The Common Law* in 1881, the dominant perspective among scholars is that tort law can be justified on instrumental grounds . . .” (citation omitted)).

48. See Solum, *supra* note 27, at 167 (“Contemporary American legal thought accepted as an almost dogmatic truth that legal decisions are (and should be) made on instrumental grounds—shaping outcomes to serve normative concerns.”).

49. See Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 679–81 (1990) (outlining four indicia that law is in a state of “Kuhnian crisis,” the fourth being “the proliferation of ‘schools’ or ‘movements’ within the academy that increasingly talk past one another: law and economics, law and literature, conventionalism, originalism, feminism, critical legal studies”).

50. For an example of such criticism in torts scholarship, see John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1735–45 (1998), which argues for a reintroduction in legal thinking of duty concepts, alongside instrumentalist concerns.

51. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 232–38 (1977) (arguing that utilitarianism fails to provide equality); JOHN RAWLS, *A THEORY OF JUSTICE* 14, 26–27, 286–89 (1971) (arguing that utilitarianism cannot give voice to concerns of fairness and individuality); Goldberg & Zipursky, *supra* note 50, at 1804 (“Although it continues to enjoy considerable popularity, utilitarianism was the subject of severe philosophical critique in the 1950s, ‘60s, and ‘70s.”); Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 75, 93–118 (1973) (arguing that utilitarianism renders moral values unintelligible). See generally *UTILITARIANISM AND BEYOND* (Amartya Sen & Bernard Williams eds., 1982) (critiquing various forms of utilitarian thought).

failed to consider important factors such as fairness and social solidarity in assessing the impact of law.⁵² Still others worried that if law simply collapsed into public policy, then law would lose its essential character.⁵³ Scholars and judges on the right thought that instrumentalist approaches to law allowed judges to sneak in their own policy preferences when deciding cases.⁵⁴

It was this final critique that gave rise to the neoformalists. For the neoformalists, deploying concepts and using deductive reasoning was not an empty exercise. It was an ineliminable part of legal reasoning.⁵⁵ If the law was to have any predictability, and if limits on the discretion of judges and other legal decisionmakers were to be

52. See generally, e.g., Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103 (2002) (criticizing law-and-economics scholars Louis Kaplow and Steven Shavell for failing to account for fairness and justice while pursuing the promotion of human welfare).

53. See Goldberg & Zipursky, *supra* note 50, at 1741 (arguing that the “Holmes-Prosser model” of judicial inquiry is undisciplined, leading to unhelpful, “arbitrary, indeterminate, and doctrinally unstable” decisions, and that “[i]n addition, as every torts professor knows, the reduction of negligence to policy analysis threatens to drain the analytic structure from torts”); see also Solomon, *Equal Accountability*, *supra* note 4, at 1758 (noting concerns that instrumentalism threatens to collapse law into public policy).

54. It was this concern that led judges and scholars such as Justice Antonin Scalia to call for a return to formalism. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 25 (Amy Gutmann ed., 1997) (“Long live formalism. It is what makes a government a government of laws and not of men.”); see also Michael C. Dorf, Foreword, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 26 (1998) (“For Justice Scalia, purposivism is indistinguishable from the common law method of case-by-case development of the law, in which judges assess the policy implications of various proposed rules of law, constrained only loosely by analogies to prior cases.”); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 996 (1985) (“The most obvious example of judicial influence on lawmaking is in the development of the common law. Although institutional constraints limit judicial action to some degree, the general policy preferences of judges will clearly have a strong effect on the content of common-law rules.”); Maimon Schwarzschild, *Keeping It Private*, 44 SAN DIEGO L. REV. 677, 687 (2007) (“The problem of judges as lawmakers in a democratic society is a familiar one. Judges are not readily answerable to the electorate. Hence, judicial lawmaking is in tension with democratic legitimacy, if not at odds with it.”).

55. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2 (2007) (“According to the formalists, judges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way.”); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 956 (1988) (“In the formalist conception, law has a content that is not imported from without but elaborated from within.”). See generally Martin Stone, *Formalism*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 166 (Jules Coleman & Scott Shapiro eds., 2002) (outlining the development of formalism and its relationship to deductive reasoning).

meaningful, then there had to be a check on judges simply implementing their own policy preferences. The formal mode of reasoning provided such a check.

In the 1980s and 1990s, a revival in thinking about rights occurred. This revival pushed back against prior critiques that rights were simply convenient labels to be used to mask whatever policy preferences a litigant, scholar, or judge was asserting.⁵⁶ Legal theorists such as Ronald Dworkin posited a meaningful role for rights in the context of judicial review.⁵⁷ Although “rights talk” enjoyed its most significant revival in the area of public law or constitutional rights, the idea of private-law rights emerged again as well. There has been a renewed interest in the importance of private-law rights—indeed, in the very idea that there is a coherent set of concepts called private law—led by the work of philosophers like Jules Coleman⁵⁸ and Ernest Weinrib in tort theory⁵⁹ and by scholars like Charles Fried in contract theory.⁶⁰ In both tort and contract theory, the philosophers have pushed back against the economists and argued that deploying ideas like rights, duties, fairness, and justice constitute a more accurate and better way to think about these areas of law.⁶¹

Much of this writing has been under the umbrella of “corrective justice.”⁶² For corrective-justice theorists, private law’s unification of the victim and the wrongdoer has normative significance.⁶³ The wrongdoer has breached a duty owed to the victim rather than to society at large, and so the wrongdoer now owes amends to the

56. See Goldberg & Zipursky, *supra* note 50, at 1793–97 (describing a resurgence of rights-based reasoning in order to further “highlight the oddity of the continued rejection of duty analysis in negligence scholarship”).

57. See, e.g., DWORKIN, *supra* note 51, at xi, 142–43.

58. See generally JULES L. COLEMAN, *RISKS AND WRONGS* (1992).

59. See generally ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

60. See generally CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

61. See, e.g., COLEMAN, *supra* note 58, at 382 (“[T]he victim’s connection to his injurer is fundamental and analytic, not tenuous or contingent. Thus, even if the current structure of tort litigation is consistent with economic analysis, it is better understood as embodying some conception of corrective justice.”); WEINRIB, *supra* note 59, at 132–33 (“[E]conomic analysis makes the wrong kind of considerations the primary building blocks of its enterprise. At the core of this treatment of welfare lies a straightforward idea: welfare cannot supply the normative underpinning for private law because private law relationships are bipolar and welfare is not.”).

62. For a summary of the leading theories of corrective justice, see Solomon, *Judging Plaintiffs*, *supra* note 4, at 1759–60.

63. See *id.* at 1759 & n.52 (citing WEINRIB, *supra* note 59, at 56–83).

victim. The practice of corrective justice, for many such theorists, helps restore the normative equilibrium among individuals in a society.⁶⁴

We are also attracted to, and have written about, a relatively new theory of individual justice called civil recourse.⁶⁵ Civil recourse takes as central components of private law that the plaintiff both decides whether to bring the case and prosecutes the case herself.⁶⁶ Like corrective justice, civil recourse sees normative significance in the plaintiff bringing her claim directly against the defendant, as opposed to bringing a demand to the attention of the state, for example.⁶⁷ And civil recourse sees torts specifically as a law of private wrongs, not as a vehicle for loss allocation or deterrence of risky activity.⁶⁸

The idea of private-law rights, though, is so closely associated with the *Lochner* doctrine that invoking such rights often invites skepticism from legal scholars.⁶⁹ *Lochner v. New York*,⁷⁰ of course,

64. See *id.* at 1784–87.

65. Civil-recourse theory was first introduced by Benjamin C. Zipursky in *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 6 (1998) [hereinafter Zipursky, *Rights, Wrongs, and Recourse*]. Shortly afterwards, John C.P. Goldberg and Zipursky addressed the theory in *The Moral of MacPherson*, *supra* note 50, which largely focused on the relationality of duty but also asserted that a relational-duty approach should go hand in hand with a civil-recourse theory of tort law, *id.* at 1826. Professors Goldberg and Zipursky have extended this relationality-and-recourse approach in several joint articles since and have also developed civil-recourse theory separately in, especially: John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 718–21 (2003) [hereinafter Zipursky, *Civil Recourse*]; and Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW, *supra* note 55, at 623.

66. See Zipursky, *Civil Recourse*, *supra* note 65, at 754 (“[C]orrective justice theory itself misses the true structure of tort law. Tort law is a system in which individuals are empowered to bring rights of actions against those who have committed torts—legal wrongs—against them . . .”).

67. See Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 65, at 92 (“The justice in the enforcement of private law lies in recognizing in those who are aggrieved a right to recourse against those who wronged them. It does not lie in the justice of bringing about a state of affairs that is optimal from a social point of view, whether corrective, distributive, or economic considerations provide the criteria of optimality.”).

68. See John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 972 (2010) (arguing that “a wrongs-based account of Torts connects elegantly to a plausible and appealing account of tort law’s place in our legal system”).

69. See Grey, *supra* note 30, at 476 (“Starting with Holmes in the 1890s, reformist American legal thinkers yoked the private law conceptualism of Langdell and his followers to the activist classical-liberal judicial review of the *Lochner* era.” (footnote omitted)). For a more positive view of *Lochner*, see generally DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

was a case wherein the right of freedom of contract was used to strike down New York State's regulation of bakery workers' hours.⁷¹ Professor Cass Sunstein and others critiqued the doctrine as enshrining a notion of common-law baselines that were somehow pre-political and natural.⁷² This view was taken as gospel among legal elites, at least until recently.⁷³ Indeed, even in *Kelo v. City of New London*,⁷⁴ a case with very good facts for proponents of private-law rights, a 5–4 decision from the Supreme Court upheld the state interest in economic development against the right to private use of one's property.⁷⁵ Moreover, in an age of statutes,⁷⁶ judges may think that legitimate state interests can only be found in legislative codes when they cannot be inferred from constitutional text. Looking for such rights in the common law might seem like praying to the “brooding omnipresence in the sky.”⁷⁷ Finally, private law may have a discredited pedigree in the court simply because of its association with the evils of litigiousness.⁷⁸

70. *Lochner v. New York*, 198 U.S. 45 (1905).

71. *Id.* at 64.

72. See HOWARD GILMAN, *THE CONSTITUTION BESIEGED: THE FOUNDING VISION OF A FACTION-FREE REPUBLIC, THE INTENSIFICATION OF CLASS CONFLICT AND CONSTITUTIONAL IDEOLOGY DURING THE LOCHNER ERA* 433 (1988) (claiming that the redirection of the Court's role in the political system required justices to come up with a reliable method of “specifying those ‘natural’ rights and liberties that liberalism claims are possessed by all individuals”); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 875 (1987) (“Numerous decisions depend in whole or in part on common law baselines or understandings of inaction and neutrality that owe their origin to *Lochner*-like understandings.”).

73. See, e.g., David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 11–12 (2003) (“Among constitutional law professors, the most popular understanding of *Lochner* is Cass Sunstein's view that the Court believed that common law rules were natural and immutable and therefore formed the appropriate baseline from which to judge the constitutionality of regulatory legislation. Legal historians, meanwhile, pay little heed to Sunstein's rather impressionistic understanding of *Lochner*. . . . [A different] understanding of *Lochner* is gradually winning an increasing audience among mainstream constitutional scholars and threatens to eventually supplant Sunstein's interpretation as the conventional understanding of *Lochner* among law professors.” (footnote omitted)).

74. *Kelo v. City of New London*, 545 U.S. 469 (2005).

75. *Id.* at 489–90; see also Richard A. Epstein, *Supreme Folly*, WALL ST. J., June 27, 2005, at A14 (“Last week's regrettable 5–4 decision in *Kelo v. City of New London* marks a new low point in the Supreme Court's takings jurisprudence.”).

76. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

77. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

78. See Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 342 (2009) (“If any other theme has emerged from the votes of Chief Justice Roberts and Justice Alito, it is an apparent hostility to litigation—continuing the views of their

This then was the intellectual backdrop when the Supreme Court considered the clash between private law and the First Amendment during the October 2010 Term in *Snyder*.

II. *SNYDER* AND THE SPEECH TORTS: A WINDOW INTO THE SUPREME COURT'S THEORY OF PRIVATE LAW

A. *Snyder v. Phelps*

On Friday, March 3, 2006, Lance Corporal Matthew A. Snyder of the Combat Service Support Group-1, First Marine Logistics Group, First Marine Expeditionary Force, died in Iraq's Anbar province when the Humvee in which he was riding overturned.⁷⁹ He had been in Iraq for one month and had been a Marine for three years.⁸⁰ He was twenty years old.⁸¹ Lance Corporal Snyder had grown up in the small Maryland town of Westminster and had only recently graduated from the local high school.⁸² Indeed, prior to shipping out to Iraq, the Marine Corps had sent Lance Corporal Snyder back as a recruiter to his high school.⁸³ His death was a major event in the small town.⁸⁴ School administrators announced it to the students and teachers at the high school, where David Brown, the assistant principal, had coached Lance Corporal Snyder as a six-year-old basketball player.⁸⁵ His mother was too grief-stricken to speak with the media, deputizing her sister—Lance Corporal Snyder's godmother—to act as her spokesperson.⁸⁶ Al Snyder, his father, said,

predecessors"); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1181 (2006) ("[T]he Rehnquist Court consistently expressed little patience with lower courts that have attempted to carve out for themselves a broader role in resolving disputes and administering justice."); Kenneth W. Starr, *The Roberts Court at Age Three: A Response*, 54 WAYNE L. REV. 1015, 1025 (2008) ("[T]he Roberts Court, more than any Court in recent memory, is skeptical of the efficacy of large-scale civil litigation.").

