

## Silencing State Courts

Jeffrey Steven Gordon

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# SILENCING STATE COURTS

Jeffrey Steven Gordon\*

## ABSTRACT

In state courts across the Nation, an absolutist conception of the First Amendment is preempting common law speech torts. From intentional infliction of emotional distress and intrusion upon seclusion, to intentional interference with contractual relations and negligent infliction of emotional distress, state courts are dismissing speech tort claims on the pleadings because of the broad First Amendment defense recognized by *Snyder v. Phelps* in 2011. This Article argues, contrary to the scholarly consensus, that *Snyder* was a categorical departure from the methodology adopted by *New York Times Co. v. Sullivan*, the landmark 1964 case that first applied the First Amendment against state common law. *Sullivan*, on the one hand, was a classical common law decision, taking the internal point of view with respect to state common law. *Snyder*, on the other, was only concerned with the existence of protected speech, an issue for which state common law was irrelevant. This Article contends that *Snyder*'s absolutism has negative systemic consequences for judicial federalism: courts are unnecessarily prevented from judging certain conduct right or wrong under the local standards of state tort law, even if the First Amendment ultimately immunizes a defendant from liability. *Sullivan*'s methodology is better than *Snyder*'s because it embraced cooperative judicial federalism. *Sullivan* has underwritten fifty years of productive state-federal judicial dialogue; in just seven years, *Snyder* has censored every significant opportunity for cross-systemic judicial conversation.

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## INTRODUCTION

A strange thing is happening to common law speech torts. In state courts across the Nation, they’re disappearing, preempted by the First Amendment. From a New Hampshire city suing its libertarian residents for harassing city officers,<sup>1</sup> to brothers suing a TV station in Arizona for broadcasting their father’s suicide,<sup>2</sup> to a Wisconsinite school bus driver suing a journalist for publicizing her petty criminal history,<sup>3</sup> to a woman suing her ex-boyfriend’s mother for plastering missing-person posters outside her home in Connecticut,<sup>4</sup> the First Amendment is preempting intentional infliction of emotional distress (IIED), intrusion upon seclusion, intentional interference with contractual relations, and negligent infliction of emotional distress. Ignoring hornbook constitutional avoidance doctrine, state courts routinely decide the First Amendment question—whether the speech is protected—while consciously refusing to consider the common law question—whether the speech is tortious in the first place—that is logically (and legally) prior. This is backwards avoidance: state courts avoid a run-of-the-mill private law issue by deciding a significant federal constitutional question.

Perhaps worse, state courts often dismiss these common law claims before discovery. It turns out that once the First Amendment appears, these lawsuits do not need developed factual records.<sup>5</sup> That’s because there are only three facts that matter to

<sup>1</sup> *City of Keene v. Cleaveland*, 118 A.3d 253 (N.H. 2015).

<sup>2</sup> *Rodriguez v. Fox News Network, L.L.C.*, 356 P.3d 322 (Ariz. Ct. App. 2015).

<sup>3</sup> *Dumas v. Koebel*, 841 N.W.2d 319 (Wis. Ct. App. 2013).

<sup>4</sup> *Gleason v. Smolinski*, 125 A.3d 920 (Conn. 2015).

<sup>5</sup> *See infra* Section II.B.3.

the First Amendment: the violence, location, and content of the speech. Nonviolent expressive conduct that is in public view and on a matter of public concern is immunized. The most important question by far is whether the speech's content falls within a roomy conception of public concern. In these cases, the First Amendment doctrine requiring appellate courts to independently and closely examine the factual record is a mirage. The First Amendment denies plaintiffs not only a trial, but also the more basic opportunity to present their case.<sup>6</sup>

The culprit is the Supreme Court's 2011 opinion in *Snyder v. Phelps*.<sup>7</sup> In *Snyder*, the father of a fallen Marine sued members of the fundamentalist Westboro Baptist Church for emotional harm caused by their picketing of his son's funeral.<sup>8</sup> The Supreme Court set aside the father's \$5 million jury verdict.<sup>9</sup> "As a Nation," wrote Chief Justice Roberts for the majority of eight, "we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."<sup>10</sup> Paying almost no attention to Maryland law, Roberts announced that the First Amendment provides a public concern defense in all state tort suits affixing liability to speech.<sup>11</sup> Rather than begin with state common law rules of liability, Roberts "beg[a]n[] in the opposite corner with the First Amendment."<sup>12</sup> State courts picked up *Snyder*'s all-purpose federal defense and have run with it. Speech on a matter of public concern (an expansive category) is privileged.

This Article offers a sustained methodological critique of *Snyder* through the structural lens of judicial federalism (the relationship between the state and federal court systems). To be clear, it does not argue that *Snyder*'s outcome was wrong or that *Snyder* was an unconstitutional exercise of power. Regardless of your theory of incorporation,<sup>13</sup> the reconstructed First Amendment applies in full force against the states. And it's a First Amendment truism that civil damages cannot be imposed for protected speech.<sup>14</sup> If

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<sup>6</sup> This Article takes state courts seriously. See also Anna E. Carpenter et al., *Studying the New Civil Judges*, 2018 WIS. L. REV. 249, 250–52 (noting the "state court knowledge deficit"); Zachary D. Clopton, *Making State Civil Procedure*, CORNELL L. REV. (forthcoming 2018) (manuscript at 4) ("[S]tate courts matter.").

<sup>7</sup> *Snyder v. Phelps*, 562 U.S. 443 (2011).

<sup>8</sup> *Id.* at 449–50.

<sup>9</sup> *Id.* at 450, 459.

<sup>10</sup> *Id.* at 461.

<sup>11</sup> *Id.* at 451–53.

<sup>12</sup> Harry Kalven, Jr., *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 292.

<sup>13</sup> See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 137–230 (1998) (tracing the history of the incorporation debate, criticizing the total and selective incorporation models, and proposing the refined incorporation model); *id.* at 231–46 (discussing the incorporation of the Free Speech Clause of the First Amendment).

<sup>14</sup> Private figure plaintiffs can recover actual damages for defamation if they prove negligence. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). See generally David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135 (arguing for more remedial flexibility in the application of the First Amendment to speech torts).

we accept that Westboro's speech was protected, then *Snyder* rightly set aside the jury verdict.

But the existence of protected speech is not the only legal inquiry. State common law speech torts can be legitimately constitutionalized in two broad ways. *Snyder* represents the first model. On this view, the First Amendment is an external limit that precludes a state from imposing liability for speech of public concern. Its vision of the First Amendment is absolutist because it protects speech of public concern regardless of context, form, factual record, and theory of liability. The first (and, most of the time, only) question is whether the content of the defendant's speech is of public concern. If it is, then the plaintiff's allegation—whether sounding in IIED, a privacy tort, an economic tort, negligence, or some other theory of civil liability—is simply irrelevant. This enables backwards avoidance, making it unnecessary for a court to decide if the state tort actually covers the speech. Only the speech matters: if speech is protected, the state is preempted. *Snyder*, then, contributed to the ongoing “rule-ification” of the First Amendment and adopted a rule-conflict model for its enforcement.<sup>15</sup> The external limit of the First Amendment invalidates or strikes down the tort. This model fits neatly into the emergent paradigm of thinking about the First Amendment as an unstoppable force, a *Lochner*-esque preemption machine.<sup>16</sup>

There is another way. The second model views the First Amendment as an internal limit on the state right of action. In *New York Times Co. v. Sullivan*,<sup>17</sup> our index case deploying the First Amendment to limit state common law torts, Justice Brennan established the famous “federal rule,”<sup>18</sup> also characterized as a “conditional privilege,”<sup>19</sup> that a public official is “prohibit[ed] . . . from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>20</sup> On this view, the threshold question is whether the application of state rules of law would impose liability for expressive conduct. If yes, then there is state action, and only then is the First Amendment inquiry taken up. This view considers crucially important not only the verdict, but also the legal reasons—the rules and principles of state law—purporting to legitimize the verdict. Rather than simply set aside the verdict because it punishes speech, this model interrogates and refashions the state common law underwriting the verdict, molding that law to ensure it conforms to the First Amendment.

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<sup>15</sup> Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 106 (2012).

<sup>16</sup> See, e.g., Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1207–09 (2015).

<sup>17</sup> 376 U.S. 254 (1964).

<sup>18</sup> *Id.* at 279–80.

<sup>19</sup> *Id.* at 282 n.21. The Supreme Court took the characterization of the federal rule as a privilege from a decision of the Supreme Court of Kansas. *Id.* at 280 (citing *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908)).

<sup>20</sup> *Sullivan*, 376 U.S. at 279–80.

The claim that *Snyder* and *Sullivan* represent different models of First Amendment enforcement is contentious and needs justification. Indeed, the scholarly consensus is that both *Sullivan* and *Snyder* operate as external, all-or-nothing limits on the states.<sup>21</sup> On the contrary, this Article argues that scholars have been too quick to align *Snyder* with *Sullivan*. This Article drives a wedge between their models of First Amendment enforcement by arguing that *Sullivan*, unlike *Snyder*, is a common law decision. Specifically, this Article argues that Brennan's opinion adopted the internal point of view vis-à-vis Alabama's common law.<sup>22</sup> As a threshold matter, *Sullivan* rested its authority to rewrite state common law on the First and Fourteenth Amendments.<sup>23</sup> It rightly accepted that the rules and principles of state common law, and not only the ancillary orders enforcing state judgments, count as state action.<sup>24</sup> By piercing the libel verdict's veil, Brennan subjected the legal reasons purporting to legitimize that verdict to First Amendment scrutiny. Brennan did not throw out Alabama's libel tort; rather, he accepted Alabama's common law of libel as far as constitutionally permissible.<sup>25</sup> This attitude—a practical attitude of accepting state common law—is the internal point of view.

Drawing on a theory of common law adjudication,<sup>26</sup> this Article argues that adopting the internal point of view towards state common law explains why *Sullivan* is a common law decision. The common law is a disciplined exercise of practical reason that reflects and informs the complex texture of daily life and relationships of members of the political community. State courts, which are the primary repositories of the common law, pride themselves on their status as common law courts. Because they are closer to the people, state courts prefer to solve problems with local rules. This, in turn, opens a dialogue on two fronts: first, with other state courts who

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<sup>21</sup> See, e.g., Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. (forthcoming 2019) (manuscript at 53) (placing *Snyder* in “the Court’s sequence of decisions” originating with *Sullivan*); John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court’s Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 437–43 (2016) (situating *Snyder* as an extension of *Sullivan*’s approach); Han, *supra* note 14, at 1175 (discussing “the Supreme Court’s general adherence to the all-or-nothing approach in speech-tort cases ranging from *Sullivan* through *Snyder*.”); Nathan B. Oman & Jason M. Solomon, *The Supreme Court’s Theory of Private Law*, 62 DUKE L.J. 1109, 1162–63 (2013) (situating *Snyder* as an extension of *Sullivan*’s approach); Cristina Carmody Tilley, *Tort, Speech, and the Dubious Alchemy of State Action*, 17 U. PA. J. CONST. L. 1117, 1157 (2015) (“[I]n the line of cases from *Sullivan* and *Snyder*, the Court has attempted to establish a categorical, quasi-legislative scheme of dignitary tort.”).

<sup>22</sup> See *Sullivan*, 376 U.S. at 265.

<sup>23</sup> *Id.* at 265–92.

<sup>24</sup> See *id.* at 265.

<sup>25</sup> *Id.* at 265–92.

<sup>26</sup> See Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155 (2002) [hereinafter Postema, *Part I*]; Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1 (2003) [hereinafter Postema, *Part II*].

adopt or reject analogous common law rules, and second, with local legislatures who prefer to comprehensively regulate.