79. Nicole Fuller & Gina Davis, *Carroll Co. Marine, 20, Killed in Iraq*, BALT. SUN., Mar. 7, 2006, at 1B; *News at Five* (ABC television broadcast Mar. 10, 2006) (transcript on file with the *Duke Law Journal*).

80. Fuller & Davis, *supra* note 79.

81. *Id.*

82. *Id.*

83. *Id.*

84. See generally, e.g., *id.*; *News at Five*, *supra* note 79; Ari Natter, *Westminster Marine Dies in Iraq*, CARROLL CNTY. TIMES, Mar. 8, 2006, at 1A.

85. Fuller & Davis, *supra* note 79.

86. *Id.*

“He was a hero, and he was the love of my life.”⁸⁷ A week later, the family held a funeral for Lance Corporal Snyder at their Catholic church.⁸⁸

In 1955, Fred Phelps founded the Westboro Baptist Church in Topeka, Kansas.⁸⁹ The church describes itself as an “Old School (or, Primitive) Baptist Church” but is not associated with the Southern Baptist Convention or any other mainstream Baptist denomination.⁹⁰ Firmly believing in the Calvinist doctrines of total human depravity and limited atonement, the Westboro Baptist Church insists that there are many people that God despises and will refuse to save.⁹¹ The websites run by the church provide a litany of those to whom God’s grace will not extend and whom he accordingly hates: www.GodHatesFags.com, www.GodHatesIslam.com, www.GodHatesTheMedia.com, www.GodHatesTheWorld.com, www.JewsKilledJesus.com, www.BeastObama.com, www.PriestsRapeBoys.com, www.blogs.SpareNot.com, and www.AmericaisDoomed.com.⁹² Much of the church’s preaching focuses on homosexuality and the punishments that God has purportedly been raining down on America because of its tolerance toward homosexuals, including homosexuals in the military.⁹³ Since 1991, the church claims to have conducted over 47,000 “sidewalk demonstrations” in which they have held aloft signs declaring “God Hates Fags,” “AIDS Cures Fags,” “Thank God for Dead Soldiers,” “Fag Troops,” and the like.⁹⁴

On March 10, 2006, members of the Westboro Baptist Church arrived in Westminster to protest Lance Corporal Snyder’s funeral.⁹⁵ They had previously contacted the local police, who informed them that they would have to conduct their protest one thousand feet from the chapel where the funeral was to be held.⁹⁶ Protests by the church

87. *Id.*

88. Gina Davis, *At Carroll Funeral, a National Protest*, BALT. SUN., Mar. 11, 2006, at 1A.

89. Westboro Baptist Church, *About Us*, GOD HATES FAGS <http://www.godhatesfags.com/wbcinfo/aboutwbc.html> (last visited Feb. 7, 2013).

90. *Id.*

91. *Id.*

92. Westboro Baptist Church, *Frequently Asked Questions*, GOD HATES FAGS, <http://www.godhatesfags.com/faq.html> (last visited Feb. 7, 2013).

93. *Id.*

94. Westboro Baptist Church, *supra* note 89.

95. Davis, *supra* note 88; *News at Five*, *supra* note 79.

96. Nina Totenberg, *Supreme Court Rules for Anti-Gay Protesters at Funerals* (National Public Radio broadcast Mar. 2, 2011), available at <http://www.npr.org/2011/03/02/134194491/high-court-rules-for-military-funeral-protesters>.

had previously attracted the attention of veterans, who formed the Patriot Guard Riders, a motorcycle gang that converges on funerals targeted by the Westboro Baptist Church and forms a cordon of leather-clad, flag waving bikers to shield family members from the protesters.⁹⁷ Bikers from up and down the East Coast converged on Lance Corporal Snyder's funeral and ringed the edge of the parish church where the funeral was held.⁹⁸ Not surprisingly, the event attracted media attention, leading the local television news broadcasts and making the front page of the *Baltimore Sun*.⁹⁹ The Westboro Baptist Church subsequently published an extensive manifesto on its website defending the protests at the funeral and accusing the Snyders of raising their child to support child molestation in the Catholic Church, thus earning divine retribution.¹⁰⁰

The church's protests had also attracted the attention of Maryland state legislators, who introduced a law designed to protect mourning families from protestors by making it a crime to protest in close proximity to funerals.¹⁰¹ This law, however, was prospective only and was thus aimed at controlling the behavior of future protestors.¹⁰² It gave Lance Corporal Snyder's parents no means of redress against those who had turned their son's funeral into a national media event.

Maryland's common law of torts, however, did provide an avenue of redress. In 1977, the Maryland Supreme Court recognized the tort of intentional infliction of emotional distress in the case of

97. Davis, *supra* note 88.

98. *Id.*

99. See, e.g., *id.*; *News at Five*, *supra* note 79.

100. Westboro Baptist Church, *Where Can I Find "The Burden of Marine Lance Cpl. Matthew Synder" Epic??*, WBC BLOGS: THE WORKMEN BLOG (Oct. 11, 2011), [http://blogs.sparen.com/workmen/2011/10/11/where-can-i-find-the-burden-of-marine-lance-cpl-matthew-a-snyder-epic](http://blogs.sporen.com/workmen/2011/10/11/where-can-i-find-the-burden-of-marine-lance-cpl-matthew-a-snyder-epic).

101. H.B. 850, 421st Gen. Assemb., Reg. Sess. (Md. 2006) (codified as amended at MD. CODE ANN., CRIM. LAW § 10-205 (LexisNexis 2012)).

102. *Id.* The law's stated purpose is:

[P]rohibiting a person from knowingly obstructing, hindering, impeding, or blocking another person's entry to or exit from a burial, memorial service, funeral, or funeral procession under certain circumstances; prohibiting a person from addressing certain speech to a person attending a funeral, burial, memorial service, or funeral procession that is likely to incite or produce an imminent breach of the peace; prohibiting certain picketing; providing penalties for a violation of this Act; making the provisions of this Act severable; and generally relating to prohibiting certain speech likely to incite or produce an imminent breach of the peace and acts at burials, memorial services, funerals, or funeral processions under certain circumstances.

H.B. 850.

Harris v. Jones.¹⁰³ Building on case law from other jurisdictions, the *Restatement (Second) of Torts*,¹⁰⁴ and academic commentary, the court crafted a tort designed to provide redress against “one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress.”¹⁰⁵ As examples of severe emotional distress, the court cited cases involving false allegations of child molestation and misconduct surrounding the death of a loved one.¹⁰⁶ On June 5, 2006, Al Snyder availed himself of this law and sued the Westboro Baptist Church protesters in federal district court in Maryland.¹⁰⁷

The jury eventually awarded Al Snyder \$2.9 million in compensatory damages and \$8 million in punitive damages, which the district court reduced to \$2.1 million.¹⁰⁸ Phelps appealed to the Fourth Circuit Court of Appeals, arguing that Maryland’s tort of intentional infliction of emotional distress violated the Free Speech Clause of the First Amendment.¹⁰⁹ The Fourth Circuit agreed, and Snyder appealed to the United States Supreme Court, which granted certiorari.¹¹⁰ The Court upheld the Fourth Circuit’s decision.¹¹¹

B. Doctrinal Background—First Amendment Versus State Tort Law

The majority opinion in *Snyder* by Chief Justice Roberts represents the culmination of a long series of cases in which the Court has considered the relationship between the First Amendment and state tort law. The Court’s jurisprudence in this area begins with *Sullivan*, a case that grew out of the Civil Rights movement and the struggle against segregation in Alabama.¹¹² On March 29, 1960, the

103. See *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977) (holding that “the independent tort of infliction of emotional distress should be sanctioned in Maryland”).

104. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

105. *Harris*, 380 A.2d at 613 (quoting RESTATEMENT (SECOND) OF TORTS § 46 (internal quotation marks omitted)).

106. *Id.* at 613–14, 617.

107. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572 (D. Md. 2008), *rev’d*, 580 F.3d 206 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011).

108. *Id.* at 595, 597.

109. *Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011).

110. *Snyder v. Phelps*, 130 S. Ct. 1737 (2010).

111. *Snyder v. Phelps*, 131 S. Ct. 1207, 1221 (2011).

112. Mr. Sullivan, one of three Commissioners of the City of Montgomery, Alabama, brought his “action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

New York Times ran a paid advertisement in the form of an editorial entitled “Heed Their Rising Voices.”¹¹³ The editorial described events in Montgomery, Alabama related to the student protests against the continuing unwillingness of the state to comply with various desegregation orders.¹¹⁴ It was undisputed that the advertisement as published contained various false statements about the Montgomery police department.¹¹⁵ For example, it stated that police had “ringed” the university campus when, in fact, the police had only been stationed nearby, and it claimed that Dr. Martin Luther King, Jr. had been arrested seven times when, in fact, he had only been arrested four times.¹¹⁶ Sullivan, one of Montgomery’s elected police commissioners, sued the *Times* for libel and was awarded \$500,000 in compensatory damages by an Alabama jury, although neither Sullivan nor the police commission was mentioned in the advertisement.¹¹⁷

The *Times* appealed to the Supreme Court, which ruled that for a public official to prevail in a tort action based on critical speech he must not only show that the statement is false and was made with “actual malice,” but he must also prove these elements with “convincing clarity.”¹¹⁸ Strikingly, the Court’s opinion, authored by Justice Brennan, reveals a view that sees private law as essentially indistinguishable from other forms of government regulation. This can be seen, for example, in the Court’s rejection of Sullivan’s state-action argument. The Court wrote:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to

113. *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at L25.

114. *See id.* (“In [the students’ efforts] to uphold these guarantees [in the Constitution and the Bill of Rights], they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom . . .”). As the Court described the article, “[s]ucceeding paragraphs purported to illustrate the ‘wave of terror’ by describing certain alleged events.” *Sullivan*, 376 U.S. at 256–57.

115. *See Sullivan*, 376 U.S. at 258 (“It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of the events which occurred in Montgomery.”).

116. *Id.* at 259.

117. *Id.* at 256, 258.

118. *See id.* at 285–86 (“[W]e consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands . . .”); *id.* at 287 (“The mere presence of the stories in the files does not, of course, establish that the Times ‘knew’ the advertisement was false . . .”).

impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.¹¹⁹

Elsewhere in the opinion, the Court wrote disparagingly of attempts to draw distinctions between libel law and other forms of restrictions on speech as “mere labels of state law.”¹²⁰ Hammering away at the equivalence between private law and other forms of government regulation, Justice Brennan wrote, “What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.”¹²¹

The Constitution prohibits the suppression of political speech by the state. The Court’s key point was that, like the other attempts to suppress the speech that its opinion listed, the effect of libel damages was to penalize speech critical of public officials.¹²² As even critics of the Court’s decision have acknowledged, it was surely correct that “[w]hether or not a newspaper can survive a succession of [civil] judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.”¹²³ Hence, the Court focused on “a State’s power to award damages for libel,”¹²⁴ seeing the purpose—or at any rate the effect—of libel law in terms of the suppression of libelous speech by the government.¹²⁵

119. *Id.* at 265. The “state rule of law” to which the Court refers, *id.*, is at sections 908 to 917 of Title 7 of the Alabama Code.

120. *See Sullivan*, 376 U.S. at 269 (“[W]e are compelled by neither precedent nor policy to give any more weight to the epithet ‘libel’ than we have to other ‘mere labels’ of state law.” (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963))).

121. *Id.* at 277.

122. *See id.* at 269–70 (“Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. . . . Thus, we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” (footnotes omitted)).

123. *Id.* at 278; *see also, e.g.*, Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 790 (1986) (“Nonetheless the states cannot be allowed to define defamation as they please. If they could, they might expand the boundaries of the tort until it covers what, in strict theory, belongs within the domain of protected speech.”).

124. *Sullivan*, 376 U.S. at 283.

125. *See id.* at 278 (“Plainly the Alabama law of civil libel is ‘a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.’” (quoting *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 70 (1963))). *But see id.*

Given the context of *Sullivan*, it is unsurprising that the Court saw the libel action at issue in the case primarily in terms of the state's effort to suppress critical speech.¹²⁶ First, the case arose in the context of the largely unsuccessful attempt by the federal courts to force southern states to desegregate.¹²⁷ Second, and related, given that the connection between the advertisement and *Sullivan* was tenuous at best, and that criticism by outside agitators (such as those who purchased the *New York Times* advertisement) likely enhanced—rather than libeled—*Sullivan*'s political reputation, it is unsurprising that the Court saw the lawsuit mainly as an effort to muffle criticism of segregationist policies.¹²⁸ There is every indication that speech suppression is exactly what the suit was intended to do.¹²⁹ Indeed, though the majority opinion was coy on this point, the concurring opinion by Justice Black, joined by Justice Douglas, was more forthright. Justice Black wrote:

One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called "outside agitators," a term which can be made to fit papers like the *Times*, which is published in New York.¹³⁰

Given this background, it is easy to understand why the justices concluded, in the words of Justice Black's concurrence, that "state

at 281 (quoting a decision by the Kansas Supreme Court weighing the importance of public discussion against the "occasional injury to the reputations of individuals" (quoting *Coleman v. MacLennan*, 98 P. 281, 286 (Kan. 1908)) (internal quotation marks omitted)).

126. See *supra* notes 119–122 and accompanying text.

127. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 42–54 (1991) (discussing the relative ineffectiveness of judicially mandated desegregation).

128. See ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 151 (Vintage Books 1992) (1991) ("No doubt Justice Brennan and those who joined his opinion of the Court were also aware of those realities [about race and political incentives raised in Justice Black's concurrence].").

129. See *id.* at 42 ("Commissioner Sullivan's real target was the role of the American press as an agent of democratic change. He and the other Southern officials who had sued the *Times* for libel were trying to choke off a process that was educating the country about the nature of racism and was affecting political attitudes on that issue.").

130. *Sullivan*, 376 U.S. at 294 (Black, J., concurring).

libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials.”¹³¹ The majority also displayed a distinct lack of trust in the Alabama courts, resolving the case on the merits before remanding it to the local court.¹³² Though the majority justified this action in the name of “effective judicial administration,”¹³³ the procedural ploy makes it clear that the majority shared the concurrence’s belief that libel law was being used as a weapon to suppress critical speech.¹³⁴ Indeed, one of the striking things about the Alabama law at issue in the case is that it was not the common law of libel but rather a statutory creation that, through a series of shifted presumptions, made it very easy for public officials to obtain libel judgments for any factually inaccurate statement, even if the errors were relatively trivial.¹³⁵

Nearly twenty-five years later, in *Hustler Magazine, Inc. v. Falwell*,¹³⁶ the Court extended its approach in *Sullivan* to cases involving the intentional infliction of emotional distress, holding that a public figure could not recover damages against the publisher of a parody that had otherwise satisfied the common-law requirements for the tort.¹³⁷ The case involved a mock advertisement published by Larry Flint’s *Hustler Magazine* featuring a drunken and incestuous sexual encounter in an outhouse between conservative televangelist Jerry Falwell and his mother.¹³⁸ In overturning Falwell’s damage award, the Court once again conceptualized damages as a form of “governmentally imposed sanctions.”¹³⁹ According to the opinion by

131. *Id.*

132. *See id.* at 292 (majority opinion) (“The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceeding not inconsistent with this opinion.”).

133. *Id.* at 284.

134. *See id.* at 291–92 (discussing the “disquieting implications” of the Alabama court’s transformation of impersonal governmental criticism “into personal criticism, and hence potential libel, of the officials of whom the government is composed”).

135. *See supra* note 119 and accompanying text.

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

137. *Id.* at 50 (“Respondent would have us find that a State’s interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.”).

138. *Id.* at 47–48.

139. *Id.* at 51; *see also id.* at 50–51 (“[T]he freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common

Chief Justice Rehnquist, the purpose of the tort of intentional infliction of emotional distress is to impose a “sanction in the form of damages” and “prevent[] emotional harm.”¹⁴⁰ Hence, the state interest to be balanced against First Amendment values was its ability to control its citizens’ behavior by suppressing a particular activity—offensive speech—through a system of monetary punishments.

This does not mean, however, that the Court’s modern First Amendment jurisprudence has always conceptualized state tort law in terms of government regulation and the suppression of speech. In *Rosenblatt v. Baer*,¹⁴¹ the Court considered who should be treated as a “public official” for purposes of *Sullivan*’s “actual malice” requirements.¹⁴² The Court entertained the possibility that the manager of a ski resort owned by a New Hampshire county was a “public official” and therefore faced the heightened requirements of *New York Times*.¹⁴³ Writing for the Court, however, Justice Brennan emphasized, “This conclusion does not ignore the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing *and redressing* attacks upon reputation.”¹⁴⁴ In his concurring opinion, Justice Stewart was even more forceful:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system. . . . The First and Fourteenth Amendments have not

quest for truth and the vitality of society as a whole.’ We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.” (alteration in original) (citation omitted) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–04 (1984))).

140. *Id.* at 52–53.

141. *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

142. *Id.* at 77; *see also id.* at 86 (“Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply.” (footnote omitted)).

143. *Id.* at 87.

144. *Id.* at 86 (emphasis added).

stripped private citizens of all means of redress for injuries inflicted upon them by careless liars.¹⁴⁵

Notice that both Justice Brennan and Justice Stewart conceptualize tort law as serving more than merely the state's interest in preventing speech damaging to reputation. They also see the law as providing an avenue of redress for wronged plaintiffs. In other words, the law is not merely a mechanism for controlling the behavior of citizens. It also serves to empower private parties to act against those who have wronged them. Indeed, Justice Stewart suggested that the availability of this agency has its roots in the idea of "ordered liberty" and may be independently protected by the Constitution.¹⁴⁶

By 2011 and *Snyder*, however, the image of tort law as a mechanism for the regulation of speech was firmly entrenched in the Court's jurisprudence.¹⁴⁷ Strikingly, for an opinion declaring a well-established common-law claim unconstitutional, Chief Justice Roberts's majority opinion in *Snyder* does not even attempt to articulate a justification for state tort law, instead focusing the bulk of its discussion on the nature of Westboro's speech.¹⁴⁸ The opinion acknowledged the plaintiff's deep emotional distress,¹⁴⁹ but, if anything, this acknowledgment served to strengthen Phelps's First Amendment claim.¹⁵⁰ The acknowledgment did this by bolstering the majority opinion's conceptualization of tort law as doing little more than seeking to punish and suppress distressing speech.¹⁵¹

145. *Id.* at 92–93 (Stewart, J., concurring).

146. *Id.* at 92.

147. Both sides' briefs in *Snyder* reflect this point. *See, e.g.*, Brief for Petitioner at 19, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (No. 09-751), 2010 WL 2145497, at *19 ("[T]he First Amendment protects speakers from tort liability only when there is a reasonable relationship between the 'matter of public concern' and the speech's target."); Brief for Respondents at 18, *Snyder*, 131 S. Ct. 1207 (No. 09-751), 2010 WL 2826988, at *18 ("*Hustler* . . . requires that any speech on public matters that is targeted by the tort of [intentional infliction of emotional distress] must be shown false and uttered with actual malice.").

148. *See Snyder*, 131 S. Ct. at 1217 ("The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro's speech.").

149. *Id.* at 1217–18.

150. *See id.* at 1219 ("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.").

151. *See id.* ("What Westboro said, in the whole context of how and where it chose to say it, is entitled to 'special protection' under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous.").

In his concurrence, which made clear that he favored a case-by-case approach to balancing First Amendment and tort interests, Justice Breyer conceptualized the tort of intentional infliction of emotional distress in terms of the state's effort to regulate a certain kind of behavior.

To uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm.¹⁵²

Notice, however, that Justice Breyer's defense of the state interest remains couched in the regulatory vision of tort law that has dominated the Court's jurisprudence since *Sullivan*.

Only Justice Alito expressed concern, writing a dissent in which he insisted that the First Amendment does not mean that the Westboro Baptist Church "may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate."¹⁵³ The bulk of his opinion focused on the church's tactic of using funerals to garner public attention, the limited public interest of the attacks directed specifically at Snyder and his family, and the wide availability of other fora in which to share their public message.¹⁵⁴ But even Justice Alito conceded the majority's assumption that tort law was a form of regulation, with liability designed to deter unwanted speech. Hence, he wrote, "[t]o protect against such injury, most if not all jurisdictions permit recovery in tort for the intentional infliction of emotional distress."¹⁵⁵

C. *Intentional Infliction of Emotional Distress*

The assumption that tort law is a form of government regulation is particularly strange in light of the tort at issue in *Snyder*—intentional infliction of emotional distress. Although the verdict in that case was based on an invasion of privacy claim as well, the conflict between intentional infliction of emotional distress and the First Amendment was the main issue on appeal.¹⁵⁶ The intentional

152. *Id.* at 1222 (Breyer, J., concurring).

153. *Id.* (Alito, J., dissenting).

154. *Id.* at 1223–26.

155. *Id.* at 1222 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988)) (internal quotation marks omitted).

156. *Id.* at 1213 (majority opinion).

infliction of emotional distress tort provides a clear example of a tort that was created by judges to provide redress for victims of wrongs, and in doing so, to reinforce social equality.¹⁵⁷ Even the most committed economists would have a hard time making the descriptive claim that intentional infliction of emotional distress was created as a means of government putting a price on certain kinds of harmful activity so as to discourage it.

The origins of the tort lie in early twentieth-century cases in which individuals suffered harm from passing trains, but without direct physical contact.¹⁵⁸ These cases, analyzed in depth by Professor Barbara Welke and by Professors Martha Chamallas and Jennifer Wriggins in recent books, were known as “fright” cases.¹⁵⁹ The word “fright” refers to the kind of injury that people thought women had suffered when trains passed too close to their homes, stopped suddenly in front of them, and the like.¹⁶⁰ But fright was not even considered to be an injury at the time, simply a condition.¹⁶¹ And it was a condition invoked particularly by women, who were not represented among judges and juries.¹⁶²

The early lawsuits against the railroads in these circumstances generally failed.¹⁶³ In not recognizing these injuries, the courts were saying (one might argue) that those who suffer these kinds of injuries—here, women—do not count. When courts moved later to recognize emotional distress as legitimate, they were validating the

157. See Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 42 (1982) (“The tort provides recovery to victims of socially reprehensible conduct, and leaves it to the judicial process to determine, on a case-by-case basis, what conduct should be so characterized.”).

158. BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920*, at 229–31 (2001).

159. See, e.g., MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 39–46 (2010); WELKE, *supra* note 158, at 203–34.

160. CHAMALLAS & WRIGGINS, *supra* note 159, at 40; Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 826–43 (1990) (describing early railroad-related fright cases).

161. E.g., WELKE, *supra* note 158, at 229–31; Chamallas & Kerber, *supra* note 160, at 819–21.

162. E.g., WELKE, *supra* note 158, at 229–31; Chamallas & Kerber, *supra* note 160, at 819–21.

163. See, e.g., CHAMALLAS & WRIGGINS, *supra* note 159, at 40 (“As with so many other legal disputes, the choice of classification was crucial: if the claim was for mental disturbance, there would be no recovery”); WELKE, *supra* note 158, at 212 (“In New York, Pennsylvania, Massachusetts, and the few states that followed their lead, gender and class combined with other factors to shape a rule of no liability for nervous ills”).

very real injuries that women had suffered, and they were affirming women's equal claim to personhood.¹⁶⁴ Recognizing this new tort of intentional infliction of emotional distress thus can be seen as the state putting its imprimatur on certain conduct as wrong, and on a class of plaintiffs as morally entitled to demand redress or justice.

How does this lens help us understand *Snyder*? It was unacceptable for Phelps to treat Snyder, a father grieving his son's loss, as simply a pawn in his larger plan to alert the country to the moral rot that Phelps believed was taking place. Providing redress for intentional infliction of emotional distress is a way that the state can underscore Snyder's equal moral worth. Snyder's claim is a chapter that fits easily in the story of a tort that has been significantly involved in the evolution of social norms on how to treat different kinds of people over the last century. But it is a poor fit for a story about the government's attempt to regulate harmful activity. Which brings us to the puzzle: why did all three opinions in *Snyder* assume that the underlying tort law was simply a species of government regulation? It is this question that we attempt to unpack in Part III.

III. UNPACKING THE SUPREME COURT'S THEORY OF PRIVATE LAW

In this Part, we unpack the Supreme Court's theory of private law through the lens of *Snyder*. In our view, the conception of private law as government regulation comes from a combination of (1) the doctrinal tools that judges use in First Amendment cases, (2) the unitary nature of the state-action doctrine, and (3) the influence of instrumentalism in obscuring the plaintiff's agency and the state interest in redress, while privileging a particular view of compensation. We explain what we mean by this in the proceeding discussion, and then in Part IV, we offer some preliminary thoughts on the normative implications if the Court were more attentive to the rights to redress embedded in private law.

A. *First Amendment Doctrine*

Generalizing about First Amendment doctrine is a dangerous task. The Supreme Court and First Amendment scholars generally

164. See WELKE, *supra* note 158, at 234 ("In the law of nervous shock, courts not only acknowledged the extent of the dependence and vulnerability which defined modern life, they as well extended the sphere of the law's protection to the intangible space of the mind. In so doing, they contributed to a redefinition of the scope of liberty in modern life.").

agree, however, that most First Amendment cases involve assessing the First Amendment values at stake in light of the state interest in the underlying law being challenged.¹⁶⁵ This analysis, though, does not amount to a simple balancing of the scales.¹⁶⁶

The problem in the speech-tort context, though, is that the Supreme Court's theory of private law skews the way that both the First Amendment and state tort interests are assessed. Specifically, the Supreme Court's theory reinforces two mistaken assumptions about the purpose and effect of state tort law. First, on the state-interest side, it bolsters the suspicion that an illicit purpose or motive is at work.¹⁶⁷ If the state is *regulating*, then it must be *suppressing*.¹⁶⁸ This is, after all, what "deterrence" is all about: preventing the wrongful conduct (here, speech) from happening in the first place. Second, the theory of private law as regulation is providing a presumption of "effects" on the First Amendment side of the equation: that speech will indeed be suppressed.¹⁶⁹

Recall that First Amendment doctrine strives to strike a balance between the constitutional interest in speech on the one hand, and the state interests in redress or regulation on the other. In doing this, the doctrine uses the basic categories of "content-based" and "content-neutral" regulation to serve as a rough divide between suspicious and

165. The majority opinion in *Snyder* itself explicitly acknowledged that this was its task, though without using the disfavored "balancing" word: "As we have noted, 'the sensitivity and significance of the interests presented in clashes between First Amendment and [state law] rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.'" *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (alteration in original) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989)).

166. See Frank I. Michelman, *Discretionary Interests—Takings, Motives, and Unconstitutional Conditions: Commentary on Radin and Sullivan*, 55 ALB. L. REV. 619, 619–20 (1992) (asserting that balancing and categorizing are better seen as a reflection of judgments about the importance of underlying governmental interests); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 712 (1994) (arguing that constitutional adjudication is less about balancing, and more about "defining the kinds of reasons that are impermissible justifications for state action in different spheres").

167. Alexander Bickel distinguished the term "motives" from "purposes" by arguing that "motives" referred to the actual intention of legislators who supported the statute, while "purposes" referred to what an outside observer would impute to the statute based on the available evidence. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 61–63 (1962).