Armed with the internal point of view to Alabama law, *Sullivan* adopted this common law methodology, and resolved a long-standing common law debate. In the early twentieth century, state courts debated the existence of a conditional privilege in defamation for criticism of public officials or candidates for public office.<sup>27</sup> *Sullivan* accepted a modified version of the so-called “liberal rule,” which permitted the conditional privilege, quoting extensively from Rousseau Burch’s 1908 opinion for the Kansas Supreme Court in *Coleman v. MacLennan*.<sup>28</sup> Interestingly, the debate played out at the American Law Institute’s [ALI] 1937 annual meeting. During discussion of a tentative draft of the First Torts Restatement, Burch, who had written *Coleman* thirty years earlier, debated Learned Hand, who rejected the liberal rule. Learned Hand convinced the ALI membership. The views of the author of *Masses Publishing Co. v. Patten*<sup>29</sup> on the relationship between libel and free speech, articulated nearly thirty years before *Sullivan*, are of independent interest.

Finally, this Article argues that *Sullivan*’s methodology is preferable to *Snyder*’s because *Sullivan* embraced, and *Snyder* eschewed, cooperative judicial federalism.<sup>30</sup> *Snyder* shut down the articulation of state law. Because doctrine is a public good, silencing state courts on state law—here, the unnecessary federal preemption of state speech torts—is a systemic ill. Cooperative judicial federalism focuses on the value of judicial dialogue between federal and state courts. It flourishes particularly when a state right of action embeds a federal issue (and vice versa) because those cases generate mixed questions of state and federal law. Exercising concurrent jurisdiction, state and federal courts respond to each other’s opinions, shape the contours of their own (and each other’s) law, and ensure state compliance with federal law. While *Sullivan*’s common law methodology inaugurated over fifty years of productive state-federal judicial dialogue, in just seven years *Snyder*’s absolutism has suppressed every significant opportunity for intersystemic judicial conversation. One of *Sullivan*’s unheralded virtues, then, is that it created the right conditions for a genuinely cooperative judicial federalism. That’s a compelling reason to prefer the *Sullivan* model.

There is a deep irony in *Snyder*’s model of First Amendment enforcement. *Snyder*’s constitutional defense, in the words of one state court, “avoid[s] a ‘prolonged, costly,

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<sup>27</sup> See, e.g., *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908).

<sup>28</sup> *Id.* at 285. See *Sullivan*, 376 U.S. at 281–82 n.21.

<sup>29</sup> 244 F. 535 (S.D.N.Y. 1917). See generally Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment: Masses Publishing Co. v. Patten*, 61 U. COLO. L. REV. 1 (1990) (arguing that in *Masses*, “Hand was the first judge to place heavy reliance on democratic theory in seeking to understand the meaning of the first amendment,” and that his premises and reasoning “have become the basic, though often unacknowledged, features of modern first amendment analysis”).

<sup>30</sup> “Judicial federalism” is used broadly to refer to the relationship between the state and federal courts.

and inevitably futile trial.”<sup>31</sup> But a trial isn’t futile for a losing plaintiff. Indeed, even pretrial litigation isn’t futile if it permits plaintiffs to properly and completely communicate their injury. Pretrial discovery and motion practice allow the tort plaintiff to allege: *that defendant wronged me*.<sup>32</sup> *Snyder*’s First Amendment, however, silences this expressive function of tort law. Moreover, it’s ironic that *Snyder*’s First Amendment smothers the articulation of state law. In an IIED suit, for example, surely it is speech of public concern when a court expresses the local political community’s collective judgment that a defendant acted beyond all possible bounds of civilized conduct. The First Amendment enforces the *national* community’s judgment that the defendant shouldn’t pay damages for that conduct; it does not follow that reasoned elaboration of the *local* community’s judgment is worthless.

The argument proceeds as follows. After Part I describes the reasoning and significance of *Sullivan* and *Snyder*, Part II distinguishes between their models of First Amendment enforcement. It defends the thesis that *Sullivan* is a common law decision by arguing that Brennan adopted the internal point of view vis-à-vis Alabama’s common law. But *Snyder* enforced an external, absolutist vision of the First Amendment, which has shut down the articulation of state common law by state courts. Finally, Part III argues that *Sullivan*’s methodology is superior to *Snyder*’s because it embraced cooperative judicial federalism and generated decades of productive state-federal judicial dialogue.

### I. SULLIVAN AND SNYDER

This Part describes the reasoning and significance of the Article’s two focal points, *Sullivan* and *Snyder*. In sum, *Sullivan* is necessary to the legitimacy of the United States; *Snyder* is not so consequential. Latent in the following discussion is that these two cases are symbols, representing not only choices about how the First Amendment is enforced against the states, but also choices about how federal and state law writ large interact. Lurking unarticulated in each is a vision of judicial federalism. Parts II and III will draw out those different visions.

#### A. Sullivan

On November 3, 1960, Lester Bruce Sullivan, the elected Police Commissioner of Montgomery, Alabama, was “very pleased.”<sup>33</sup> Twelve “outstanding jurors”<sup>34</sup> had

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<sup>31</sup> *Rodriguez v. Fox News Network, L.L.C.*, 356 P.3d 322, 325 (Ariz. Ct. App. 2015) (citation omitted).

<sup>32</sup> Scott Hershovitz recently argued that tort law serves an expressive function. See Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. Tort L. 405, 406 (2017) (“What message does tort liability send? At the least, this: *The defendant wronged the plaintiff.*”).

<sup>33</sup> *Jury Awards \$500,000 In Alabama Libel Suit*, HARTFORD COURANT, Nov. 4, 1960, at 29.

<sup>34</sup> *Id.*



just awarded him \$500,000 for an alleged libel contained in a paid advertisement in the New York Times describing police harassment and abuse. The largest libel award in Alabama history,<sup>35</sup> it was also the most damaging salvo in Sullivan's campaign against the northern press. Earlier that year, on his thirty-ninth birthday, Sullivan had issued a statement excoriating the "prejudiced northern press" and its program of "further[ing] . . . racial strife and exploitation for financial gain and spectacular distorted news coverage."<sup>36</sup>

Sullivan's active prosecution of the media starkly contrasted with his passive (to put it generously) policing of white brutality. On February 27, 1960, a white man clubbed Christine Stovall, a twenty-two-year-old black woman, over the back of the head.<sup>37</sup> The press reported that nearby police made no arrests.<sup>38</sup> Sullivan said, "[o]ur hands were tied . . . because officers didn't arrive on the scene until the disturbance was over . . . and they couldn't arrest anyone without a complaint."<sup>39</sup> The following year, as Freedom Riders arrived in Montgomery on a Greyhound Bus, the city's police force was nowhere to be found.<sup>40</sup> The Freedom Riders were mercilessly beaten.<sup>41</sup> Sullivan said, "we have no intention of standing police guard for a bunch of trouble makers coming into our city and making trouble."<sup>42</sup>

It was left to the federal courts to police Sullivan. His abnegation of duty earned an injunction from District Judge Frank M. Johnson, who found "that the Montgomery Police Department, under the direction of Sullivan . . . willfully and deliberately failed to take measures to ensure the safety of the students and to prevent unlawful acts of violence upon their persons," which "continued even after the arrival of the bus."<sup>43</sup> Sullivan's attempt to weaponize libel was thwarted by the Supreme Court in *New York Times Co. v. Sullivan*.<sup>44</sup> Justice Brennan reversed Sullivan's damages award by establishing the famous "federal rule,"<sup>45</sup> also characterized as a "conditional'

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<sup>35</sup> ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 35 (1991). In 1964, as now, libel in Alabama is a common law cause of action subject to some statutory regulation.

<sup>36</sup> Statement by L. B. Sullivan, March 5, 1960, available at [http://archives-alabama-primo.hosted.exlibrisgroup.com/01ALABAMA:default\\_scope:01ALABAMA\\_ALMA216138970002743](http://archives-alabama-primo.hosted.exlibrisgroup.com/01ALABAMA:default_scope:01ALABAMA_ALMA216138970002743) [<https://perma.cc/TNG8-CSD4>].

<sup>37</sup> *Montgomery Woman Beaten*, N.Y. TIMES, Feb. 28, 1960, at 51.

<sup>38</sup> *Id.*

<sup>39</sup> *Sitdown Campaigns Are Pushed*, ANNISTON STAR, Feb. 29, 1960, at 1.

<sup>40</sup> LEWIS, *supra* note 35, at 10–11.

<sup>41</sup> Don Martin, *U.S. Official Is Knocked Unconscious: Montgomery Police Break Up Scuffles With Tear Gas*, WASH. POST, May 21, 1961, at A1.

<sup>42</sup> *Id.* at A6. Sullivan tried to leverage all the attention into a gubernatorial candidacy, "if public reaction continue[d] to be favorable." *Alabama Cop May Seek Post*, CHI. DAILY DEFENDER, July 17, 1961, at 11.

<sup>43</sup> *United States v. U.S. Klans, Knights of Ku Klux Klan, Inc.*, 194 F. Supp. 897, 901 (M.D. Ala. 1961).

<sup>44</sup> 376 U.S. 254 (1964).

<sup>45</sup> *Id.* at 279.

privilege,”<sup>46</sup> that a public official is “prohibit[ed] . . . from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>47</sup>

The Court in *Sullivan* also claimed power to “‘make an independent examination of the whole record’ . . . to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.”<sup>48</sup> Brennan disposed of a Seventh Amendment objection on two distinct grounds. First, he observed that the Seventh Amendment “does not preclude us from determining whether governing rules of federal law have been properly applied to the facts.”<sup>49</sup> Second, Brennan pointed out that the Supreme Court is empowered to review a state court’s findings of fact “‘where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.’”<sup>50</sup> In *Sullivan*, the first ground did all the work: the facts, as found, showed that the advertisement was not of and concerning Sullivan, and its publication did not amount to actual malice.<sup>51</sup>

The *Sullivan* case was “an occasion for dancing in the streets”<sup>52</sup> and the most important First Amendment decision of the twentieth century.<sup>53</sup> It held that a state’s law of libel “can claim no talismanic immunity from constitutional limitations” and “must be measured by standards that satisfy the First Amendment.”<sup>54</sup> The Court staked out the “central meaning of the First Amendment” as the abolition of seditious libel.<sup>55</sup> And it concluded that the federal rule protected the good-faith publication of criticism of public officials who enforced discriminatory laws and policies in the south.<sup>56</sup>

*Sullivan*, then, stood at a nexus of the private law of torts, the First Amendment, and federalism. First, aided by sympathetic state courts, Sullivan had obtained a private law tort remedy against the publisher of a paid advertisement criticizing official conduct. According to M. Roland Nachman, Jr., Sullivan’s lawyer, an award of damages for the advertisement was “within the normal, usual rubric and framework of libel.”<sup>57</sup>

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<sup>46</sup> *Id.* at 282 n.21.

<sup>47</sup> *Id.* at 279–80.

<sup>48</sup> *Id.* at 285 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

<sup>49</sup> *Id.* at 285 n.26.

<sup>50</sup> *Id.* (quoting *Fiske v. Kansas*, 274 U.S. 380, 385–86 (1927)).

<sup>51</sup> *Id.* at 285–92.

<sup>52</sup> Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125 (quoting a personal conversation with Alexander Meiklejohn).

<sup>53</sup> Henry Paul Monaghan, *In Memoriam—Herbert Wechsler, A Legal Giant Is Dead*, 100 COLUM. L. REV. 1370, 1375 (2000).

<sup>54</sup> *Sullivan*, 376 U.S. at 269.

<sup>55</sup> *Id.* at 273.

<sup>56</sup> *See id.* at 292.

<sup>57</sup> Oral Argument at 01:23:59, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (No.

Second, at the time conventional doctrine held that the First Amendment did not protect libel. Professor Herbert Wechsler, representing the New York Times, agitated against that ingrained view, and announced that the Alabama judgment “poses . . . hazards to the freedom of the press of a dimension not confronted since the early days [of] the Republic.”<sup>58</sup> Third, Nachman not only argued that libel fell outside the First Amendment as a doctrinal matter.<sup>59</sup> He also argued that “[t]he Court has left the characterization of publications as libelous or not libelous to the States.”<sup>60</sup> In other words, there can be no federal common law of libel.