168. Cf. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594–2600 (2012) (discussing the tax/penalty distinction, with taxes designed to put a price on activity and penalties designed to suppress it). Thanks to Katie Ertmer for this interesting analogy.

169. See Richard H. Fallon, Jr., Foreword, *Implementing the Constitution*, 111 HARV. L. REV. 56, 69–70 (1997) (discussing "effects tests").

less suspicious government action.¹⁷⁰ This division has been criticized as a crude one,¹⁷¹ but has been explained by scholars such as Professor Jed Rubenfeld and now-Justice Elena Kagan as a proxy for or means of “flushing out” suspect or illegitimate government motives, namely suppressing disfavored speech.¹⁷²

This kind of doctrine—deploying tools for flushing out “motive”—is common in constitutional adjudication.¹⁷³ To be sure, the Supreme Court has denied, in the seminal case *United States v. O'Brien*,¹⁷⁴ that government purpose is relevant, but scholars have persuasively shown that the Court's actions in subsequent cases prove otherwise.¹⁷⁵ In *O'Brien*, the Court was concerned about “effects” on

170. See Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 235 (2012) (describing the “two basic ideas behind the content-discrimination principle” as being that it is “usually wrong” for government to regulate based on the content of the speech, and “usually acceptable” to regulate for other reasons).

171. See, e.g., Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 50 (2000) (arguing that the Court's application of the distinction is “inconsistent”); Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 12 (2006) (observing that the “alleged black-letter rule” that the state may not regulate speech on the basis of its content is “blatantly false”); cf. Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 159 (arguing that the use of strict scrutiny in Equal Protection cases reflects an empirical assumption about the “perceived likelihood of legitimate versus illegitimate motives”).

172. See, e.g., Kagan, *supra* note 77, at 441 (“By using these rules, courts could invalidate laws supported by improper reasons without ever confronting the problems of proof generated by a direct inquiry into motive. The function of the rules [is] in flushing out impermissibly motivated actions”); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 794 (2001) (explaining that the narrow-tailoring test is used as a “smoking-out” device in circumstances where the evidence gives rise to a “strong suspicion” of unconstitutional purpose).

173. See, e.g., Lawrence A. Alexander, Introduction, *Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 926 (1978) (outlining the kinds of questions a theory of motivation inquiry would have to answer (citing Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; and John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970))); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 302 (1997) (“This Article attempts to identify principles that the Court may use to guide its purpose scrutiny in a manner consistent with its constitutional role.”).

174. *United States v. O'Brien*, 391 U.S. 367 (1968).

175. See Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1787–88 (2008) (noting that, despite the Court's protestation in *O'Brien*, courts had “long been willing to consider some objective indicia of legislative purpose” in assessing the constitutionality of a statute, even if they had been unwilling to scrutinize the “legislature's inner workings”). Indeed, the Supreme Court has acknowledged as much. See *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2663 (2011) (“Just as the ‘inevitable effect of a statute on its face may render it unconstitutional,’ a statute's stated purposes may also be considered.” (quoting *O'Brien*, 391 U.S. at 384)).

speech, another common test in constitutional adjudication.¹⁷⁶ But many perfectly permissible “content-neutral” regulations have the effect of lessening the amount of speech—it is when the government *seeks to* (again, purpose or motive is at work) suppress speech because of its content that the Court gets worried.¹⁷⁷

One can argue, of course, that in a case like *Snyder*, this is precisely what the government is doing through its agent, the jury. It is regulating Phelps’s speech because it is “outrageous,” a judgment about content and a key element in the intentional infliction of emotional distress tort that is primarily at issue in *Snyder*.¹⁷⁸ But suppressing or putting a high price on speech because of its offensiveness to the majority is exactly what the First Amendment is designed to protect against.¹⁷⁹ So the argument goes.

What this argument misses, however, is the nature of the intentional infliction of emotional distress tort. It is a tort limited to situations in which people deliberately use speech as a weapon for inflicting severe emotional harm.¹⁸⁰ The “outrageousness” element is not an indicator that the tort is designed or used to go after unpopular views. The outrageousness requirement is to make sure that the speech is sufficiently egregious that it is not simply something that the majority doesn’t like.¹⁸¹ The strength of the constitutional suspicion

176. *O’Brien*, 391 U.S. at 383, 385; *see also supra* note 169.

177. *See* Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 82 (2003) (characterizing the framework of First Amendment law as “being as concerned with illicit government purposes as it is with effects”); Fallon, *supra* note 169, at 90–102 (arguing that purpose-based tests and their surrogates play a more central role in constitutional doctrine than has been appreciated, including in First Amendment doctrine).

178. *See* David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1531 (1992) (pointing out that the “legitimacy of government power depends also on the purpose behind its exercise” and that the purpose gets greater scrutiny “the more deeply revered the right”).

179. *See supra* note 12. *But see* Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 477–78 (2011) (arguing that the “outrageousness” standard is a high threshold to meet, and that the intentional infliction of emotional distress tort is far more cabined than the Court seems to think).

180. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). In fact, some commentators have proposed new torts because intentional infliction is so limited. *See, e.g.*, Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 151–57 (1982) (walking through cases and concluding that courts generally “have not recognized the gravity of racial insults” in denying many apparently strong intentional infliction of emotional distress claims).

181. *See* Zipursky, *supra* note 179, at 500–04 (explaining how the outrageousness requirement serves as a judicial screening device to limit liability). Assume, though, that the

here, we posit, comes from attributing the interest in speech-suppression to *the state itself*. The state of Maryland, not just a particular jury deputized by it, wants to protect its citizens from emotional harm, the argument goes, by suppressing speech.

Attributing this goal to the state, however, is problematic in many respects. In a case like *Snyder*, involving a common-law action, “the state” is at once everywhere and nowhere. It empowers plaintiffs to bring lawsuits.¹⁸² It provides its authority to juries to decide what is acceptable and what is outrageous. And it, of course, provides a forum for the highly staged dance of demands for accountability and explanations of conduct to take place.¹⁸³ At the same time, the state has no control over the litigation. Rather, the decision to bring an action and the subsequent course of the litigation is left entirely in the hands of the victim.

The state’s alleged motive or purpose in deterring speech plays an important role, standing alone, in elevating the First Amendment concerns.¹⁸⁴ But what the Supreme Court is *also* doing here is using government motive as a way to extrapolate to government effect. Attributing a suppressionist motive helps to create the assumption that the state law has a suppressionist effect.¹⁸⁵

Court is right about this danger of juries. If it was *only* juries that the Court was worried about, then the First Amendment interests *still* might not have enough bite. After all, juries are historically designed to serve as a bulwark against government power, and though this function has been greatly diminished in the civil context, the mythology around this role of the jury remains. Cf. Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1342–45 (2012) (discussing the lack of contemporary justification for the civil jury on this ground). The jury is not the agent of government oppression; it is the counterweight to it. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 81–110 (1998). Amar refers to the “populist and local institution of the jury” as “[t]he dominant strategy to keep agents of the central government under control.” *Id.* at 83.

182. Arguably, this context is an example of what Don Herzog has called the “*Kerr* principle,” a principle in constitutional adjudication that “bars the state from serving as a conduit for private parties’ illegitimate preferences.” See Herzog, *supra* note 171, at 1–2.

183. See MILNER S. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS* 42–63 (1981) (describing trials as a type of theater); ROBERT P. BURNS, *A THEORY OF THE TRIAL* 34–72 (1999) (explicating trials as a set of highly structured linguistic practices where a person “actually ‘performs’ his or her interpretation of events in a public forum” (internal quotation marks omitted)).

184. See Nelson, *supra* note 175, at 1856–57 (positing that the outcome of judicial review in constitutional challenges can frequently “hinge” on the court’s assessment of legislative purpose: “Was the legislature *trying* to produce the adverse effects in question, or were those effects simply incidental to the legislature’s pursuit of some legitimate objective?”).

185. In the course of disagreeing with Jed Rubenfeld’s argument for focusing on legislative purpose in First Amendment adjudication, Judge Posner acknowledges this role for governmental purpose.

The Supreme Court's "effects" concern in a case like *Snyder*, involving a multimillion dollar jury verdict, is with the next speaker. If someone wanted to voice concerns on public issues in a way that could be construed as hurtful, even if meant simply to be provocative, would the speaker be chilled from undertaking such speech? The answer depends on an empirical question about the degree to which tort law—specifically "speech torts" such as defamation, privacy, and intentional infliction of emotional distress—affects people's behavior.¹⁸⁶ We have very little empirical evidence on this question,¹⁸⁷ but the relatively small number of such claims—and lack of widespread awareness of claims brought, verdicts achieved, and the like—suggests that the effect is likely to be minimal. Given the weak support for the claim that cases like *Snyder*'s suppress speech, why does the Court remain concerned?

Because, as we have already posited, the Court fears that the state is trying to suppress speech. By enabling an intentional infliction of emotional distress tort, the state's motive—so the conventional story goes, repeated in all three opinions in *Snyder*—was to limit (or *deter*) such speech.¹⁸⁸ If the state is setting up and maintaining an expensive apparatus—the tort system—for deterring such conduct, then the Court must assume that the game is worth the candle.

The purpose, even the motives, behind a regulation of expressive activity may indeed be relevant—to assessing its consequences. We often and rationally infer the probable consequences of an action from evidence of a desire by the actor to produce them. People generally don't undertake a course of action without reason to believe that it will accomplish their purpose in undertaking it.

Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 745 (2002).

186. Richard Fallon points to *Sullivan* and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), as examples of cases that rely on "empirical, predictive calculations" in making constitutional judgments, Fallon, *supra* note 169, at 63.

187. See Faigman, *supra* note 178, at 1524–25 (arguing that the Supreme Court's questionable practice of incorporating consideration of government interests into the definition of whether a constitutional right is implicated permits the Court to "avoid answering difficult empirical questions inherent in government interest analysis").

188. See *supra* note 12; *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (Breyer, J., concurring) (defining the State's interest as "protecting its citizens against severe emotional harm"); *id.* (Alito, J., dissenting) (noting that "most if not all" jurisdictions allow the intentional infliction of emotional distress tort "[t]o protect against such injury" (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988)) (internal quotation marks omitted)).

The trial court instructed the jury along these lines as well. See *Snyder v. Phelps*, 580 F.3d 206, 214–15, 221 (4th Cir. 2009) (reversing a jury instruction on other grounds that read in part: "The Supreme Court has held that the First Amendment interest in protecting particular types of speech must be balanced against a state's interest in protecting its residents from wrongful injury"), *aff'd*, 131 S. Ct. 1207 (2011).

Notice, however, that this entire chain of inferences and intuitions rests on the assumption that the primary goal of state tort law is regulatory.

B. State Action

The Court's focus on tort law as a form of state regulation may also be driven by the nature of the state-action doctrine. In this Section, we briefly explain why we think this is the case. The state-action doctrine is the mechanism by which courts determine whether a particular action ought to receive constitutional scrutiny, and it has been the site of much contentiousness among courts and scholars since the beginning of the twentieth century.¹⁸⁹ Constitutional rights, of course, can only be invoked against action fairly attributable to the state, and so the state-action doctrine seeks to answer this question of proper attribution.¹⁹⁰

Since *Shelley v. Kraemer*,¹⁹¹ common-law actions brought by private parties can be deemed state action.¹⁹² *Shelley* arose from attempts by private parties to use litigation to uphold racial segregation. Applying the state-action doctrine to this litigation and finding it to be state action allowed federal courts to use the Fourteenth Amendment to dismantle de jure racial apartheid in American housing.¹⁹³ Then, in *New York Times v. Sullivan*, Sullivan was an individual suing the *New York Times* for libel arising out of

189. For a sampling of the vast literature, see sources cited in Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1446 nn. 273–74 (2003). For a recent critique, see Peller & Tushnet, *supra* note 41, at 789, which argues that the false public-private distinction that grounds the state-action doctrine makes the doctrine “analytically incoherent.”

190. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (describing the question as one of “fair attribution” (internal quotation marks omitted)).

191. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

192. See *id.* at 19–20 (holding that court enforcement of a racial covenant on property was state action). How far *Shelley* extends beyond its facts, though, has been much debated. See, e.g., Kevin Cole, *Federal and State “State Action”: The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 352 (1990) (pointing out that the state’s involvement in *Shelley* was so minimal that “it is difficult to imagine any case in which state action is not present”); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 316–17 (1995) (noting that “*Shelley* has proven controversial because it could be read to mean that any court involvement in an essentially private dispute satisfies the state action requirement,” but that it can also be construed more narrowly).

193. See generally Charles L. Black, Foreword, “State Action,” *Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69 (1967).

the civil rights struggle in Alabama.¹⁹⁴ And this was the context in which the First Amendment was first applied to suits among private parties.¹⁹⁵ In a sense *Sullivan*, decided sixteen years later, was a logical extension of *Shelley*.

Since *Sullivan*, though, the scope of what is considered state action for First Amendment purposes has continued to grow,¹⁹⁶ and it is worth pausing to consider just how much the factual circumstances of *Sullivan* differ from those in *Snyder*. Snyder is an individual citizen whose son died at war and was only in the spotlight because the Westboro Baptist Church decided to show up at his son's funeral. His entanglement with the "state" was simply availing himself of the right of any citizen to bring a civil suit. In contrast, *Sullivan* basically *was* the state; he was an elected city commissioner in Montgomery, Alabama.¹⁹⁷ The lawsuit was a part of a strategy—later documented by Anthony Lewis and others—to threaten Northern newspapers that, like the *Times*, reported on the civil rights movement, in an effort to discourage them from criticizing segregationist policies.¹⁹⁸ That is to say, it was an effort by elected officials to use the legal system to suppress future speech.

In contrast to the factual circumstances of *Snyder*, in which a private citizen brought an individual lawsuit, consider another First Amendment case, *Sorrell v. IMS Health, Inc.*,¹⁹⁹ also decided in 2011. Vermont had passed a law barring the sale (or give-away) of doctors' prescription records by pharmacies and data miners, unless the doctors gave permission.²⁰⁰ The prescription records were valuable to

194. *Id.* at 256.

195. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). The Court explained:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. (citation omitted).

196. See *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1255–66 (2010) (providing an analytic summary of the evolution of the state-action doctrine).

197. *Sullivan*, 376 U.S. at 256. Compare this with someone like Jerry Falwell, who is a public figure but not a government official. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 49 (1988).

198. See generally LEWIS, *supra* note 128.

199. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

200. An Act of Mar. 5, 2008, No. 89, 2008 Vt. Acts & Resolves 4 (codified as amended at VT. STAT. ANN. tit. 18 § 4631 (West (2012)).

companies that were marketing pharmaceuticals to doctors and their patients.²⁰¹ So here we have the state of Vermont, speaking through its legislature, telling companies not to do certain activities within its borders, at least without consent. *This* is clearly state action in a way that Snyder's private lawsuit is not.

The problem with the state-action doctrine is that it does not take into account the differences between the type and extent of state involvement in the *Snyder* and *Sorrell* cases.²⁰² The state-action doctrine is unitary: either something is state action, or it is not.²⁰³ If it is, then full-blown constitutional scrutiny applies; if it is not, then no constitutional scrutiny applies. But the concerns underlying the First Amendment are not necessarily as salient in cases in which a private party brings a lawsuit, as opposed to those in which a state legislature passes a statute, as in *Sorrell*, or a public official either uses his authority or the courts, as in *Sullivan*. This is because in providing recourse through the private law, the state is not primarily regulating or punishing speech, as opposed to the effort by Vermont to suppress a certain class of commercial expression.

The effect of this unitary aspect of the state-action doctrine is to exacerbate the tendency to view the common law as an arm of state regulation. After all, regulation is *what the state does* in the twenty-first century.²⁰⁴ So if it is indeed the *state* acting, then that is what it *must* be doing: regulating conduct. Surely the twenty-first-century state does not provide fora for slightly more civilized duels.²⁰⁵ Moreover, the acceptance of the "everything is state action" status quo has led the doctrine to bleed over far beyond the specific question that it is designed to answer: whether the government is

201. See *Sorrell*, 131 S. Ct. at 2659–60.

202. This is of course just one problem with the much-criticized doctrine. For another kind of critique, see Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 CARDOZO L. REV. 99, 120–25 (2004), which argues that the doctrine relies too much on state involvement, and should take account of "substantive context" as well as the values implicated by the particular constitutional rights, *id.* at 120–25.

203. E.g., John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 578 (2005) ("[T]he state action issue presents an all-or-nothing question. Either there is state action, in which case the ultimate act is attributed to the government, or there is no state action, and the case is dismissed. No middle ground is available.").

204. See EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 204 (2005) (suggesting that "policy and implementation"—the basic tools of regulation—"constitute the full range of governmental action in a modern state").

205. But see Oman, *supra* note 4, at 45–49 (exploring the historical relationship between litigation and dueling).

sufficiently involved in the challenged action such that constitutional protections apply at all.²⁰⁶ One can agree that common-law actions and enforcement implicate “the state” such that they may be subject to challenge under the Constitution on the one hand, without committing to the view that the animating purpose or function of the common law is state regulation.²⁰⁷

A defender of the Court can respond that it is true that the common law can be characterized, perhaps is even best characterized, as serving an interest in redress. Perhaps that is the underlying purpose of private law, at least tort law. But that does not mean that tort law cannot also have the effect of putting a price on certain activity so as (whether intentionally or otherwise) to discourage it.²⁰⁸ State-provided fora where lawsuits can result in the payment of money damages can do that.

If private law has the effect of discouraging speech by putting a price on it (and in *Snyder*, it turned out to be a pretty high one, \$5 million),²⁰⁹ then courts must obey the stricture of the Bill of Rights, according to this view. The federal interest simply trumps. In our view, consistent with Justice Breyer’s concurrence in *Snyder*, this is both inconsistent with the thrust of First Amendment doctrine and accords the federal constitutional interest too much weight. Rather, as we suggest in Part IV, freedom of speech should be protected in ways that do not eliminate any recourse by victims against those that wrong them. The private-law baby ought not to be thrown out with the regulatory bath water.

C. Instrumentalism’s Influence

Besides the unitary state-action requirement, the instrumentalist view of private law also gives the state a greater role than it actually has in a case like *Snyder*. According to the instrumentalist view,

206. See *supra* note 190.

207. E.g., Herzog, *supra* note 171, at 22–23. In this sense, the state-action doctrine is less about “attribution” or causation, and more about responsibility—the state cannot be *responsible* for the suppression of speech, even if it is not doing the suppressing itself, or making the tort available for the purpose of suppression.

208. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (“The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.”).

209. The original jury verdict was actually \$10.9 million, made up of \$2.9 million in compensatory damages and \$8 million in punitive damages, but the amount was reduced by the trial court to a total of \$5 million by decreasing the punitive award. See *Snyder v. Phelps*, 533 F. Supp. 2d 567 (D. Md. 2008), *rev’d*, 580 F.3d 206 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011).

particularly the law-and-economics variant, the plaintiff is a private attorney general, acting on behalf of the government to deter undesirable behavior.²¹⁰ But this imposes a particular theoretical construct on facts that are unlikely to fit it. The public record contains little on Snyder's motives for bringing the lawsuit, but it seems most plausible that he was acting on behalf of himself and his deceased son, not the state of Maryland.²¹¹ Certainly, the law of Maryland did not treat Snyder's cause of action as a mere extension of its regulatory aims. Rather, his standing to sue depended decisively on his status as a victim of the Westboro Baptist Church's actions, and under Maryland law the right of action against Phelps was a piece of personal property that belonged exclusively to Snyder.²¹²

Doctrinally, in the cases on the conflict between the First Amendment and speech torts, it matters whether plaintiffs like Snyder are "public figures" or not.²¹³ Snyder and his son were private figures, unlike Jerry Falwell, the plaintiff in the Supreme Court's only other case involving intentional infliction of emotional distress and

210. For example, some scholars have argued that speech torts are an area of civil liability for which First Amendment protection ought to be at its highest because the government's use of its power is "duty-defining." *E.g.*, Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1686 (2009). According to this view, private law is used here as "a way for the government to regulate social conduct by defining the duties and having private parties serve as civil 'prosecutors' to enforce them." *Id.* This is precisely the view that we think has led the doctrine astray.

211. *See* Zipursky, *supra* note 179, at 505 ("[T]he 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.").

212. *See, e.g.*, *Jones v. Prince George's Cnty.*, 835 A.2d 632, 644 (Md. 2003) ("Under Maryland common law, standing to bring a judicial action generally depends on whether one is 'aggrieved,' which means whether a plaintiff has 'an interest such that he [or she] is personally and specifically affected in a way different from . . . the public generally.'" (alterations in original) (quoting *Sugarloaf Citizens' Ass'n v. Dep't of Env't*, 686 A.2d 605, 614 (Md. 1996)) (internal quotation marks omitted)); *Summers v. Freishtat*, 335 A.2d 89, 92 (Md. 1975) ("[T]he modern rule, as we have heretofore pointed out, is that a chose in action in tort is generally assignable, in the absence of a statutory prohibition, if it is a right which would survive the assignor and could be enforced by his personal representative."); *Long Green Valley Ass'n v. Bellevalle Farms, Inc.*, 46 A.3d 473, 483 (Md. Ct. Spec. App. 2012) ("Standing rests on 'a legal interest such as . . . one protected against tortious invasion, or one founded on a statute which confers a privilege.'" (quoting *Comm. for Responsible Dev. on 25th St. v. Mayor of Baltimore*, 767 A.2d 906, 912 (Md. Ct. Spec. App. 2001)) (internal quotation marks omitted)); *see also* *Roberts v. Total Heath Care, Inc.*, 709 A.2d 142, 153 (Md. 1998) (citing *Summers v. Freishtat*, 335 A.2d 89 (Md. 1975), as setting the standard for assignability of choses in action).

213. *See, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *see also* Mark Strasser, *Funeral Protests, Privacy, and the Constitution: What Is Next After Phelps?*, 61 AM. U. L. REV. 279, 293–96 (2011) (arguing that Snyder's ignoring of this issue does not reflect the current state of First Amendment law).

the First Amendment, *Hustler*.²¹⁴ But Justice Roberts's opinion ignores entirely this issue, despite the fact that it was the ground on which the district court ruled that the verdict should stand.

Under an instrumentalist view of private law, how public a figure the plaintiff is ought not to matter at all. In bringing the lawsuit, the plaintiff becomes an agent of the state. But the reason Snyder's private-ness or public-ness *does* matter in First Amendment doctrine, *contra* instrumentalism, is that it affects his entitlement to recourse. That is to say, even if Richard Jewell, the Atlanta security guard suspected of bombing the Olympics in 1996, had been defamed, as he claimed in his lawsuit, he was not entitled to complain because he had "thrust himself to the forefront" of public life.²¹⁵ This is consistent with a kind of "consensual waiver" approach to First Amendment doctrine.²¹⁶ It also accords with well-established tort doctrines like the assumption of risk.²¹⁷

Below we outline three other ways that an instrumental view obscures important features of private law in a case like Snyder's. Specifically, the instrumental approach ignores the plaintiff's agency, the state interest in redress, and the degree to which compensation is a form of justice.

1. *Ignoring Plaintiffs' Agency.* One of the results of the Court's emphasis on state tort law as a form of public regulation is to render the agency of the plaintiff in bringing the lawsuit largely invisible. One of the core features of the law of private wrongs is that nothing happens unless a wronged plaintiff chooses to sue.²¹⁸ The machinery

214. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) ("Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do.").

215. *Atl. Journal-Constitution v. Jewell*, 555 S.E.2d 175, 182–85 (Ga. Ct. App. 2001).

216. See Solomon, *Judging Plaintiffs*, *supra* note 4, at 1767–68 (explaining the public-figure doctrine as a variant of assumption of risk).

217. Cf. RESTATEMENT (SECOND) OF TORTS § 496A (1965) ("A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."); *id.* § 496A cmt. c(2) ("[Assumption of risk means] that the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances. . . . [T]he legal result is that the defendant is relieved of his duty to the plaintiff.").

218. See Oman, *supra* note 4, at 39 ("[T]he private law empowers plaintiffs to act against defendants. Plaintiffs may choose to bring suit against tortfeasors and contract breachers, but

of the law will remain inert unless a private party brings an action.²¹⁹ Furthermore, the private party bringing the lawsuit must be a victim of the defendant's action. He must have suffered a wrong of some sort. He is thus in a different position than a public prosecutor or someone such as a *qui tam* relator under federal whistleblower statutes who need not be a victim of the defendant's wrongdoing to sue.²²⁰ Rather, the law of torts empowers victims to act against those who have wronged them.

When tort law is seen purely as a matter of safety regulation or loss spreading, the way in which tort law empowers plaintiffs becomes at best an idiosyncratic system of private enforcement.²²¹ On this view, the regulatory ideal would be for an omniscient and omnicompetent state to monitor the behavior of all citizens and to impose sanctions on those who frustrate the supposed regulatory goals of tort law.²²² Given the limitations in terms of resources and information that the state faces, however, this ideal is not possible. The second-best solution is to create private rights of action and then give plaintiffs an incentive to sue. Private suits thus serve to vindicate public policy.²²³ In short, private litigation is just a pragmatic, second-best solution in the face of limitations on the state's reach. Whatever the merits of this argument, however, it completely fails to make sense of certain ubiquitous, core features of the law of torts.

But if tort actions are a second-best means of controlling behavior, it makes little sense to confine the right of action to victims.

the law does not require that they do so. Rather, it waits entirely on the plaintiff's decision to sue. Until she brings an action, nothing happens.”).

219. Zipursky, *Civil Recourse*, *supra* note 65, at 738–39.

220. See Oman, *supra* note 4, at 39 (explaining that under “disaggregated enforcement mechanisms,” such as *qui tam* actions, “the plaintiff need not be a victim of the defendant’s wrongdoing but may sue as a way of enforcing public policy merely on the basis of information”).

221. See Jane Stapleton, *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*, 75 *FORDHAM L. REV.* 1529, 1538 (2006) (“[C]ivil recourse theory does not fall into the trap of depending on the assertion of some ‘goal’ of tort law such as ‘compensation’ or ‘deterrence’ or ‘loss-spreading.’”).

222. See John C.P. Goldberg, *Tort in Three Dimensions*, 38 *PEPP. L. REV.* 321, 325–26 (2011) (ascribing such a view to mid-twentieth century scholars such as Leon Green and William Prosser—that tort would be “a branch of the emergent administrative state in which regulations directed toward certain kinds of influential actors . . . would be crafted primarily by jurors and judges on a case-by-case basis”).

223. See KAPLOW & SHAVELL, *supra* note 34, at 136 (arguing that a norm that encourages victims to seek redress is valuable because “deterrence is undermined when victims fail to respond”).

Remember, according to the second-best argument, private litigation is a response to finite government resources and limited government information.²²⁴ This, however, would imply that anyone with resources and information should be allowed to bring a suit to vindicate the government's regulatory interests.²²⁵ Tort law, by confining the right of action to victims, would seem to undermine the very regulatory goals that it is supposedly pursuing. A more plausible view is that empowering victims is not a second- or even third-best solution to problems of enforcement. Rather, empowering victims by giving them the agency to act against their wrongdoers is itself a primary value of private law.²²⁶ On this view, tort law may be a poor system of risk regulation, but that is not its purpose.²²⁷ Rather, there is an independent normative value in giving victims recourse against tortfeasors.²²⁸

One way of thinking about this value is suggested by the writing of John Rawls. In *A Theory of Justice*,²²⁹ Rawls argues that there are certain preconditions for a good life that hold true regardless of one's

224. See *id.* (“[V]ictims are often in the best position to know when and how much they have been injured as well as the identity of injurers.”).