It is worth pausing to emphasize *Sullivan*’s stakes. Its enforcement of the First and Fourteenth Amendments against state common law was part of an epic constitutional struggle. *Sullivan* and its plaintiff cannot be disentangled from the Jim Crow south, as Anthony Lewis chronicled in elegant detail.<sup>61</sup> The menace of racism infected the trial: the Times found it difficult to retain local counsel; to avoid violence, its New York attorneys stayed in Alabama motels under assumed names; Sullivan’s lawyers struck two African Americans from the list of thirty-six potential jurors; and the trial judge was a Confederate zealot.<sup>62</sup> Nor was *Sullivan* the only libel action afoot against the Times. A cluster of lawsuits threatened the paper’s financial viability.<sup>63</sup> Indeed, a loss for the Times may have silenced national coverage of the civil rights movement.<sup>64</sup>

There are, moreover, strong reasons to think that *Sullivan* is necessary for a free society. It is closely aligned with the eradication of seditious libel—the central thrust of, or one of the core policies underlying, the First Amendment.<sup>65</sup> The Madison and Meiklejohn arguments about self-government establish that the minimal conception of free expression protects criticism of government.<sup>66</sup> And Rawls argued that the absence of the crime of seditious libel is a necessary condition of a free society:

So long as this crime exists the public press and free discussion cannot play their role in informing the electorate. And, plainly,

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39), [https://apps.oyez.org/player/#/warren11/oral\\_argument\\_audio/14501](https://apps.oyez.org/player/#/warren11/oral_argument_audio/14501) [<https://perma.cc/A8Y6-YGSF>].

<sup>58</sup> *Id.* at 00:00:27.

<sup>59</sup> *See id.* at 01:23:21.

<sup>60</sup> *Id.*

<sup>61</sup> *See generally* LEWIS, *supra* note 35, at 15–22 (describing racial segregation and discrimination in the United States in the mid-twentieth century, especially in Alabama and the south, where it “was . . . far more virulent, because it had force of law,” and was a defining characteristic of “the atmosphere in Alabama as *The New York Times* prepared to defend itself in court in Montgomery against the first libel action, brought by Commissioner Sullivan”).

<sup>62</sup> *Id.* at 24–27.

<sup>63</sup> *See id.* at 42.

<sup>64</sup> *See id.* at 34–45 (noting that the suit by Sullivan was designed “to choke off a process that was educating the country about the nature of racism and was affecting public attitudes on that issue”).

<sup>65</sup> Monaghan, *supra* note 53, at 1376 n.34.

<sup>66</sup> *See New York Times v. Sullivan*, 376 U.S. 254, 275, 297 (1964).

to allow the crime of seditious libel would undermine the wider possibilities of self-government and the several liberties required for its protection. Thus the great importance of *New York Times v. Sullivan*.<sup>67</sup>

For Rawls, the freedom of political speech is essential “to any fully adequate scheme of basic liberties.”<sup>68</sup>

### B. Snyder

On March 10, 2006, Albert Snyder rode with his ex-wife and their two daughters to St. John’s Catholic Church in Westminster, Maryland.<sup>69</sup> They were attending the funeral of Snyder’s son, Marine Lance Corporal Matthew Snyder, who had died in Iraq in the line of duty a week earlier.<sup>70</sup> As the funeral procession pulled into the church grounds, Snyder saw the tops of some signs held by picketers between 200 and 300 feet away.<sup>71</sup> He did not learn what was written on the signs until later that day, when someone switched on the news at a private wake in his parents’ home.<sup>72</sup>

The picketers were seven members of the Westboro Baptist Church. Westboro deploys confrontational tactics to preach its Calvinist theology, which Randall Balmer, Westboro’s expert witness and a respected historian of American religion, described as “fire-and-brimstone,” “fundamentalist militancy,” and “‘prophetic’ and condemnatory.”<sup>73</sup> Westboro preaches that the United States “is full of sin, and proud of her sin.”<sup>74</sup> “This proud sin,” Westboro members said in sworn affidavits, “does not just include homosexuality, though that is a major one.”<sup>75</sup> Adultery, divorce, remarriage, and idolatry are also among the “institutionalize[d] sin[s].”<sup>76</sup> The United States, they say, “has become a nation of idolaters, and their main idols are the military uniform, the American flag, and patriotism.”<sup>77</sup> Coupled with the view that the United States

<sup>67</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 343 (2005).

<sup>68</sup> *Id.* (citing Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 529–44).

<sup>69</sup> See Michael Smerconish, *He Looked Hate in the Eye*, POLITICO (Mar. 7, 2014), <http://www.politico.com/magazine/story/2014/03/al-snyder-westboro-baptist-church-104353> [<https://perma.cc/93JC-X3UX>]; Mike Argento, *Time of Solace, Signs of Hate*, YORK DAILY RECORD, Mar. 11, 2006, at 01.

<sup>70</sup> Argento, *supra* note 69.

<sup>71</sup> Snyder v. Phelps, 562 U.S. 443, 449 (2011).

<sup>72</sup> *Id.*

<sup>73</sup> Statement of Randall Balmer, Snyder v. Phelps, 533 F. Supp. 2d 567 (D. Md. 2008) (No. RDB-06-1389), 2007 WL 3118533, at 3–6.

<sup>74</sup> Affidavit of Rebekah A. Phelps-Davis at ¶ 17, Snyder v. Phelps, 533 F. Supp. 2d 567 (D. Md. 2008) (No. 06-CV-1389).

<sup>75</sup> *Id.* ¶ 63.

<sup>76</sup> *Id.* ¶¶ 17, 63.

<sup>77</sup> *Id.* ¶ 18.

“is de facto Babylon” are beliefs that Westboro members are prophets, that scriptural “discussions about the fall of Babylon . . . are in fact for America,” that tragedies are punishments from God, and that the Iraq war was “a precursor to the destruction of this nation and this world.”<sup>78</sup> It follows that “we have a duty to publish to this nation, and the world, a message that God is punishing them for their proud sins.”<sup>79</sup>

So, on March 10, 2006, Fred Phelps, two of his adult daughters, and four of his minor grandchildren picketed Matthew Snyder’s funeral.<sup>80</sup> After about forty-five minutes of picketing, they packed up just as the funeral service was beginning.<sup>81</sup> Westboro had given law enforcement notice.<sup>82</sup> The picketing was peaceful, unamplified, and confined to a small police-designated area on public land sandwiched between a public street and church property.<sup>83</sup> It was neither seen nor heard during the funeral service.<sup>84</sup> Phelps’s daughters held signs saying: “God Hates You,” “God Hates America,” “America is Doomed,” “Semper Fi Fags” (with a graphic of stick figures having sex), “Not Blessed Just Cursed,” and “God’s View” (with a graphic of Uncle Sam in cross-hairs).<sup>85</sup> Phelps’s grandchildren held signs saying: “You’re Going to Hell,” “God Hates the USA/Thank God for 9/11,” “Fag Troops,” “Don’t Pray for the USA,” “Thank God for Dead Soldiers,” “Thank God for IEDs,” “Maryland Taliban,” “Fags Doom Nations,” “Priests Rape Boys,” and “Pope in Hell.” All seven wore T-shirts emblazoned with “God Hates Fags.”<sup>86</sup>

Snyder commenced a diversity action against Phelps and Westboro,<sup>87</sup> and later added Phelps’s daughters as defendants.<sup>88</sup> Three of the state law tort claims—IIED, intrusion upon seclusion, and civil conspiracy—survived to a jury trial.<sup>89</sup> The jury returned a verdict for Snyder on all three, awarding \$2.9 million in compensatory damages and \$8 million in punitive damages.<sup>90</sup> The District Judge reduced punitive damages to \$2.1 million.<sup>91</sup> The Fourth Circuit reversed, accepting Westboro’s argument that the judgment contravened the First Amendment.<sup>92</sup>

<sup>78</sup> *Id.* ¶¶ 25, 34, 36.

<sup>79</sup> *Id.* ¶ 35.

<sup>80</sup> See Isaac Baker & Ari Natter, *Group Pickets Across Country*, CARROLL CTY. TIMES, Mar. 11, 2006, at 01.

<sup>81</sup> See *id.*

<sup>82</sup> *Snyder v. Phelps*, 562 U.S. 443, 448 (2011).

<sup>83</sup> *Id.* at 448–49.

<sup>84</sup> *Id.* at 460.

<sup>85</sup> *Id.* at 448, 454; Affidavit of Rebekah A. Phelps-Davis at ¶ 126, *Snyder v. Phelps*, 533 F. Supp. 2d 567 (D. Md. 2008) (No. 06-CV-1389); Argento, *supra* note 69, at 01.

<sup>86</sup> *Snyder*, 562 U.S. at 448, 454; Argento, *supra* note 69, at 01.

<sup>87</sup> *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572 (D. Md. 2008).

<sup>88</sup> *Snyder v. Phelps*, 580 F.3d 206, 210–11 (4th Cir. 2009).

<sup>89</sup> See *id.* at 211.

<sup>90</sup> *Id.*

<sup>91</sup> *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571 (D. Md. 2008).

<sup>92</sup> *Snyder v. Phelps*, 580 F.3d 206, 211, 226 (4th Cir. 2009).

The Supreme Court rejected Snyder’s appeal in an opinion by Chief Justice Roberts, joined by all except Justice Alito.<sup>93</sup> Proceeding on “the unexamined premise that [Westboro’s] speech was tortious,” Roberts noted that “[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.”<sup>94</sup> Making out the defense “turns largely on whether [Westboro’s] speech is of public or private concern, as determined by all the circumstances of the case.”<sup>95</sup> Speech is of public concern “when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”<sup>96</sup> The Court must examine the “content, form, and context” of the speech as disclosed by an independent review of the whole record.<sup>97</sup> Roberts gave two examples of speech of purely private concern: information about a particular individual’s credit report made solely in the personal interest of the speaker to a small number of subscribers who were bound not to disseminate; and videos of a government employee engaged in sexual activity.<sup>98</sup>

Turning to the speech at issue, Roberts held that “[t]he ‘content’ of Westboro’s signs plainly relates to broad issues of interest to society at large.”<sup>99</sup> This conclusion is stated rather than justified. Westboro’s signs, although “fall[ing] short of refined social or political commentary,” nevertheless highlighted “matters of public import,” namely, “the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy.”<sup>100</sup> It did not matter that some of the signs could be fairly considered as related to the Snyders specifically, because “the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.”<sup>101</sup> On form, Roberts held that the signs conveyed Westboro’s position “in a manner designed . . . to reach as broad a public audience as possible.”<sup>102</sup> And on context, Roberts held that the funeral setting “cannot by itself transform the nature of Westboro’s speech.”<sup>103</sup> Roberts rejected Snyder’s arguments on content, form, and context—for example, that Westboro’s picketing was simply a pretext for a private, personal attack on Snyder

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<sup>93</sup> *Snyder v. Phelps*, 562 U.S. 443, 446, 461, 463 (2011).

<sup>94</sup> *Id.* at 451, 451 n.2.

<sup>95</sup> *Id.* at 451.

<sup>96</sup> *Id.* at 453 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983); *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)).

<sup>97</sup> *Id.* at 453–54 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)).

<sup>98</sup> *Id.* at 453 (citing *Dun & Bradstreet, Inc.*, 472 U.S. at 762 and *City of San Diego*, 543 U.S. at 84).