225. Indeed, some scholars have proposed exactly this in the context of tort law. See, e.g., Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 279–86 (2009) (explicating the appeal of this “private attorneys general” model in cases where retributive justice against wrongdoers is warranted, but victims decline to sue).

226. See Goldberg & Zipursky, *supra* note 68, at 972 (arguing that it is “legitimate and useful” for the state to “afford the victims of certain wrongs an avenue of recourse against those who have wronged them,” and referring to civil recourse as “what the state delivers” by having tort law).

227. Certain features of tort law are plausibly seen as designed to regulate risk, with punitive damages being one example. See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677–78 (7th Cir. 2003). But even punitive damages might fit more comfortably into a wrongs-and-redress model of tort law. See Goldberg & Zipursky, *supra* note 68, at 962 (“[T]here is nothing remotely surprising about the idea that a victim of a particularly malicious or willful wrong would be entitled to ask the court for permission to *be punitive* in her response to the defendant.”); Markel, *supra* note 225, at 249–50 (“[P]unitive damages should be understood as ‘quasi-criminal’ ‘private fines’ designed to punish and deter the misconduct at issue.” (quoting *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001))); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1025 (2007) (“The reason that informs the subjective aspect of punitive damages is the plaintiff’s rational exercise of her power to seek redress appropriate to the wrong she suffered.”).

228. See Oman, *supra* note 4, at 40 (“Recourse theorists insist there is some distinctive normative goal that is vindicated by giving citizens the ability to proceed in court against those that have wronged them.”).

229. RAWLS, *supra* note 51.

ultimate beliefs about the shape of that life.²³⁰ Because such preconditions do not hinge on controversial beliefs about the good or moral life but are necessary for virtually every conception of such a life, they become a legitimate object for a liberal state.²³¹ Among these preconditions, Rawls names self-respect, the notion that the life one is pursuing is valuable and worth pursuing.²³² Thus far the claim strikes us as plausible. Rawls, however, tends to view self-respect as a good distributed by a beneficent social planner. It becomes a right that the individual claims, like the right to vote or perhaps the right to a welfare benefit.²³³ What this formulation misses is the role of agency in generating self-respect.²³⁴

The idea of honor provides a way of thinking about the role of agency. Think of a tort as an act of humiliation, a way in which the tortfeasor fails to show due concern to the victim. How does one recover one's honor? If the person who humiliates you is punished, one might believe that justice has been done, that the injured person has received his due reward. Yet just punishment is not the same thing as the restoration of lost honor—of lost self-respect.²³⁵

Here it would seem that epic poetry provides a more insightful account of self-respect than John Rawls. In *The Iliad*,²³⁶ *The Aeneid*,²³⁷ or *Beowulf*,²³⁸ a beneficent king does not dispense honor. To be sure, all of these stories are set within hierarchical societies in which differing levels of honor are attached to certain kinds of statuses—king, knight, hero, slave, and so on. This status-based honor, however, is not the honor that drives the plot.²³⁹ Rather the self-respect gained by Achilles, Aeneas, and Beowulf comes from their actions. In the

230. *Id.* at 155. One of us first used Rawls in this context in Oman, *supra* note 4, at 55–56 (citing JOHN RAWLS, A THEORY OF JUSTICE, at 155–56 (rev. ed. 1999)).

231. *See* RAWLS, *supra* note 51, at 178–82 (discussing the role of self-respect in the deliberations of agents in the original position).

232. *See id.* at 178 (“Self-respect is not so much a part of any rational plan of life as the sense that one’s plan is worth carrying out.”).

233. *See* SHARON R. KRAUSE, LIBERALISM WITH HONOR 18 (2002) (“Thus self-esteem is a good to be distributed, according to Rawls, and in a just society it will be distributed equally.”).

234. Oman, *supra* note 4, at 56.

235. *Id.* at 62–63.

236. HOMER, THE ILIAD (Robert Fagles trans., Viking Penguin 1990) (n.d.).

237. VERGIL, THE AENEID (Sarah Ruden trans., Yale Univ. Press 2008) (19 B.C.E.).

238. BEOWULF AND OTHER ENGLISH POEMS (Craig Williamson ed. & trans., Univ. of Pa. Press 2011).

239. *See* Oman, *supra* note 4, at 56 (“In *The Iliad*, honor is not ultimately dispensed by the gods, but is gained by heroic actions.”).

face of humiliation, taking action against those who have humiliated them restores their self-respect.²⁴⁰

For the heroes of the epic poems, agency against wrongdoers took the form of violent self-help. Fortunately, the modern state has been relatively successful at suppressing private violence and other forms of serious private aggression. We can call those who wrong us names, but we cannot act directly against their persons or their property. This leaves the modern victim with relatively few options for acting against his wrongdoer. Even an act of forgiveness or magnanimity loses much of its meaning in a world in which the forbearance of the victim has little impact on the wrongdoer. In short, there is a sense in which the success of Leviathan in suppressing the Hobbesian war of “all against all” is too successful, leaving wrongdoers more or less invulnerable to attack by their victim.²⁴¹

Private law responds to this problem by creating “liability.” Though the word is ubiquitous, its original meaning is seldom fully remembered. To be liable is to be vulnerable.²⁴² To be liable to attack means that one is vulnerable to attack. It does not mean that the attack will actually occur. That is left to the choice of the attacker. Tort law defines wrongs, but it does not suppress those wrongs.²⁴³ Rather, it makes the wrongdoer vulnerable to recourse by the victim.²⁴⁴

This recourse, however, is sharply limited. It is *civil* recourse. Nevertheless it avoids the problem of the humiliated and powerless victim that is created by the complete suppression of self-help.²⁴⁵ In effect we solve the problem of Leviathan’s overeffectiveness by reintroducing the war of all against all into society, albeit in a very

240. See, e.g., HOMER, *supra* note 236, at 421 (“Fight like men, my friends . . . ! [Patroclus urges.] Now we must win high honor for Peleus’ royal son . . . !”).

241. See THOMAS HOBBS, *LEVIATHAN passim* (Everyman’s Library 1983) (1651).

242. See Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243, 249–50 (2011) (relating this meaning of “vulnerable” to the vulnerability that accompanies physical embodiment and is often taken advantage of in a situation resulting in tortiously caused harm).

243. See Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 65, at 90 (“The tort law defines the ways in which we wrong one another . . .”).

244. *Id.*

245. See *id.* at 85 (referring to the law of civil recourse as allowing society to “avoid[] the mayhem and crudeness of vengeful private retribution, but without the unfairness of leaving individuals powerless against invasions of their rights”).

stylized form that sharply limits the scope of conflict.²⁴⁶ Nevertheless, litigation is a form of conflict, a way in which a victim chooses—or not—to act against her victimizer.²⁴⁷ The danger of a decision such as *Snyder* is that it renders the victim of aggression utterly powerless. The victim is deprived by the power of Leviathan from exercising self-help to hold the aggressor accountable. At the same time, by in effect eliminating the victim's cause of action against a tortfeasor, *Snyder* also eliminates the possibility of acting in the courts. Above and beyond any evil caused by inefficient levels of deterrence or losses left uncompensated, the Court in *Snyder* made it impossible for the victim to reassert his worth and honor through action in the face of aggression.

Another way of thinking about the value of agency is in terms of moral address. This refers to the nature of the implicit authority of a speaker making normative arguments or claims. The regulatory vision of the law sees its obligations primarily in the third person.²⁴⁸ The impersonal demands of the law are ideally enforced by the impersonal force of the state. The law does not involve the victim addressing the tortfeasor and demanding redress.²⁴⁹ At best, on the regulatory view, the state addresses itself to the tortfeasor through the person of the victim, who is reduced to an instrument of the state's policy.

What the regulatory vision of the law denies is the idea that the victim himself has a right to address the tortfeasor and make demands

246. Cf. HOBBS, *supra* note 241, at 64 (“[D]uring the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man against every man.”).

247. See Oman, *supra* note 4, at 63–64 (“Suing someone is more than simply a petition for redress. It is an act of aggression by the plaintiff against the wrongdoer. Likewise the process of litigation is a battle and a struggle.”).

248. In moral philosophy, such obligations are also referred to as “*state-of-the-world-regarding*.” STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 5 (2006). That is, the obligation exists because the world would be a better place if it were so, not because of any reason one might have for having such an obligation (first-person), or because of anything owed to another (second-person). See *id.* at 5–6 (citing G.E. MOORE, PRINCIPIA ETHICA (1993)).

249. An alternative view of the law, consistent with what we describe here and also based in significant part on Stephen Darwall's work, is presented in Robin Bradley Kar, *The Second Person Standpoint and the Law* 14–19 (Ill. Pub. Law Research Paper No. 10-19, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1589791 (using Darwall's work to argue that “legal obligations purport to have a special form of authority, which is best understood as involving either implicit or explicit interpersonal demands”).

on him as a result of his wrongdoing.²⁵⁰ It is the difference between saying, “One should not step on the feet of others” and saying, “Hey you! Get off my foot.”²⁵¹ The second form of address acknowledges the moral authority that a victim acquires over a wrongdoer, an authority that gives the victim the right to make demands on the person who has victimized him.

Bringing a lawsuit, then, is a way for an individual to demand answers or accountability from one who has wronged him. In providing a forum for such practices, the state reinforces a particular kind of social equality that is relational.²⁵² It underscores that no individual’s interests are above another’s simply because of status or wealth.²⁵³ It underscores that we all have obligations to one another, and are answerable for these obligations.²⁵⁴ And by empowering victims to demand accountability, the state underscores each individual’s moral authority and personal agency.

2. *The Missing State Interest in Redress.* Acknowledging the importance of empowering victims and providing a legal mechanism for them to exercise agency against their victimizers have implications for how one conceptualizes the state interest in private-law cases. When private law is seen as a regulatory enterprise, the state interest centers on controlling the behavior of the defendant.²⁵⁵ For example, the purpose of libel law becomes the suppression of libelous speech. The purpose of products-liability law becomes the elimination of defective products. And so on.

Placing the agency of the plaintiff in the foreground of the discussion of tort law, however, recasts the state interest. Although the state may be interested in suppressing certain kinds of wrongs

250. See Solomon, *Equal Accountability*, *supra* note 4, at 1810 (“From the state’s perspective, by establishing a system whereby individuals can hold those who have wronged them *legally* accountable, the state underscores the *moral* accountability we have toward one another as well. The state does this simply by establishing the system and making it available.”).

251. This example is drawn from DARWALL, *supra* note 248, at 5–6.

252. See Solomon, *supra* note 242, at 256 (“By empowering individuals with the right to recourse, the state affirms relational equality in giving individuals the authority to make demands of others and also the obligation to respond to those demands.”).

253. See Goldberg, *supra* note 65, at 607–08 (articulating tort law’s role in promoting and maintaining a “nonhierarchical conception of social ordering”).

254. See Solomon, *Equal Accountability*, *supra* note 4, at 1807–11 (describing this as a “moral community of equals who are mutually accountable”).

255. See KAPLOW & SHAVELL, *supra* note 34, at 86 & n.2 (pointing first to the “incentives it creates for potential injurers” as a way to evaluate tort law, and acknowledging in a footnote that the influence on potential victims’ behavior is another “important effect”).

that give rise to torts, this is not the primary purpose of tort law itself.²⁵⁶ Rather, tort law, with its plaintiff- and victim-centered structure, advances the state's interest in providing citizens with recourse against those that have harmed them.²⁵⁷ What is important is not ensuring that wrongs do not happen but ensuring that if wrongs do happen the victim is not left powerless to act against the wrongdoer.²⁵⁸ There is ample evidence that providing civil recourse is an interest that is deeply embedded in state law.

Snyder sued Phelps under the Maryland tort of intentional infliction of emotional distress. Part of the state's interest in having such a tort *could* be the deterrent effect that the prospect of liability might have on those such as Phelps, who set out to terrorize grieving families.

One can imagine, for example, the Maryland state legislature holding hearings on the amount of emotional distress that individuals are suffering within its borders. One can imagine a blue-ribbon report documenting this phenomenon, labeling it a problem, and making recommendations about what to do. One of those recommendations might be the passage of a law providing for a private right of action for individuals to bring tort claims for emotional distress inflicted on them, and one can even imagine a purpose or preamble section of the statute that specifically says that this is the state's motive in passing the law and including the private right of action: to reduce or deter or suppress this kind of conduct, including speech. Indeed, statutes providing individuals with private rights of action for wrongs done to them are quite common in state and federal law.²⁵⁹ If this were the backdrop to Snyder's lawsuit, then the Supreme Court's view of the lawsuit as a regulatory mechanism would make perfect sense.

But Maryland's law at issue here—the common-law tort of intentional infliction of emotional distress—arose quite differently. It arose in a context in which individuals came into court seeking

256. See Zipursky, *supra* note 179, at 478 (“Tort law, unlike criminal law or regulation, is not a series of general prohibitions or restrictions promulgated and then enforced by the state.”).

257. *Id.* at 519.

258. Almost in passing, at the end of his *Snyder* dissent, Justice Alito acknowledges this value of a tort claim: “Respondents’ outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a *judgment that acknowledges the wrong he suffered*.” *Snyder v. Phelps*, 131 S. Ct. 1207, 1229 (2011) (Alito, J., dissenting) (emphasis added).