<sup>99</sup> *Id.* at 454 (quoting *Dun & Bradstreet, Inc.*, 472 U.S. at 759).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

and his family, and that the signs deserved minimal First Amendment protection because Westboro exploited the funeral as a platform to publicize its message—by reiterating that Westboro peacefully communicated its sincerely held beliefs on matters of public concern while lawfully present on public land.<sup>104</sup> Westboro’s speech was therefore “entitled to ‘special protection’ under the First Amendment.”<sup>105</sup>

The remainder of the opinion argued three seemingly unrelated points. First, IIED is not a content-neutral time, place, or manner restriction on speech.<sup>106</sup> Rather, “[i]t was what Westboro said that exposed it to tort damages,” and “any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed.”<sup>107</sup> Second, the IIED element of outrageousness is “highly malleable” with “an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.”<sup>108</sup> This creates an unacceptable risk that the jury would be turned into a censor; an outraged jury cannot overcome the First Amendment’s special protection. Finally, in the only substantive argument dealing with the intrusion upon seclusion claim, Roberts rejected Snyder’s assertion that he was a member of a captive audience at his son’s funeral.<sup>109</sup> The captive audience doctrine, Roberts explained, is applied only sparingly. Snyder did not meet his burden of “‘showing that substantial privacy interests [were] invaded in an essentially intolerable manner,’”<sup>110</sup> because Westboro stayed well away from, and did not interfere with, the memorial service itself, and Snyder saw no more than the tops of the signs while driving there.<sup>111</sup>

Justice Breyer’s prudential concurrence emphasized that the Court’s opinion was narrowly limited to Westboro’s picketing. Although he “agree[d] with the Court’s conclusion that the picketing addressed matters of public concern,” Breyer thought that more was required.<sup>112</sup> After all, a physical assault committed as a means to broadcast a matter of public concern to a wide audience is not immunized by the First Amendment, and “in some circumstances the use of certain words as means would be similarly unprotected.”<sup>113</sup> The judicial task, when “First Amendment values and state-protected (say, privacy-related) interests seriously conflict,” is to “review[] the underlying facts in detail.”<sup>114</sup> And—just like the Court—Breyer reiterated that Westboro’s peaceful picketing communicated its sincerely held beliefs on matters

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<sup>104</sup> *Id.* at 453–54.

<sup>105</sup> *Id.* at 458.

<sup>106</sup> *Id.* at 457–58.

<sup>107</sup> *Id.* at 457.

<sup>108</sup> *Id.* at 458 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 459–60 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

<sup>111</sup> *Id.* at 460.

<sup>112</sup> *Id.* at 461 (Breyer, J., concurring).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 462.

of public concern while lawfully present on public land, that the picketing did not impact the funeral service, and that Snyder only saw the tops of the signs as he drove there.<sup>115</sup> The application of state law 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.”<sup>116</sup>

Justice Alito penned a lonesome dissent. He disagreed “that the First Amendment protected [Westboro’s] right to brutalize Mr. Snyder.”<sup>117</sup> Alito was obviously affected by Snyder’s “incalculable loss,” and worried that the First Amendment insulated Westboro from liability for a “vicious verbal assault” that had deprived Snyder the elementary right of every parent to bury a dead child in peace.<sup>118</sup> Alito denied that the First Amendment is a license to “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.”<sup>119</sup> Because IIED is “a very narrow tort”<sup>120</sup> that can be satisfied by speech, “[w]hen grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery.”<sup>121</sup> Alito carefully reviewed Westboro’s speech and concluded that it “specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military,”<sup>122</sup> and that “this attack, which was almost certain to inflict injury, was central to [Westboro’s] well-practiced strategy for attracting public attention.”<sup>123</sup> On the one hand, Alito said, “commentary on the Catholic Church or the United States military constitutes speech on matters of public concern,” but, on the other, “speech regarding Matthew Snyder’s purely private conduct does not.”<sup>124</sup> Alito thought Breyer’s analogy—that a physical assault committed as a means to broadcast a matter of public concern to a wide audience is not immunized by the First Amendment—captured the nature of Westboro’s verbal assault here.<sup>125</sup>

Alito directly engaged the Court’s opinion on three fronts. He argued, first, that the Court was wrong to conclude that “the overall thrust and dominant theme of Westboro’s demonstration spoke to broad[] public issues.”<sup>126</sup> Rather, Westboro’s specific attack on Matthew was of “central importance.”<sup>127</sup> “[I]n any event,” Alito argued, “I fail to see why actionable speech should be immunized simply because

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 462–63.

<sup>117</sup> *Id.* at 463 (Alito, J., dissenting).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 464.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 466.

<sup>122</sup> *Id.* at 470.

<sup>123</sup> *Id.* at 466.

<sup>124</sup> *Id.* at 470.

<sup>125</sup> *See id.* at 471.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*



it is interspersed with speech that is protected.”<sup>128</sup> Second, Alito rejected what he called the Court’s “suggest[ion] that [Westboro’s] personal attack on Matthew Snyder is entitled to First Amendment protection because it was not motivated by a private grudge.”<sup>129</sup> Westboro executed a “cold and calculated strategy to slash a stranger as a means of attracting public attention,” and its desire to achieve maximum publicity did not turn a personal attack into a contribution to public debate.<sup>130</sup> Third, Alito contended that the location of the picketing—on public land adjacent to a public street—should not be dispositive: if otherwise actionable speech grounds IIED liability, then a public street near a funeral is not “a free-fire zone.”<sup>131</sup>

## II. *SULLIVAN V. SNYDER*

*Sullivan* and *Snyder* are usually placed in the same category of First Amendment enforcement, because *Snyder* takes up *Sullivan*’s mantle to limit state common law torts according to the constitutional free speech guarantee.<sup>132</sup> Since *Sullivan*, no tenable First Amendment theory can deny that the First Amendment protects some speech which would otherwise be actionable under a state’s common law. For example, a state’s IIED tort: compensates for injury to state of mind, and is not a “generally applicable law”; does not involve the injured party’s waiver of First Amendment rights; can punish for speech of public concern; and can be balanced away when it restricts speech.<sup>133</sup> In a choice between “two radically different ways that the First Amendment addresses civil liability involving speech—either full First Amendment protection or virtually none at all”<sup>134</sup>—*Sullivan* and *Snyder* are of the same ilk.

But their modes of First Amendment enforcement are categorically different. This Part aims to drive a wedge between them. *Sullivan* is a common law decision. It started with the Alabama law of libel because that is what the state courts purported to enforce.<sup>135</sup> And, as this Part shows, *Sullivan*’s primary holding settled a long-standing common law debate that raged in state courts over the existence of a

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 471–72.

<sup>130</sup> *Id.* at 472.

<sup>131</sup> *Id.*

<sup>132</sup> See generally Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1658–60 (2009) (explaining that *Sullivan*’s application of the First Amendment to state common law had “profound implications” and that the Supreme Court “expanded the *Sullivan* rule in defamation law” and “also applied the First Amendment beyond defamation to a variety of speech torts”).

<sup>133</sup> See generally *id.* at 1672–85 (detailing various theories of First Amendment applicability, including the nature of the injury approach, the generally applicable law approach, the consensual waiver approach, the public concern approach, and the First Amendment balancing approach).

<sup>134</sup> *Id.* at 1652.

<sup>135</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

conditional privilege in a defamation action for criticism of public officials or candidates for public office. Brennan quoted extensively from, and modeled his federal rule on, the leading state court decision supporting the so-called “liberal rule,” which immunized criticism of public officials and candidates for office.<sup>136</sup> *Sullivan* is a common law decision because it adopted the internal point of view towards state common law.

*Snyder* started not with Maryland’s common law, but with the First Amendment. Roberts announced that the First Amendment provides a public concern defense in all state tort suits affixing liability to speech.<sup>137</sup> Consequently, speech on matters of public concern (an expansive and elastic category) is not actionable. This Part demonstrates that since it was decided, state courts have applied *Snyder* to a wide range of factual circumstances and to torts beyond IIED. *Snyder* is absolutist because its immunization of speech that is arguably of public concern has effectively pre-empted state common law speech torts. Although courts are required to analyze the content, form, and context of speech in determining the extent of First Amendment protection, in reality, content is almost always dispositive.

#### A. *Sullivan*: Start with the Common Law

Methodologically, *Sullivan* is a common law decision. This claim, though simple-sounding, needs unpacking. *Sullivan* is a common law decision because Brennan’s opinion adopted the internal point of view vis-à-vis Alabama’s common law. Brennan first held that a state common law rule grounding a jury verdict counts as state action.<sup>138</sup> He then adopted the point of view of a state common law court to supply a rule of decision that conformed to the First Amendment.<sup>139</sup>

##### 1. Looking Behind the Libel Label

The state action point did not receive much airtime in briefing, oral argument, or Brennan’s final opinion. Wechsler’s brief urged the Court to look behind the libel label. The brief emphasized that not only the judgment but also the “rule of law” (or “rule of liability” or “principle of liability”) was state action that is offensive to the First Amendment.<sup>140</sup> In Wechsler’s telling, the Times “challenged a State rule of law applied by a State court to render judgment carrying the full coercive power of the State, claiming full faith and credit through the Union solely on that ground.”<sup>141</sup> It

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<sup>136</sup> *Id.* at 282.

<sup>137</sup> *See Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011).

<sup>138</sup> *See Sullivan*, 376 U.S. at 264–65.

<sup>139</sup> *See id.*

<sup>140</sup> Brief for Petitioner at 29, 30, 32, 38, 39, 42, 49, 58, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39). The pincites refer to expressions like “rule of law” in the petitioner’s brief.

<sup>141</sup> *Id.* at 39–40.

was “obvious[ ]” to Wechsler that both “[t]he rule *and* judgment” were “of course” state action.<sup>142</sup> In a phrase picked up by Brennan, Wechsler said that “libel does not enjoy a talismanic insulation from the limitations of the First and Fourteenth Amendments.”<sup>143</sup> Wechsler’s “first proposition” during oral argument was “that this action was judged in Alabama by an unconstitutional rule of law . . . offensive on its face to the First Amendment.”<sup>144</sup>

Brennan accepted this argument almost glibly. He held that the common law rule was constitutionally deficient due to inconsistency with the First and Fourteenth Amendments.<sup>145</sup> Like Wechsler’s brief, Brennan’s opinion referred to the “rule of law” or “rule of liability”<sup>146</sup> as state action to be “measured by standards that satisfy the First Amendment.”<sup>147</sup> “It matters not,” said Brennan, that the “law has been applied in a civil action and that it is common law only, though supplemented by statute.”<sup>148</sup> What matters is whether state “power has in fact been exercised.”<sup>149</sup> The common law fashioned and applied by the Alabama courts counted as state action that must yield to the First Amendment.

Having subjected the legal reasons purportedly legitimizing the jury verdict to First Amendment scrutiny, there were a few options available to Brennan. One was to throw out the libel tort when wielded by officials as officials, as Wechsler and the concurrences urged.<sup>150</sup> Another was to require the official to prove special damages (that is, actual or material economic harm).<sup>151</sup> A third option was to require the official to prove the critic’s malice.<sup>152</sup> The requirement of malice distinguished between dishonest statements designed to harm the official and honest yet factually incorrect criticisms.<sup>153</sup>

Brennan’s famous adoption of an actual malice requirement was characterized by a striking and unusual engagement with state common law. Thanks to *Erie R.R. Co. v. Tompkins*,<sup>154</sup> the Supreme Court rarely bothers with the intricacies of state common law, on which state courts are authoritative. A similar tendency is apparent

<sup>142</sup> *Id.* (emphasis added).

<sup>143</sup> *Id.* at 29. *See also Sullivan*, 376 U.S. at 269 (“[l]ibel can claim no talismanic immunity from constitutional limitations.”).

<sup>144</sup> Oral Argument, *supra* note 57, at 00:40:55.

<sup>145</sup> *Sullivan*, 376 U.S. at 264.

<sup>146</sup> *Id.* at 268.

<sup>147</sup> *Id.* at 264–65, 268–69, 278.

<sup>148</sup> *Id.* at 265.

<sup>149</sup> *Id.*

<sup>150</sup> *Sullivan*, 376 U.S. at 293 (Black, J., concurring), 297–98 (Goldberg, J., concurring); Brief for Petitioner at 51–52, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39); Oral Argument, *supra* note 57, at 00:41:08.

<sup>151</sup> *See* Brief for Petitioner at 53, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39).

<sup>152</sup> *See id.* at 53–54.

<sup>153</sup> *See id.* at 54.

<sup>154</sup> 304 U.S. 64 (1938).

when state statutes present federal constitutional questions. Federal courts are often reluctant to narrow state statutes to avoid those questions.<sup>155</sup> Although arguably erroneous, federal courts avoid avoidance in state statutory cases. This approach is driven by a concern that federal courts lack power to rewrite state statutes if the Constitution does not affirmatively require it. Rather than decide the question for themselves, the federal courts often punt to state legislatures or state courts. In *Sullivan*, the Alabama law of libel was a mix: a creature of the common law regulated by statute.<sup>156</sup> Unusually in a post-*Erie* world, Brennan held that the First and Fourteenth Amendments affirmatively required that the Alabama law of libel be changed.

## 2. The Internal Point of View

Put differently, Brennan adopted an internal point of view vis-à-vis Alabama common law. Ordinarily, the Constitution either upholds or invalidates state law. Rather than narrow, federal courts prefer to veto state statutes. Wechsler and the concurrences similarly preferred to view the application of the First and Fourteenth Amendments as a binary operator: before, state officials could bring defamation claims; after, they could not.<sup>157</sup> On this view, the Constitution operates externally to state common law. But Brennan took a different view. The First and Fourteenth Amendments justified Brennan adopting an internal point of view vis-à-vis Alabama law and modifying that law to remove the constitutional infirmity.

The distinction between the internal and external points of view of a social group equipped with rules of conduct was first made by Herbert Hart in 1961. The external point of view is an attitude towards the rules of the group “as an observer who does not himself accept them.”<sup>158</sup> The internal point of view towards the rules is the attitude of “a member of the group [who] accepts and uses them as guides to conduct.”<sup>159</sup> Hart illustrated this concept by way of a traffic light on a busy street. The external point of view, he said, is limited to the view of an observer who says that “when the light turns red there is a high probability that the traffic will stop.”<sup>160</sup> But this “will miss out a whole dimension of the social life” of the drivers, who adopt the internal point of view by treating the red light “not merely [as] a sign that others will stop,” but “as a *signal for* them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation.”<sup>161</sup>

The debate over the correct understanding of the distinction between the internal and the external points of view is alive and well. This is not the place to rehash that

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<sup>155</sup> Abbe R. Gluck, *Intersystemic Statutory Interpretations: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1948–58 (2011).

<sup>156</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

<sup>157</sup> *See id.* at 293, 297–99 (Black, J., concurring).

<sup>158</sup> H.L.A. HART, *THE CONCEPT OF LAW* 89 (2d ed. 1994).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 90.

<sup>161</sup> *Id.*

debate. The distinction has been widely adopted (a version of it was deployed by both Hart and Ronald Dworkin) but no one seems to agree precisely on what it is. Hart distinguished between the observer and the group member;<sup>162</sup> Dworkin between the sociologist or historian and the participant;<sup>163</sup> Shapiro (reconstructing Hart) between the theoretical and the practical.<sup>164</sup> In a skeptical intellectual history, Barzun distinguished between substantive and methodological varieties of the distinction.<sup>165</sup> I'll focus on the substantive internal point of view, which, as articulated by Shapiro, is "the practical attitude of rule acceptance,"<sup>166</sup> or, according to Barzun, is "the attitude of someone who accepts a given rule as a guide for his or her conduct."<sup>167</sup> A person "takes the internal point of view towards a rule when one intends to conform to the rule, criticizes others for failing to conform, does not criticize others for criticizing, and expresses one's criticism using evaluative language."<sup>168</sup>

Under the Rules of Decision Act,<sup>169</sup> federal courts regard relevant state law as rules of decision, unless federal law requires otherwise. This means that federal judges take the substantive internal point of view towards state law. They display a practical attitude of accepting state law: they intend to conform to state law (except where it is preempted by federal law), criticize other judges if they fail to apply state law correctly, view the fact of criticism as legitimate, and use evaluative language. But there are, nevertheless, crucial differences in the expression of the practical attitude of state law acceptance in federal and state courts. State courts have a legal claim to the status of ultimate sovereign authority over state law. They make and develop state law. As a species of the substantive internal point of view, I'll call this the *authorial* attitude: state courts author state law.

Federal courts adopt another species of the substantive internal point of view, which I'll call *scribal*. Thanks to *Erie*, in the absence of applicable federal law, federal courts have no authoritative say over the content of state law. When federal courts

<sup>162</sup> See *id.* at 89–90.

<sup>163</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 13–14 (1986).

<sup>164</sup> See Scott J. Shapiro, *What Is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157 (2006) (distinguishing between two points of view: the practical, which "is that of the insider who must decide how he or she will respond to the law"; and the theoretical, which "is that of the observer, who is often, but not necessarily, an outsider, who studies the social behavior of a group living under law").

<sup>165</sup> Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 *VA. L. REV.* 1203 (2015) (summarizing three different internal points of view, one substantive and two methodological, and arguing that the distinction between the internal and external perspectives has "proliferated throughout legal theory," "allowed novel, interdisciplinary approaches to studying legal phenomena," and "offered a sophisticated intellectual justification for engaging in more traditional, doctrinal forms of scholarship," but has also "dodged as many questions as it has answered").

<sup>166</sup> Shapiro, *supra* note 164, at 1157, 1159, 1161.

<sup>167</sup> Barzun, *supra* note 165, at 1218.

<sup>168</sup> Shapiro, *supra* note 164, at 1163.

<sup>169</sup> Rules of Decision Act, 28 U.S.C. § 1652 (2012).

apply state law in the exercise of federal jurisdiction, and state law has run out, the federal court can either hazard an *Erie* guess or, in some instances, certify the question to the state supreme court. In a run-of-the-mill case, the federal court ascertains state law as best it can, seeking to capture and apply state law as it exists, point-in-time. This scribal attitude thus takes a substantive internal point of view by seeking a current but static snapshot of state law. And while federal court judges need no longer “be a ventriloquist’s dummy,”<sup>170</sup> it was not until 1991 that the U.S. Supreme Court adopted *de novo* rather than deferential review of lower federal court determinations of state law.<sup>171</sup> Federal courts are not authors, but scribes of state law.

### 3. The “Discursive” Method of the Common Law

Reconstructing a modest and historically minded conception of the common law, Gerald Postema sensitively theorized some of our platitudinous aphorisms about the common law: incrementalism, case-by-case adjudication, bottom-up reasoning, and so on.<sup>172</sup> The common law, he argued, “is rooted in a disciplined practice of public practical reasoning, maintaining a substantial congruence (but not identity) with the texture of daily life and affairs of members of the political community.”<sup>173</sup> For our purposes, there are three aspects of this so-called “artificial reason” that merit highlighting.

The first is that the classical conception of the common law focused on what Matthew Hale dubbed the “texture of human affairs” and the “conversation between man and man.”<sup>174</sup> In Postema’s reconstruction, “Hale’s use of these two terms ‘texture’ and ‘conversation’ is rich and telling,” because they capture the complexity of “all the forms of daily social interaction, commerce, and communication that give shape to human affairs.”<sup>175</sup> The aim of the common law judge was “to make concrete judgments from a comprehensive grasp of the concrete relations and arrangements woven into the fabric of common life.”<sup>176</sup> Judges acquire “the social capacity to make judgments that even in novel cases one can be confident will elicit recognition and acceptance as appropriate in one’s community.”<sup>177</sup> When interpreting a covenant, for example, Hale’s judge “sets the words into the context of his understanding of the concrete commerce of the parties,” and deploys relevant cases and “his understanding

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<sup>170</sup> CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 396 (6th ed. 2002).

<sup>171</sup> *Salve Regina College v. Russell*, 499 U.S. 225, 236 (1991) (“The obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie* require that courts of appeals review the state-law determinations of district courts *de novo*.”).

<sup>172</sup> Postema, *Part I*, *supra* note 26; Postema, *Part II*, *supra* note 26.

<sup>173</sup> Postema, *Part II*, *supra* note 26, at 27.

<sup>174</sup> *Id.* at 4.

<sup>175</sup> *Id.* at 4 n.17.

<sup>176</sup> *Id.* at 5.

<sup>177</sup> *Id.* at 9–10.

of the practice of making sense out of such agreements.”<sup>178</sup> The common law crafted solutions molded to the tangible social relationships between parties, and its credibility depended on a sensitive, textured understanding of those complex relationships.

Second, the artificial reason of the common law is “discursive,” because it constitutes “deliberative reasoning and argument in an interlocutory, indeed forensic, context.”<sup>179</sup> Sound law is “tried and sifted upon disputation and argument” in open court.<sup>180</sup> Hale thought that common law judging “was a distinctively deliberative, discursive capacity,” that is, “an ability to articulate and defend judgments publicly.”<sup>181</sup> And, on this view, the authority of a common law opinion derives from its surviving continual contestation in a public forum. A judicial decision claims authority as “the product of a process of discursive reasoning and contextually-situated reflective judgment.”<sup>182</sup> According to Hale, a judgment counts as law if it is integrated or incorporated into the practice of common law reasoning<sup>183</sup>: as Postema put it, “[o]nly through continual use, exposition, interpretation, and extension—through being taken up and appropriated by practitioners of the common law—was a novel rule or doctrine made part of the common law.”<sup>184</sup> And, through its incorporation into the common law, a doctrine influences the activities of members of the political community, strengthening the link between the common law and the complex texture of human experience.

Finally, the common law resisted the canonical formulation of its doctrines. Common law rules and norms can be reduced to text, argued Postema, “but no such formulation is conclusively authoritative; each is in principle vulnerable to challenge and revision in the course of reasoned argument and dispute in the public forensic context.”<sup>185</sup> Bacon thought that the common law “is not to be sought from the words of the rule, as if it were the text of the law,”<sup>186</sup> and Coke thought that “[t]he reporting of particular cases . . . is the most perspicuous course of tracing the right rule and reason of the law.”<sup>187</sup> Postema labeled these statements “orthodox common law jurisprudence.”<sup>188</sup>

We see the threads of this discursive account of common law jurisprudence at work today, especially in state courts. State courts view themselves, and distinguish themselves from federal courts, as common law courts. Ellen Ash Peters, former Chief Justice of the Connecticut Supreme Court, wrote that “[u]nlike the federal courts, Connecticut courts still function, most of the time, as common law courts, where the

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<sup>178</sup> *Id.* at 9.

<sup>179</sup> *Id.* at 7.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 16.

<sup>182</sup> *Id.* at 17.

<sup>183</sup> *See id.* at 13.

<sup>184</sup> *Id.* at 20.

<sup>185</sup> *Id.* at 14.

<sup>186</sup> *Id.* at 6.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

operative principles are more often derived from fact-bound precedents than from authoritative texts.”<sup>189</sup> Similarly, Margaret H. Marshall, former Chief Justice of the Massachusetts Supreme Judicial Court, contended, “[t]o an extent virtually unknown in the federal courts, state court judges are common law judges.”<sup>190</sup> “Because we are deeply rooted in the common law,” argued Marshall, “we are fluent in its cardinal principle of law’s plasticity,” and the ability of the common law to “adapt[ ] to changing realities with a disciplined incrementalism.”<sup>191</sup>

State courts, because they are common law courts, reflect and influence the day-to-day activities of, and relationships among, their residents.<sup>192</sup> State courts are local courts, less centralized than their federal counterparts, and in that sense are “closer” to the people.<sup>193</sup> The doctrinal basins of the common law (torts, contracts, property, and restitution) are located in the states. State common law courts often prefer to solve problems possessing a constitutional dimension by fashioning a common law rule that avoids the constitutional difficulty. Their “focus . . . is to fashion workable rules for a narrower, more specific range of people and situations.”<sup>194</sup> “The state courts’ long tradition as common law generalists,” argued Helen Hershkoff, “affords legitimacy to this nonconstitutional elaboration of public issues.”<sup>195</sup> The absence of a federal general common law means that the general common law is state law; and that common law is co-constitutive of the complex texture of human affairs.