259. In state law, a wave of recent consumer fraud statutes provides perhaps the best examples. See Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1521–25 (2009) (reviewing these developments).

redress for wrongs done to them.²⁶⁰ Indeed, Maryland has a deeply rooted interest in providing its citizens with the power to act against those who wrongfully harm them. The Maryland constitution's Declaration of Rights states

[t]hat every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.²⁶¹

Elsewhere the Declaration states “[t]hat the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law.”²⁶²

What is striking about these constitutional provisions is that rather than entitling the citizens of Maryland to some absolute protection of their persons and property, they confer upon citizens rights of redress, a “remedy by the course of the Law.”²⁶³ Far from being an anomaly, the Maryland constitution's emphasis on the right to a law of redress for private wrongs represents a powerful strand running through American law. Most states have “open courts” provisions in their state constitutions guaranteeing to citizens access to the courts for the redress of private wrongs.²⁶⁴ Though the way in which these provisions are phrased varies from state to state,²⁶⁵ they all represent private recourse as a state interest of sufficient importance to be enshrined in the state's fundamental law.

The notion that members of the community have a basic right of access to civil justice against those who have wronged them is also deeply embedded in the common-law tradition from which our legal system emerged.²⁶⁶ Beginning in the seventeenth century, classical common-law theorists such as Coke, Hale, and Selden began

260. *Harris v. Jones*, 380 A.2d 611, 611–17 (Md. 1977). See *supra* text accompanying notes 156–166.

261. MD. CONST. art. 19.

262. *Id.* art. 5(a). This provision of the state constitution acts as Maryland's reception statute for the common law.

263. *Id.* art. 19.

264. See Goldberg, *supra* note 65, at 560–62 & n.177 (describing the insertion of such rights into early state constitutions).

265. See David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 n.25 (1992) (listing state constitutional provisions providing for free and open courts).

266. See Goldberg, *supra* note 65, at 549 (locating these ideas in Blackstone's *Commentaries*, itself a synthesis of common-law and social-contract theories).

articulating a theory of “the ancient constitution” that placed significant limitations on royal prerogatives.²⁶⁷ Although the ancient constitution was little more than a historical myth, it did mark an important set of arguments about the legal institutions to which subjects were entitled.²⁶⁸ A key element in this theory was the right to redress of private grievances.²⁶⁹ Hence, for example, though the king had considerable power to grant special exemptions from the law, the classical common-law theorists insisted that he could not do so in a way that deprived a wronged subject of recourse against those who had committed private wrongs against them.²⁷⁰ These ideas were then transmitted via Blackstone and social-contract theorists to America, where they formed the basis for the tradition of open-courts provisions in state constitutions guaranteeing access to civil justice.²⁷¹

Based on these sources, Professor John Goldberg has gone so far as to argue that there is a right to a law for the redress of wrongs that emerges from the Due Process Clause of the Fourteenth Amendment and the structure of the federal Constitution.²⁷² According to Goldberg, such a right is justified by the historical link between due process and redress for wrongs and is consistent with the structure of many of the Court’s decisions construing the Due Process Clause.²⁷³ Without taking a position on the ultimate merits of Goldberg’s constitutional claim, however, we note that it is not necessary to go so far to appreciate the importance of redress.

Even if the Constitution does not require a law for the redress of wrongs, providing such a law surely counts as an important state interest, one that is likely to be “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” that goes

267. See *id.* at 532–37 (describing the components of the “ancient constitution”).

268. For discussions of the “ancient constitution,” see generally GLENN BURGESS, *THE POLITICS OF THE ANCIENT CONSTITUTION: AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT, 1603–1642* (1992); J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* (1987); and JOHN PHILLIP REID, *THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY* (2005).

269. Goldberg, *supra* note 65, at 537–39.

270. See *id.* (discussing limits on the “dispensing power” of the king).

271. See *supra* note 265. Most of these provisions assert that the courts must be open “freely” and “without purchase.” See, e.g., IND. CONST. art. 1, § 12. Others state that courts must be available to redress harms to “property or character.” See, e.g., MINN. CONST. art. 1, § 8.

272. See Goldberg, *supra* note 65, at 583–96 (referring to this as a “structural due process” right).

273. See *id.* at 564–80 (analyzing Supreme Court doctrines that consider due process limits on remedies).

to the “very essence of a scheme of ordered liberty,” and which is contained within the written constitutions of many states.²⁷⁴ It is this interest in a law that empowers victims to seek redress against those who have wronged them—rather than suppressing some particular form of behavior—that is largely missing from the way in which the Supreme Court conceptualizes the states’ interest in tort law.²⁷⁵

3. *Compensation as Social Insurance or Pricing Mechanism.* The instrumentalist view of private law sees compensation or damages as a mechanism either of social insurance for accidental harm, or as a pricing mechanism for risky activity.²⁷⁶ This view is reflected in the contemporary Court’s discussion of compensation like the \$5 million jury verdict at issue in *Snyder*. But there is an alternative view with deeper historical and cultural roots: namely, that compensation is a means of making amends or paying back debt.

As Professor William Miller has emphasized, money has always, across cultures and eras, been a substitute for literally taking the other person’s eye when he takes yours.²⁷⁷ If you bring a civil lawsuit against one you think has wronged you, you are not seeking vengeance, that is, seeking to inflict pain on another like that which had been inflicted on you. Instead, you are making a demand to settle a moral accounting that stems from the wrong done to you.²⁷⁸ Money happens to be the vehicle for settling such accounts.

274. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (internal quotation mark omitted), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

275. See Ronen Perry, *Empowerment and Tort Law*, 76 TENN. L. REV. 959, 979–80 (2009) (“Civil litigation may serve to empower victims in several ways.”); Zipursky, *Civil Recourse*, *supra* note 65, at 735 (“By recognizing a legal right of action against a tortfeasor, our system respects the principle that the plaintiff is entitled to act against one who has legally wronged him or her.”).

276. Gerald F. Gaus, *Does Compensation Restore Equality?*, in COMPENSATORY JUSTICE: NOMOS XXXIII, at 45, 60–62 (John W. Chapman ed., 1991).

277. See WILLIAM IAN MILLER, *EYE FOR AN EYE* 25 (2006) (“The fact is that revenge in blood invariably coexisted with means of paying off the avenger by transfers of property or money-like substances in lieu of blood. . . . Revenge was compensation using blood, not instead of money, but as a kind of money.”).

278. See Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 426 (1982) (“First, one might argue from the principle of retributive justice for the imposition of liability of faulty injurers. Such an argument would hold that wrongdoing, whether or not it secures personal gain, is sinful and ought to be punished or sanctioned. Imposing liability in torts is a way of sanctioning mischief. Therefore liability is imposed on the faulty injurer not to rectify his gain—of which there may be none—but to penalize his moral wrong.”).

Though the compensation involved in tort cases can be seen as the equivalent of a payment from a “no-fault” government-provided fund for accidental injury, such as that from the 9/11 fund for victims’ families or the system governing accidental injury in New Zealand,²⁷⁹ it is of a different character. There is normative significance in the fact that the demand for compensation is made to the wrongdoer, not the government, and that the demand for justice is made by the victim rather than the state, as it is in criminal law.²⁸⁰ These characteristics of tort law highlight the normative connection between the “doer and the sufferer,”²⁸¹ as Aristotle described it, and put this particular kind of cash payment on a different plane than a Social Security check, for example.

Moreover, though the social insurance mechanism is certainly one function that tort compensation serves,²⁸² it is not clear how much tort compensation serves this function. Though economic damages for wage loss and medical bills are certainly a significant part of tort compensation, they are not all. Noneconomic—or pain and suffering—damages also make up a major segment of tort damages, although caps on such damages may be changing that.²⁸³ In Snyder’s lawsuit, for example, the amount of “economic” damages—primarily

279. See generally Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CALIF. L. REV. 976, 982–83 (1985) (describing New Zealand’s no-fault Accident Compensation Act 2001).

280. See Zipursky, *Civil Recourse*, *supra* note 65, at 699 (“The state provides the plaintiff with a right of action against the defendant for damages or other relief only if the defendant has wronged the plaintiff in a manner specified by tort law. In permitting and empowering plaintiffs to act against those who have wronged them, the state is not relying upon the idea that a defendant has a pre-existing duty of repair. Instead, it is relying on the principle that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor who wronged them.”).

281. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 125 (Terence Irwin trans., Hackett Publ’g Co. 1985) (c. 384 B.C.E.).

282. See Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 88 (1993) (“In short, the conventional picture of the tort system as a corrective justice and deterrence regime is overly simple. Tort liability is also a forced-insurance arrangement, under which potential victims are required to insure themselves against the risk of suffering injury from the provision of health care or the sale of a product. In this respect, at least, tort law constitutes a disguised insurance program that resembles some of the programs that more explicitly perform this function.”).

283. See, e.g., CHAMALLAS & WRIGGINS, *supra* note 159, at 170–82 (criticizing such caps as having a disproportionate impact on women, children, the elderly, and minorities); 3 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 479, at 8 (2d ed. 2011) (stating that plaintiffs may recover for “virtually any form of conscious suffering, both emotional and physical.”).

for psychological counseling—was a miniscule percentage of the overall verdict.²⁸⁴

There is a form of justice involved in tort law. We can call it individual justice, corrective justice, or, perhaps, equal accountability. We can even see it as a way of redeeming honor or underscoring dignity—when the wrongdoer has to pay money to the victim, that payment shows that the victim is someone who must be dealt with, who cannot be ignored with a flick of the hand. This is the kind of justice instantiated in the state constitutions that mention a right to redress, and discussed by tort scholars as civil recourse theory—the right to confront one who has wronged you. The payment of damages can be seen as settling a moral debt, or making amends.²⁸⁵

This is a different kind of justice than the distributive justice implicated by social insurance. Social insurance is at root a way of achieving greater equality of misfortune or, put differently, a way of evening out, or cushioning people from, the burden of risk.²⁸⁶ For example, when Congress created a vaccine-compensation program,²⁸⁷ it achieved this kind of justice by ensuring a “cushion” of sorts for individuals who happen to have the misfortune of taking particular vaccines at a particular point in time.

But the Court too often seems to assume this kind of distributive justice is at issue, rather than individual or corrective justice (or the state interest in redress).²⁸⁸ Snyder claimed that Phelps had harmed him in a particular way—by knowingly acting and, yes, speaking in such a way as to cause him severe emotional harm—and that Phelps had thereby treated him as less than human. To use the familiar Kantian terms, Phelps treated Snyder as a means to another’s end. Snyder’s ceremonial grieving was simply a backdrop for Phelps’s main event, speaking to the world about the moral rot that he believed existed in the United States. And so for a court to order the

284. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 586–89 (D. Md. 2008), *rev’d*, 580 F.3d 206 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011).

285. See Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 65, at 83–84 (“The idea of recourse is arguably in the same conceptual family as the retributive notion of an eye for an eye, and an idea of recourse lies behind the conviction that I may hit someone who hits me, that I may take back stolen property, that I may lash out with bitter words at one who has acted cruelly towards me. The same principle supports the notion that a person is entitled, as a matter of justice, to redress a wrong done to her.”).

286. See Robert E. Goodin, *Compensation and Redistribution*, in COMPENSATORY JUSTICE, *supra* note 276, at 143, 143–77.

287. 42 U.S.C. § 300aa-10 (2006).

288. See *supra* Part.III.C.2.

payment of damages, or compensation, is to “restore[] equality,” to use Aristotle’s term, between the two men, both of equal dignity and moral worth.²⁸⁹

Compensation has always been about justice.²⁹⁰ Indeed, the duty to pay damages—compensation—is the fundamental act of “repair” in corrective justice theory.²⁹¹ And though compensation as social insurance may implicate distributive justice—that the victims not bear an undue burden of the costs of particular kinds of accidents—it does not further the kind of accountability or interpersonal justice that private law allows.²⁹² By viewing compensation as social insurance or a pricing mechanism, the Court furthers the notion of private law as regulation, keeping concepts like wrongs and redress out of the picture.

IV. NORMATIVE IMPLICATIONS OF RECAPTURING PRIVATE LAW

We have now seen how the evolution of First Amendment doctrine, the unitary nature of the state-action doctrine, and the influence of instrumentalist thinking have combined to shape the Court’s view of the role of private law. Having unpacked these factors, the question then becomes how this ought to affect doctrine. Here, we are cautious. Our observations in Part III on the factors that have shaped the Court’s theory of private law are not the kind to lead to wholesale doctrinal revamping. For the most part, our prescription is for greater caution in determining the interests at stake when private law is at issue.

Nonetheless, we present some prescriptive or normative ideas here in Part IV. Our ideas come from thinking about these issues in the First Amendment context, but some may apply more broadly to how the Supreme Court ought to treat private law and the state interest in providing redress or access to courts for individuals in a variety of contexts.

289. ARISTOTLE, *supra* note 281, at 125–27.

290. See MILLER, *supra* note 277, at 4 (“[J]ustice is a matter of restoring balance, achieving equity, determining equivalence, making reparations, paying debts, taking revenge—all matters of getting back to zero, to even.”).

291. See COLEMAN, *supra* note 58, at 329–60, 437–38; WEINRIB, *supra* note 59, at 56–58 (describing corrective justice as a self-contained practice in which those who behave wrongfully discharge their duty of repair by compensating those they have harmed).

292. See Jason M. Solomon, *What Is Civil Justice?*, 44 LOY. L.A. L. REV. 317, 329 (2010) (“[C]ivil justice is a legal regime that responds to wrongdoing by vindicating the right of the victim to hold the wrongdoer accountable.”).