In its ideal form, the common law practice of state courts is classically discursive. For one thing, of course, state courts “regularly borrow from each other, using good ideas and forms of analysis that lawyers cite in appellate proceedings.”<sup>196</sup> State courts are wary of a U.S. Supreme Court that prematurely silences interstate judicial dialogue when federalizing the common law.<sup>197</sup> Moreover, a preference for

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<sup>189</sup> Ellen Ash Peters, *What Are the Locals Up To? A Connecticut Snapshot*, in *WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY* 129, 130 (Kathleen Claussen et al. eds., 2010).

<sup>190</sup> Margaret H. Marshall, *State Courts in the Global Marketplace of Ideas*, in *WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY* 153, *supra* note 189, at 160.

<sup>191</sup> *Id.*

<sup>192</sup> See Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 *N.Y.U. L. REV.* 1, 5–11 (1995).

<sup>193</sup> Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 *VAL. U. L. REV.* 459, 465 (1996); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 *COLUM. L. REV.* 2047, 2067 (2010).

<sup>194</sup> Judith S. Kaye, *A Double Blessing: Our State and Federal Constitutions*, 30 *PACE L. REV.* 844, 848 (2010).

<sup>195</sup> Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 *HARV. L. REV.* 1131, 1164 (1999).

<sup>196</sup> Randall T. Shepard, *State Supreme Courts as Places for Litigating New Questions*, in *WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY* 137, *supra* note 189, at 150.

<sup>197</sup> Marshall, *supra* note 190, at 162–63.



crafting common law solutions to avoid constitutional difficulties opens a dialogue with the state legislature. Judith Kaye, former Chief Judge of the New York Court of Appeals, noted that common law decisions “leave it open for legislatures to fix comprehensive standards.”<sup>198</sup> Molding common law rules against the backdrop of constitutional norms “afford[s] the legislature an explicit opportunity to develop programmatic content.”<sup>199</sup> The integrated discourse among a state’s lawmaking institutions is deep. Ellen Ash Peters observed that “state supreme courts see the creation of an integrated state jurisprudence, without sharp lines of demarcation between constitutional law, statutory law, and judge made law, as part of our judicial responsibility.”<sup>200</sup> And, because state courts are closer to the people and to state legislatures, unacceptable common law is “more readily redressable.”<sup>201</sup> Developing common law rules consistently with constitutional norms increases the likelihood that those rules survive continual public contestation and are taken up by legislatures and other courts.

#### 4. *Sullivan*’s Discourse

Armed with the internal point of view to Alabama law, *Sullivan* adopted the discursive method of the common law. In the first half of the twentieth century, a debate raged in state courts over the existence of a conditional privilege to a defamation suit.<sup>202</sup> In the mid-1930s, state courts were about evenly split on whether a member of the public was conditionally privileged to make false and defamatory statements of fact about public officers and candidates for office.<sup>203</sup> To establish a privileged occasion, the defendant had to show that the speech related to the qualifications of a public officer or a candidate for office. The burden then shifted to the plaintiff to prove that the privilege had been abused, that is, the plaintiff had to prove that the defendant did not believe the truth of the statement or did not have reasonable grounds for believing in its truth. The states recognizing this conditional privilege were said to adhere to the “liberal rule,” because it permitted more public discussion and loosened defamatory restrictions; the states rejecting the conditional privilege adhered to the “narrow rule.”<sup>204</sup>

Kansas, for example, affirmed the liberal rule in a 1908 case, *Coleman v. MacLennan*.<sup>205</sup> The plaintiff, the state’s attorney-general seeking re-election, sued

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<sup>198</sup> Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 745 (1992).

<sup>199</sup> Hershkoff, *supra* note 195, at 1164.

<sup>200</sup> Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1070–71 (1998).

<sup>201</sup> Kaye, *supra* note 194, at 848–49.

<sup>202</sup> RESTATEMENT OF TORTS § 1041 (AM. LAW. INST., Tentative Draft No. 13, 1936) (Note to Annual Meeting).

<sup>203</sup> *Proceedings of 1937 Annual Meeting*, 14 AM. LAW. INST. PROC. 135 (1937) (“The authority is just about evenly divided.”).

<sup>204</sup> RESTATEMENT OF TORTS § 1041 (AM. LAW. INST., Tentative Draft No. 13, 1936).

<sup>205</sup> 98 P. 281 (Kan. 1908).

the owner and publisher of a newspaper for an allegedly defamatory article purporting to state facts about the plaintiff's official conduct relating to a school fund transaction.<sup>206</sup> The trial judge instructed the jury on the conditional privilege, and the jury found for the defendant.<sup>207</sup> Rousseau Burch, for the Kansas Supreme Court, affirmed the lower court in an interesting and wide-ranging opinion.<sup>208</sup> Burch held that anyone claiming to be defamed by a communication on "matters of public concern, public men, and candidates for office," "must show actual malice, or go remediless."<sup>209</sup> Burch noted that "[u]nder a form of government like our own there must be freedom to canvass in good faith the worth of character and qualifications of candidates for office."<sup>210</sup> Analogizing from English cases on parliamentary and courtroom privilege, Burch argued, in a passage made famous by *Sullivan*, that the importance of the discussion of the character and qualifications of candidates for office "is so vast and the advantages derived are so great that they more than counterbalance" any potential injury to individuals.<sup>211</sup>

Nearly twenty years after *Coleman*, the debate over the liberal and the narrow rules played out at the American Law Institute's 1937 annual meeting, attended by Burch and also by Learned Hand.<sup>212</sup> The thirteenth tentative draft of the first torts Restatement adopted the liberal rule, citing *Coleman* as a leading case.<sup>213</sup> This proved contentious. Fowler V. Harper, the Associate Reporter and a noted torts expert, said that the state of authority was about evenly divided or "a little bit on the side of the strict rule."<sup>214</sup> Augustus N. Hand, Learned Hand's first cousin and, like Learned Hand, a judge on the Second Circuit, moved to strike the conditional privilege from the Restatement.<sup>215</sup> William Draper Lewis, ALI's founding director, called it "the most important question you have in relation to this volume."<sup>216</sup>

Burch spoke in favor of the liberal rule. He defended *Coleman* but was "extremely reluctant to be in the attitude of the fireman rescuing his own child."<sup>217</sup> Nevertheless, he responded to criticism that the conditional privilege was contrary to English law, saying, "I have never thought it necessary to roll up the bottoms of my trousers when it was raining in London."<sup>218</sup> He suggested that the Restatement's broad and unchallenged conditional privilege rule—permitting "any one of several

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<sup>206</sup> *See id.* at 281.

<sup>207</sup> *See id.* at 281–82.

<sup>208</sup> *Id.* at 293.

<sup>209</sup> *Id.* at 285.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 286.

<sup>212</sup> *Proceedings of 1937 Annual Meeting*, 14 AM. LAW. INST. PROC. 2 (1937).

<sup>213</sup> RESTATEMENT OF TORTS § 1041 (AM. LAW. INST., Tentative Draft No. 13, 1936).

<sup>214</sup> *Proceedings of 1937 Annual Meeting*, 14 AM. LAW. INST. PROC. 148 (1937).

<sup>215</sup> *Id.* at 137 (Judge Augustus Hand).

<sup>216</sup> *Id.* (Director William Draper Lewis).

<sup>217</sup> *Id.* at 142–43 (Hon. Rosseau A. Burch).

<sup>218</sup> *Id.* at 143.

persons having a common interest in a particular subject matter” to claim a conditional privilege—would support the liberal rule, just as it supported a conditional privilege to members of non-profit associations for communications concerning the qualifications of officers and members.<sup>219</sup> The requirement of good faith, “a matter that is tried every day in all the courts of the country,” ensured that newspapers were not given a license to defame.<sup>220</sup> And he argued that the predicted dangers flowing from the liberal rule—that it would deter people from running for office and encourage outrageous and scandalous press reporting—had not eventuated in Kansas, where the liberal rule had prevailed for sixty years.<sup>221</sup> Burch’s final point was fundamental. If an investigation leads to an honest and reasonably founded belief in facts which turn out to be wrong, Burch asked, “just because somebody is running for office, that must be suppressed?”<sup>222</sup>

Burch’s support of the liberal rule pitted him against Learned Hand. Hand started from the premise that “[t]he elector is not helped by learning false things about a man who is running for office or who is in office.”<sup>223</sup> He embraced the view that there is no public interest in the discussion of falsehood. For Hand, the problem was one of burden of proof. If the liberal rule privileged newspapers to publish facts about a public officer or candidate that turned out to be untrue, then Hand would have no objection.<sup>224</sup> But the burden of showing good faith and that the privilege had not been abused rests with the injured party. A newspaper “has not got to justify itself” because “[i]t is enough for it to say this man was running for public office or he was in public office and then the burden moves to the other side.”<sup>225</sup> This burden, Hand argued, is impossible to discharge. Take, for example, “a great metropolitan paper.”<sup>226</sup> How is an injured party “to burrow into the structure and the management of a great paper to find out what inquiry they make; whether the editor was moved by a personal feeling of spite; whether he was sore against the party[?]”<sup>227</sup>

Hand then suggested that libel is not a very effective control on newspapers. He drew a distinction between preventing a newspaper from making statements (which no one could countenance) and making the newspaper liable for its statements. “At least,” said Hand, libel “gives [the injured person] some money. That is not much.”<sup>228</sup> If newspapers are not liable for damages, then “they have a free hand for anything that they want to say in the heat of a campaign or perhaps when guided by the meanest

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 146.

<sup>222</sup> *Id.* at 147.

<sup>223</sup> *Id.* at 150.

<sup>224</sup> *See id.*

<sup>225</sup> *Id.* at 151–52.

<sup>226</sup> *Id.* at 152.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

of motives.”<sup>229</sup> Hand thought that “a most unjust deprivation of remedies to the parties who are injured.”<sup>230</sup> Hand thus supported rejecting the conditional privilege.

Burch briefly responded, arguing that the problems with the burden of proof were more apparent than real. Relating an anecdote of a libel trial, Burch said that a jury deciding the question of good faith would find against a defendant who “displayed a tendency to conceal,” even if the evidence ultimately showed that the defendant was testifying truthfully.<sup>231</sup> A jury would not be satisfied that an untrustworthy defendant honestly believed facts after making a reasonable investigation. Burch thought that burden-of-proof difficulties “all wash[ ] out when the parties face the jury and good faith will appear which will warrant the jury finding one way or the other without difficulty.”<sup>232</sup> This rejoinder was apparently unconvincing. After a little more discussion, the ALI sided with Hand and rejected the conditional privilege, 98 votes to 22.<sup>233</sup>

In *Sullivan*, Brennan held that the First Amendment required the liberal rule—in other words, the First Amendment resolved the common law question as Burch had suggested in 1937. Brennan quoted extensively from *Coleman*, noting that it represented “[a]n oft-cited . . . like rule, which has been adopted by a number of state courts,”<sup>234</sup> and that “[t]he consensus of scholarly opinion apparently favors the rule that is here adopted.”<sup>235</sup> The “privilege for the citizen-critic of government” was “required by the First and Fourteenth Amendments.”<sup>236</sup> It is true, of course, that the privilege established in *Sullivan* is not precisely coterminous with the liberal rule. But Brennan went out of his way to draw from state common law. His first draft of the *Sullivan* opinion stated that “[s]afeguards have already been devised by state courts to guard against the risk that the civil action for libel might be a vehicle for the suppression of protected comment.”<sup>237</sup> The liberal rule articulated by *Coleman*, Brennan’s first draft continued, “satisf[ies] the requirements of the Fourteenth Amendment.”<sup>238</sup> *Sullivan*, in other words, was sensitive to the states as authorities over their own common law. Alabama common law was inconsistent with the First Amendment; looking to sister states for a constitutional answer is, at the very least, state-regarding and sensitive to the legitimate interests of the states to develop and direct the course of their own common law.

The course of authority after *Sullivan* is well known and, after a shaky start, developed into a stable doctrinal regime.<sup>239</sup> In 1977, John Wade said that the developments

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 154 (Hon. Rosseau A. Burch).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 156–57.

<sup>234</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

<sup>235</sup> *Id.* at 280 n.20.

<sup>236</sup> *Id.* at 282–83.

<sup>237</sup> LEWIS, *supra* note 35, at 265–66.

<sup>238</sup> *Id.*

<sup>239</sup> This is not necessarily a consensus view. In 1990, when *Sullivan* was 25 years old, a

in the law of defamation after *Sullivan* were “coming about through the traditional common law technique,” that the Supreme Court was “working out the problems on a case-by-case basis,” and that “[t]here have been some wrong turns, but they have been corrected.”<sup>240</sup> The Supreme Court’s reform of defamation, said Wade, produced “a much better system, simplified and workable administratively—and with a better total balance of interests.”<sup>241</sup> The Supreme Court’s extensive reformation of the law of defamation was “sound and solid,” and “all the signs point to a very fine completed product.”<sup>242</sup>

### B. Snyder: Start with the First Amendment

While *Sullivan* started with the state’s legal reasons underpinning the jury verdict, *Snyder* started with the bare social fact that a verdict is attached to speech. The initial focus on naked speech in *Snyder*, rather than state common law, is a methodological difference that apparently tees up a prodigious value conflict. The modern First Amendment is defined by its hostility to discretion. But the discursive method of the common law plainly embraces discretion in its incremental attempt to reflect and contribute to the complex texture of daily human interaction. This section shows, by reference to IIED, that this value conflict is more apparent than real. Then, by focusing on how state courts have applied *Snyder*, this section demonstrates that *Snyder* is absolutist because it protects speech that is arguably of public concern, regardless of form, context, factual record, or theory of liability. In sum, *Snyder*’s rule is that arguably public speech is always immune.

#### 1. First Amendment Hostility to Discretion

The unstoppable march of the First Amendment is old news. The literature is awash with First Amendmentisms (expansionism, *Lochnerism*, consequentialism) characterizing its uncontrollable spread. One of the engines of this growth is the First Amendment’s historic and epic hostility to discretion. The intellectual traditions embodied by the First Amendment view discretion very skeptically. The Supreme

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number of critiques appeared in legal scholarship. One criticized *Sullivan* as leaving “little opportunity for common-law growth or innovation,” and arguing that “[t]he fifty laboratories are gone; there is just the United States Supreme Court groping for a rational scheme.” Elaine W. Shoben, *Uncommon Law and the Bill of Rights: The Woes of Constitutionalizing State Common-Law Torts*, 1992 U. ILL. L. REV. 173, 182–83. Some scholars continue to argue that *Sullivan* created doctrinal confusion. See, e.g., Tilley, *supra* note 21, at 1155–60 (arguing that the Court, in the post-*Sullivan* dignitary tort cases, “has elegantly articulated the need to balance speech and dignity,” but “the rules it has promulgated are inconsistent and imprecise”).

<sup>240</sup> John W. Wade, *The Communicative Torts and the First Amendment*, 48 MISS. L.J. 671, 710 (1977).

<sup>241</sup> *Id.* at 711.

<sup>242</sup> *Id.*

Court zealously embraced this skepticism. It is no exaggeration to say that First Amendment doctrine views discretion as free speech's blood enemy.

When used to evaluate speech, words like *malice* and, especially, *offensive* and *outrageous* give us a bout of First Amendment jitters. "Malice," said Black in his *Sullivan* concurrence, "is an elusive, abstract concept, hard to prove and hard to disprove."<sup>243</sup> It is "at best an evanescent protection for the right critically to discuss public affairs."<sup>244</sup> IIED's outrageousness element fares even worse. Quoting *Hustler*, Roberts's opinion in *Snyder* stated that outrageousness "is a highly malleable standard with 'an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.'"<sup>245</sup> Eugene Volokh thought that "[m]any statements might be labeled 'outrageous' by some judge, jury, university administrator, or other government actor."<sup>246</sup> If a tort attaches liability to outrageous (whatever that means) speech, then the First Amendment should step in.

The argument that a word like "outrageous" in a legal standard is malleable and vague strikes me as obvious and unhelpful. It is obvious because clearly there are borderline cases of outrageous conduct (following Timothy Endicott and others, let's say that a legal standard is vague if there are borderline cases for its application).<sup>247</sup> Vagueness in law is very common,<sup>248</sup> perhaps even pervasive,<sup>249</sup> and officials and juries impose liability on the basis of vague standards every day (reasonableness is a prime example). And it's unhelpful because it proves too much. If the First Amendment destroyed all vague standards attaching liability to speech, then it would invalidate all content-neutral time, place, and manner regulations too: there are borderline cases of content neutrality.

The argument must be that outrageous is so vague a concept that there are no clear cases of IIED. It is a borderline case every time a court finds that a defendant's

<sup>243</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring).

<sup>244</sup> *Id.*

<sup>245</sup> *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

<sup>246</sup> Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 300.

<sup>247</sup> See TIMOTHY A.O. ENDICOTT, *VAGUENESS IN LAW* 31 (2000) ("An expression is vague if there are borderline cases for its application."); *id.* at 32 (noting that tall is a vague word and that "a borderline case is one in which, even if we do know how tall someone is, we do not know whether to say that they are tall or not tall"). Without any more context, Endicott might say that "outrageous" is a "dummy standard," that is, a requirement that decisionmakers set a standard. But "if there is a doctrine of precedent, judicial decisions may give a particular content to a dummy standard." *Id.* at 49, 49 n.35.

<sup>248</sup> *Id.* at 1.

<sup>249</sup> See Geert Keil & Ralf Poscher, *Vagueness and Law: Philosophical and Legal Perspectives*, in *VAGUENESS AND LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES* 1, 9 (Geert Keil & Ralf Poscher eds., 2016).

expressive conduct is outrageous. And because outrageousness is all border and no center, decisionmakers have complete discretion to decide whether expressive conduct is outrageous. Therefore, IIED is a license to censor. But, as Zipursky argued, this is “exactly backwards.”<sup>250</sup> The outrageousness element of IIED functions not as an open-ended conferral of arbitrary discretion, but as a significant limitation on liability. The legal reality is that “IIED is among the most heavily guarded torts.”<sup>251</sup> Courts routinely accept defendants’ arguments that their conduct, “while admittedly inappropriate and hurtful, does not rise to the extraordinary level expected for the tort.”<sup>252</sup>

It’s wrong to think of IIED as a tort with only an outrageous element. “The tort is not,” argued Zipursky, “acting outrageously and thereby causing severe emotional distress.”<sup>253</sup> More accurately, “[o]ver decades and even centuries, courts recognized clusters of cases in the following areas: striking effrontery in dealing with passengers or guests, vicious practical jokes, gross sexual misconduct and/or stalking, and mishandling of the deaths, funerals, or corpses of family members.”<sup>254</sup> These classes of cases are the core or center of IIED, and the tort expands in the usual common law, incremental way. In determining whether the tort applies to new facts, courts are guided by the stinginess of the outrageous element, and judges have a large gatekeeping role to ensure that juries do not run amok. IIED, and its outrageousness element, are not comprehensively vague. There are core instances and—like many other legal standards—there are borderline applications.

Not that any of this is apparent from *Snyder*, which was indifferent to Maryland’s common law of torts. It is a remarkable feature of *Snyder*—a case originating in the district court’s diversity jurisdiction—that Maryland law is mentioned in passing only twice.<sup>255</sup> The first is a sentence stating the elements of IIED, citing a Maryland Court of Appeals case from 1977.<sup>256</sup> The second is a paragraph on why the outrageousness element is insufficiently protective.<sup>257</sup> The opinion betrayed no effort to decide whether the outrageousness element actually threatened the First Amendment; instead, it simply relied on *Hustler*’s wrong-headed assertion that outrageousness is too vague.<sup>258</sup> Even though IIED had been recognized as a viable tort in Maryland for more than thirty years,<sup>259</sup> *Snyder* made no effort to find out what “outrageous” means under Maryland law.

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<sup>250</sup> Benjamin C. Zipursky, *Snyder v. Phelps: Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 500 (2011).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 503.

<sup>254</sup> *Id.* at 502–03.

<sup>255</sup> *See Snyder v. Phelps*, 562 U.S. 443, 451, 458 (2011).

<sup>256</sup> *Id.* at 451 (citing *Harris v. Jones*, 380 A.2d 611 (Md. 1977)).

<sup>257</sup> *Id.* at 458.

<sup>258</sup> *See id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

<sup>259</sup> Maryland first recognized the IIED tort in *Harris v. Jones*, 380 A.2d 611 (Md. 1977).

*Snyder*'s failure to interrogate Maryland's IIED tort suggests that it adopted an external point of view vis-à-vis state law. Without inquiring into the tort-related legal reasons grounding the jury verdict, or the attitudes or beliefs of the Marylanders who accept IIED as a practical standard of conduct, the Supreme Court viewed the jury verdict as a bare social fact offensive to the First Amendment. And this posited a conflict-of-laws relationship between state common law and federal law. This model of rule-conflict says that a state common law tort is either consistent or inconsistent with the First Amendment, and if it is inconsistent it is invalid and superseded by the Free Speech Clause.<sup>260</sup> The state tort, then, must be abandoned in favor of the rule of decision supplied by the First Amendment. Thus Volokh accurately described *Snyder* as holding that "the intentional infliction of emotional distress tort is presumptively unconstitutional when applied to speech on matters of public concern."<sup>261</sup>

Forgive me for thinking it odd to describe a state common law tort as "invalid" or "unconstitutional," or as being "struck down." That is, of course, the appropriate vocabulary for judicial review of state (and federal) legislation. As a species of law, legislation is amenable to the valid/invalid binary. But one of the fundamental differences between judicial and legislative lawmaking is what Joseph Raz called the "special revisability of judge-made law."<sup>262</sup> The common law may be incrementally revised each time it is litigated. The judicial power to distinguish precedent, and to modestly amend or develop the common law, means that legislation is more static than judge-made law. These are general observations of course; nevertheless, "[i]t is typical of common law rules to be moulded and remoulded in the hands of successive courts using explicitly or unconsciously their powers of reformulating and modifying the rules concerned."<sup>263</sup>

*Snyder*, however, equated Maryland's common law right of action to legislation. As noted above, the common law since Hale and Coke resists the reduction of its rules and principles to a canonical text because they are "vulnerable to challenge and revision in the course of reasoned argument and dispute in the public forensic context."<sup>264</sup> Treating IIED as reduced to a fixed, canonical text, the Supreme Court adopted a plain-meaning interpretation of "outrageous," ignored state common law, and effectively preempted IIED when applied to speech of public concern. By taking an external point of view to Maryland's IIED tort, as though it were statute-like and invulnerable to change, the Court denied the capacity of a judge to act as an author of the common law and develop the tort in a way that removes the inconsistency with the First Amendment.

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<sup>260</sup> Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 27 (1977).

<sup>261</sup> Eugene Volokh, *Gruesome Speech*, 100 CORNELL L. REV. 901, 916 (2015).

<sup>262</sup> JOSEPH RAZ, *Law and Value In Adjudication*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 195 (2d ed. 2009).