The payoff of the prior discussion can be boiled down to three prescriptive points, directed toward the Supreme Court: (1) because private law has value that is not reducible to regulation, consider placing further limits on the speech torts without shutting them off entirely; (2) take a careful look at state interests, including things like providing citizens with a right to redress; and (3) recognize that the identity of the plaintiff matters generally and specifically in understanding the value of the litigation at issue.

A. Tinker with Speech Torts, But Do Not Shut Them Off Entirely

In *Sullivan*, the Court dealt with the conflict over First Amendment values by creating a fault requirement for the state of mind of the defendant—“actual malice”—in order for the plaintiff to recover.²⁹³ But there were several other roads not taken that could be explored anew. Chief Justice Roberts’s opinion in *Snyder* seems to indicate that if the First Amendment applies, then it automatically trumps.²⁹⁴ There would be no liability at all. But Justice Breyer’s approach in his concurring opinion that called for a more nuanced assessment of First Amendment interests in light of the state interest is perfectly plausible.²⁹⁵

Moreover, in a case like *Snyder*, it might be that only actual damages are warranted.²⁹⁶ If the concern is that verdicts like this would put too high a price on speech, then this could serve to lower the price considerably. In this way, an individual like *Snyder* could still get redress by being able to confront in court the individual who had wronged him.²⁹⁷

Perhaps, though, one could say that no lawyer would take such a case if there were only actual damages available, and that, therefore, the ability to get into court at all is illusory. One might also ask: If not a serious damages award, what would the remedy be? Here, though,

293. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

294. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (“Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.”).

295. *Id.* at 1221–22 (Breyer, J., concurring).

296. *See Epstein, supra* note 123 at 793–94 (suggesting that limiting an award to actual damages was a road that the *Sullivan* Court could have taken).

297. *See id.* at 791 (arguing that the presumption “should be in favor of the constitutional permissibility of the common law rules”); Timothy Zick, “Duty-Defining Power” and the First Amendment’s Civil Domain, 109 COLUM. L. REV. SIDEBAR 116, 120 (2009) (pointing out that *Sullivan*’s constitutionalizing of the common law was an “anomaly”).

it may well be that the ability to demand answers and confront another is a value in itself,²⁹⁸ and also alternative remedies such as court-ordered apologies or some form of restorative justice might also serve that state interest in redress just as well or better.²⁹⁹

One thing, though, is clear: As a mechanism for providing redress, private law is not something that is easily replicated by other avenues, particularly in the case of private-figure plaintiffs like Snyder. This inquiry about available redress, though, has been entirely absent due to the Court's imputing regulatory motive to the state.³⁰⁰ Closer attention to the state interest in redress, we believe, would lead to greater efforts to allow *some* measure of redress, while still protecting First Amendment values.

B. Take a Considered Look at State Interests and State Level of Involvement

Second, the Court ought to take a considered look at state interests, and not automatically assume that the regulation of primary activity is what the state is after.³⁰¹ In order to do this, the court will have to understand the common law as embodying rights of various kinds, including the right to redress.³⁰² And the Court will have to be comfortable with the fact that the common law contains no purpose section, as statutes passed by state legislatures frequently do.³⁰³ Nonetheless, the history of the common law, the practice in states, and the presence of rights of redress in state constitutions are all indicia that this interest is something that matters to states.

298. Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 73–74 (2010).

299. See Solomon, *supra* note 242, at 266–67 (“We can also think of a hypothetical civil justice system where apologies are the most common remedy, as opposed to money damages.”).

300. See Zipursky, *supra* note 179, at 519 (“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.”).

301. See Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 826 (1994) (arguing that government interests play an “immense, though often unarticulated role in constitutional adjudication” and are not subject to the same scrutiny as claims of constitutional rights).

302. See Goldberg, *supra* note 65, at 606–11 (making the case for such a right, in conjunction with historical and doctrinal evidence).

303. See Nelson, *supra* note 175, at 1855 (noting that modern courts “rarely hesitate” in considering legislative history and other information about the internal deliberations of legislatures when inquiring into governmental purpose).

There is also the question of how exactly to determine what the state interest is and who to listen to on the question. In Snyder's case, he sued Phelps and the Westboro Baptist Church.³⁰⁴ All parties were private individuals and entities. The state of Maryland was nowhere in the picture. So when the Court was determining what the state interest was in the underlying law, there was no one representing the state to ask.

By the time the case got to the Supreme Court, Maryland, along with several other states, had entered as amici. Their brief emphasized the importance of "protecting the sanctity and privacy of funerals," as well as their interest in protecting "the emotional well-being of grieving families through traditional tort law."³⁰⁵ The state, then, appeared to also buy into the idea of tort law as regulation. But it is not clear how much weight ought to be given to the state's assertions in litigation.³⁰⁶ Among the unusual dimensions of placing state interests at the center of the analysis is that it is not at all clear who gets to define those interests, or how.³⁰⁷

In determining the state interest, though, a distinct doctrinal question—the threshold one of whether the state is sufficiently involved to trigger constitutional scrutiny at all (under the state action doctrine)—has the potential to mislead. As explained above, state-action doctrine has become overly unitary.³⁰⁸ Either there is state action, or there is not. There is no in-between. So when there is state action, the state involvement is assumed to be regulatory. After all, that is what modern governments do.

Many scholars have criticized the state-action doctrine, saying that it is outmoded and should be retired.³⁰⁹ Our view is somewhat different. To a certain extent, we think the public-private distinction that the state-action doctrine helps police should be stronger, not

304. See *Snyder v. Phelps*, 533 F. Supp. 2d 567, 569 (D. Md. 2008), *rev'd*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

305. Brief for the state of Kansas, 47 Other States, and the District of Columbia as *Amici Curiae* in Support of Petitioner at 1–2, *Snyder v. Phelps*, 130 S. Ct. 1207 (2011) (No. 09-751), 2010 WL 2224733, at *1–2.

306. See Nelson, *supra* note 175, at 1789 (pointing out that judicial inquiries into legislators' "true goals" are now "widely accepted" in American constitutional doctrine).

307. See Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 917–18 (1988) (pointing out that the literature has ignored the "validity of the process of inferring interests" and "the validity of the interests inferred").

308. See *supra* note 203–204 and accompanying text.

309. See Metzger, *supra* note 189, at 1446–47 & n.275 (2003).

weaker. That is, we think more attention ought to be paid to the genuinely *private* aspect of private-law actions.³¹⁰

The issue, though, would not be whether the Constitution is implicated at all, as under the current unitary state-action doctrine. In our view, the extent to which the state is involved in the litigation has implications for the extent to which constitutional rights are at stake.³¹¹ If the state involvement consists of making available a common-law action and enforcing a jury verdict, then the constitutional concerns should be less significant than those raised in litigation involving a state statute, agency action, or direct action by government officials.³¹² In short, the degree and kind of state involvement ought to matter in determining the interests and values that prevail in a particular case.

For example, at least seventeen states have statutes that forbid some kinds of false campaign speech, and the lower courts are split about whether such laws are constitutional.³¹³ Of course, speech in political campaigns is at the heart of First Amendment concerns, and the fact that it is a state statute means that the level of state involvement is relatively high compared to a tort action brought by a private citizen like *Snyder*. Because the state directive comes from legislators who have to face voters every few years, we ought to be suspicious of the governmental motive or purpose as well, more so than we need to be in the twice-removed-from-the-sovereign (plaintiff brings action, jury enforces) posture of *Snyder*. Here, the motive of the legislators may well be to suppress speech that is critical of incumbents like them—much closer to the facts and posture of *Sullivan* than *Snyder*. And so a court ought to give more First

310. Cf. Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281, 284 (2013) (arguing that the “morass of the state action doctrine is almost entirely a product of conflicting intuitions concerning what is public . . . and what is private,” and also arguing for more attention, not less, to what exactly is public and what is private about the area of law at issue).

311. For a similar argument in the context of how to deal with privatization, see *id.* at 1431–32, which criticizes the “all-or-nothing” approach to state action as a “very blunt instrument.”

312. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 721, 730 (1931) (extending this principle to judicial injunctions against speech in a 5–4 decision in part based on the ex post availability of private-law remedies such as defamation); Epstein, *supra* note 123, at 788 & n.14 (pointing out that if one reads Blackstone, “one could easily conclude that freedom of press meant only that prior restraint by administrative officials was unconstitutional” (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *151)).

313. See Adam Liptak, *Was That Twitter Blast False, or Just Honest Hyperbole?*, N.Y. TIMES, Mar. 6, 2012, at A12 (mentioning a pending certiorari petition challenging a Minnesota law of this kind).

Amendment protection to the defendant in such a case, relative to the defendants in *Snyder*.

C. *The Identity of the Plaintiff and the Purpose of the Litigation Matter*

Finally the identity of the plaintiff and the point of the litigation ought to be taken into account. In a case like *Snyder*, the fact that the plaintiff is an individual, not a state, matters. It matters because one reason we give individuals access to the courts is to underscore their moral and political agency. And it ought to matter for First Amendment doctrine in a few ways.

First, the public or private status of the plaintiff ought to remain a central part of First Amendment doctrine when evaluating the viability of speech torts. In *Snyder*, the Court ignored this central issue—whether the identity of the plaintiff ought to matter to the level of First Amendment protection accorded the speech.³¹⁴ Using this doctrinal divide in intentional infliction of emotional distress cases—as well as in privacy and defamation cases where it is well established—is truer to the real interests at stake. The entitlement to redress for a public figure ought to be less because of the decision to be in the public eye.³¹⁵

In *Snyder*, the Court confronted a situation similar to that in *Hustler* with one important difference: neither Al Snyder nor his dead son was a public figure. Unlike Jerry Falwell, they had not placed themselves before the public as participants in public affairs who can expect bare-knuckled political debate. Al Snyder didn't ask for the Westboro Baptist Church to show up at his son's funeral simply because his son was a Marine.³¹⁶ Accordingly, the state interest is

314. *Snyder v. Phelps*, 131 S. Ct. 1207, 1221 (2011) (Breyer, J., concurring) (“The Court holds that the First Amendment protects the picketing that occurred here, primarily because the picketing addressed matters of ‘public concern.’ While I agree . . . I do not believe that our First Amendment analysis can stop at that point.”); Jeffrey Shulman, *Free Speech at What Cost?: Snyder v. Phelps and Speech-Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO 313, 325–26, 333–34 (criticizing the Fourth Circuit’s opinion and the Westboro Baptist Church lawyers for ignoring the status of the plaintiff).

315. *But see* Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 304 (arguing that the public/private figure distinction “bears only on the degree of culpability required to allow compensatory damages for the constitutionally valueless false statements of fact”).

316. The second and third sentences of Justice Alito’s dissent read: “Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq.” *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

stronger in providing redress against those who have wronged him by invading his privacy and inflicting emotional pain. By failing to recognize this dichotomy in *Snyder*, the Court further obscured the centrality of the plaintiff's agency and interest in accountability through private law.

To be sure, this distinction has been difficult to navigate in the defamation context, but in cases like *Snyder*'s—in which the plaintiff is a private figure, not a public one—there ought to be less First Amendment protection for the speaker. The majority opinion in *Snyder* looked exclusively at the content of the speech in deciding the amount of First Amendment protection it was given; because it was held to be a matter of public concern (itself debatable),³¹⁷ it got full First Amendment protection.³¹⁸ But the other side of the equation is what the state's interest is in providing redress for this plaintiff. Put differently, the question is whether the plaintiff has the moral authority to complain about certain speech. When the plaintiff is a public figure of his or her own choosing, then courts in the defamation context will frequently deny liability on the ground that the plaintiff does not have a right to complain, having sought the spotlight.³¹⁹ But if the plaintiff is a private citizen like *Snyder*, then he does have grounds to complain.

In addition, the plaintiff's identity matters because it provides a clue as to what the purpose of any particular lawsuit is—a key issue in First Amendment doctrine.³²⁰ *Snyder*'s interest was certainly not in speech suppression. It was in demanding accountability from someone who had harmed him at a particularly vulnerable time in his life. If the Supreme Court took a closer look at what was actually going on in the underlying litigation, instead of assuming that the plaintiff and the jury were acting as agents of state regulation, then the degree of First Amendment protection might not have been so absolute.

317. *See id.* at 1226 (“While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder’s purely private conduct does not.”).

318. *Id.* at 1218 (majority opinion).

319. Solomon, *Judging Plaintiffs*, *supra* note 4, at 1767.

320. *See supra* notes 170–177 and accompanying text.

CONCLUSION

The core of the First Amendment prevents prior restraint of speech by government officials. That much we have known for a long time. It is only since *Sullivan* in 1964 that we have grappled with what limits exactly the First Amendment places on civil liability for speech ex post, as opposed to criminal punishment of speech ex post or restraint of speech ex ante.

In this Article, we have shown just how much the First Amendment's protections have been broadened from *Sullivan*, a case involving public officials using private law to suppress criticism of their conduct as public officials (the core of "matters of public concern"), to *Snyder*, a case involving a private citizen using private law to seek redress against a group of people who sought to hijack his son's funeral for their own purposes.

In our view, the disappearance of any distinction between public law and private law is a step too far, and has led constitutional doctrine astray. There is something missing in the view that started with Holmes in 1897 and is dominant at the Supreme Court in 2012. According to this approach, all areas of law are best seen through an instrumental lens, fundamentally as ways of promoting various public policies of the state.

In *Snyder*, this approach has been taken too far. It is time to revisit ways to protect First Amendment values while also protecting the state interest in individuals being able to redress wrongs that were done to them. Words can wound. And when attacked, the Al Snyders of the future ought to have a civilized means for redeeming their honor and holding accountable those who have wronged them. Far from being a relic of the past, the right to civil recourse is a fundamental part of a modern society that aspires to social equality. It is a right worthy of state interest, and a right worthy of being preserved.