<sup>263</sup> *Id.*

<sup>264</sup> Postema, *Part II*, *supra* note 26, at 14.



## 2. Seven Years On: *Snyder* in State Court

The First Amendment's hostility to discretion is borne out by the important state court cases that have considered *Snyder*.<sup>265</sup> These cases have not been collected or analyzed elsewhere, and they are critically important to an appreciation of how state courts have understood and applied *Snyder*.<sup>266</sup> *Snyder* framed the question presented and its holding in terms of "tort liability."<sup>267</sup> It imposed a blanket First Amendment "defense in state tort suits, including suits for intentional infliction of emotional distress."<sup>268</sup> The Court also included suits for intrusion upon seclusion, although that tort received even less attention than IIED in the *Snyder* opinion. *Snyder*'s reasoning is, therefore, freely generalizable. Indeed, state courts have adopted the broad, trans-substantive First Amendment defense. Only the tort of defamation, to which *Sullivan* and its progeny directly apply, is resistant to *Snyder*'s broad sweep.

### a. *Robin Hooders in New Hampshire*

The clearest example of *Snyder*'s broad sweep comes from New Hampshire,<sup>269</sup> where the official state motto is "Live Free or Die." The City of Keene in southwestern New Hampshire employed three Parking Enforcement Officers (PEOs) to monitor its downtown parking meters and issue tickets.<sup>270</sup> Six of the City's residents, who were relatively new Granite Staters and part of a movement called "Free Keene," conducted what they called "Robin Hooding": regularly and closely following and videotaping the PEOs, identifying expired meters, and refilling them before a ticket could issue.<sup>271</sup> A card would be left on the vehicle's windshield: "Your meter expired! However, we saved you from the king's tariff!"<sup>272</sup> They characterized their activity

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<sup>265</sup> A Westlaw search for "Snyder/5 Phelps" across all state courts produces 89 cases and 24 trial court orders. The cases analyzed here are all the noncriminal opinions that relied on *Snyder*'s methodology.

<sup>266</sup> Clay Calvert, in an earlier analysis focusing on IIED and media defendants, argued that lower courts were not limiting *Snyder* to its facts. See Clay Calvert, *Public Concern and Outrageous Speech: Testing the Inconstant Boundaries of IIED and the First Amendment Three Years After Snyder v. Phelps*, 17 U. PA. J. CONST. L. 437 (2014). Calvert's article was published before any of the opinions analyzed here were issued.

<sup>267</sup> *Snyder v. Phelps*, 562 U.S. 443, 447 (2011) ("The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case."); *id.* at 461 ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.").

<sup>268</sup> *Id.* at 451.

<sup>269</sup> *City of Keene v. Cleaveland*, 118 A.3d 253 (N.H. 2015).

<sup>270</sup> See *City of Keene v. Cleaveland*, Nos. 213-2013-cv-00098, 213-2013-cv-0241, 2013 WL 8691664, at \*2 (N.H. Super. Ct. Dec. 3, 2013).

<sup>271</sup> See *Cleaveland*, 118 A.3d at 255.

<sup>272</sup> *Id.*; Dan Barry, *Libertarians Trail Meter Readers, Telling Town: Live Free or Else*, N.Y. TIMES, May 5, 2014, at A1.

as political protest with an ultimate goal of abolishing parking enforcement because parking is not a criminal act, the City should not be charging citizens to park, and parking tickets are a threat against the people.<sup>273</sup>

On an almost daily basis, the Robin Hooders videotaped and trailed the PEOs, sometimes about a foot away or so close that if the PEO turned around they would bump into each other.<sup>274</sup> They followed the PEOs on breaks and on their days off.<sup>275</sup> They called various PEOs a “fucking thief,” “liar,” “racist,” “bitch,” and “coward.”<sup>276</sup> They accused the PEOs of stealing from citizens and of vandalism when the PEOs chalked tires.<sup>277</sup> They suggested that a PEO who was a veteran would “drone brown babies.”<sup>278</sup> This PEO resigned.<sup>279</sup> Another PEO contemplated quitting.<sup>280</sup> She found it difficult to focus on her job, she refused to work Saturdays because she felt unsafe, and she contacted the police on three occasions.<sup>281</sup> The third PEO felt intimidated, and would tense up and become distracted when she heard approaching footsteps.<sup>282</sup> Apart from the reduction of staffing hours and loss of ticket revenue, the City also incurred costs by hiring a private investigator and a therapist.<sup>283</sup>

The City sued the six Free Keeners in state court for tortious interference with contractual relations and civil conspiracy, and sought preliminary and permanent injunctive relief.<sup>284</sup> Defendants moved to dismiss, contending that the pleadings failed to state a claim on tortious interference, and that all causes of action violated the free speech clause of the First Amendment, and Articles 8 (government accountability) and 22 (free speech) of Part I of the New Hampshire Constitution.<sup>285</sup> The City then filed a separate civil complaint against the same defendants based on the same alleged facts, which requested a jury trial and sought money damages for tortious interference and negligence.<sup>286</sup>

In the Superior Court of New Hampshire, Judge Kissinger, after a three-day evidentiary hearing, granted the motion to dismiss all claims because they violated the First Amendment.<sup>287</sup> Although “skeptical” that tortious interference could be made out when private citizens protest government employees, Kissinger nevertheless did

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<sup>273</sup> See *Cleaveland*, 118 A.3d at 256.

<sup>274</sup> See *id.* at 257.

<sup>275</sup> See *id.* at 256–57. See also *Cleaveland*, Nos.213-2013-cv-00098, 213-2013-cv-0241, 2013 WL 8691664, at \*2 (N.H. Super. Ct. Dec. 3, 2013).

<sup>276</sup> *Cleaveland*, 118 A.3d at 256; *Cleaveland*, 2013 WL 8691664, at \*2.

<sup>277</sup> *Cleaveland*, 2013 WL 8691664, at \*4.

<sup>278</sup> *Id.* at \*4.

<sup>279</sup> *Id.* at \*4; *Cleaveland*, 118 A.3d at 257.

<sup>280</sup> *Cleaveland*, 2013 WL 8691664, at \*3.

<sup>281</sup> *Cleaveland*, 118 A.3d at 257; *Cleaveland*, 2013 WL 8691664, at \*2–3.

<sup>282</sup> *Cleaveland*, 118 A.3d at 257; *Cleaveland*, 2013 WL 8691664, at \*5.

<sup>283</sup> *Cleaveland*, 2013 WL 8691664, at \*5.

<sup>284</sup> *Cleaveland*, 118 A.3d at 255.

<sup>285</sup> *Id.* at 256.

<sup>286</sup> *Id.*

<sup>287</sup> *Cleaveland*, 2013 WL 8691664, at \*9.

not reach the issue because “the enforcement of such a tort is an infringement on the Respondents’ right to free speech and expression under the First Amendment of the Federal Constitution.”<sup>288</sup> In an opinion littered with citations to *Snyder*, Kissinger described defendants’ conduct as “speech and expressive protest of the City’s parking regulation through filling meters, placing cards on windshields, telling the PEOs they should quit, calling the PEOs ‘thieves,’ ‘fucking thieves,’ and ‘liars,’ and attacking [a] PEO . . . for his military service.”<sup>289</sup> This speech implicates “the political authority of the City as a sovereign and its regulation of the citizens, as well as the United States’ military actions abroad,” which “are clearly matters of public concern.”<sup>290</sup> The speech “is given special protection because it is at a public place on a matter of public concern.”<sup>291</sup>

The tortious interference claim, said Kissinger, could not be characterized as a “reasonable time, place, or manner restriction” on speech.<sup>292</sup> He explained that tortious interference with contractual relations requires a plaintiff to show that the defendant intentionally and improperly interfered with an economic relationship between the plaintiff and a third party.<sup>293</sup> Like *IIED*’s outrageousness requirement, Kissinger thought that the requirement of improper interference was so subjective as to “create[] an unreasonable risk that the jury will find liability ‘on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.’”<sup>294</sup> With this, Kissinger dismissed the tortious interference and civil conspiracy claims, denied injunctive relief, and dismissed the negligence claim.

In the New Hampshire Supreme Court, Justice Bassett affirmed the trial court’s ruling on tortious interference, but reversed and remanded the denial of injunctive relief.<sup>295</sup> Bassett noted that “we normally address constitutional questions first under the State Constitution and rely on federal law only to aid in our analysis.”<sup>296</sup> Because the trial court did not address the state constitutional arguments, however, Bassett first considered the arguments under the federal Constitution.<sup>297</sup> Although echoing the trial

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<sup>288</sup> *Id.* at \*10.

<sup>289</sup> *Id.* at \*12.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at \*13.

<sup>292</sup> *Id.* at \*14.

<sup>293</sup> *Id.* at \*9–10.

<sup>294</sup> *Id.* at \*14 (quoting *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988))).

<sup>295</sup> The Supreme Court of New Hampshire reversed and remanded the denial of injunctive relief because the trial court had not considered all the factual circumstances of the case. The Supreme Court “express[ed] no opinion as to whether the City’s allegations, if proven, [we]re sufficient to warrant the trial court’s exercise of its equitable power, or as to whether the particular injunctive relief requested by the City would violate the Federal or State Constitutions.” *Cleveland*, 118 A.3d at 264.

<sup>296</sup> *Id.* at 258.

<sup>297</sup> *Id.* at 258–59.

court's skepticism that a tortious interference claim can exist when private citizens protest the government, Bassett agreed that it was not necessary to reach the issue because enforcing the City's tortious interference claim "would infringe upon the respondents' right to free speech under the First Amendment."<sup>298</sup> His First Amendment analysis basically tracked the lower court's, with a similarly large dose of *Snyder*: in sum, the First Amendment bars state tort liability attaching to speech of public concern.

The City did not challenge the trial court's conclusion that the *content* of defendants' speech was of public concern.<sup>299</sup> It did, however, contend that the First Amendment does not protect specific conduct such as "following closely, chasing, running after, approaching quickly from behind, lurking outside bathrooms, yelling loudly, and filming from close proximity."<sup>300</sup> Bassett disagreed. He observed that a boycott of businesses which causes economic harm and is realized by expressive conduct ("speeches, marches, and threats of social ostracism") cannot ground an award of damages.<sup>301</sup> Physical violence "is beyond the pale of constitutional protection," but peaceful expression on matters of public concern "need not meet standards of acceptability."<sup>302</sup> The specific conduct targeted by the City was nonviolent and "intended to draw attention to the City's parking enforcement operations and to persuade the PEOs to leave their positions."<sup>303</sup> "[T]he mere threat of tort liability," explained Bassett, would have an intolerable chilling effect.<sup>304</sup>

*b. A Police Chase and a Suicide in Arizona*

On September 28, 2012, armed with a Glock pistol, JoDon Romero carjacked a maroon Dodge Caliber in the parking lot of a Phoenix Denny's.<sup>305</sup> He led police on an hour-long, high-speed chase.<sup>306</sup> At first driving east along Interstate 10 for five miles, Romero made a U-turn, fired his pistol at a police car, and sped west on I-10 for an hour.<sup>307</sup> He exited at Tonopah, a "census-designated place" in the Tonopah Desert near Salome, and eventually turned onto a dirt path before stopping.<sup>308</sup> Romero got out, ran a short distance, fell down, got up, walked through some brush, and

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<sup>298</sup> *Id.* at 259.

<sup>299</sup> *Id.* at 260. *See also Cleaveland*, 2013 WL 8691644, at \*12.

<sup>300</sup> *Cleaveland*, 118 A.3d at 260.

<sup>301</sup> *Id.* at 261.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 260.

<sup>305</sup> Jessica Testa, *Why Did Jodon Romero Kill Himself On Live Television?*, BUZZFEED (May 9, 2013, 10:27 PM), [https://www.buzzfeed.com/jtes/why-did-jodon-romero-kill-himself-on-live-television?utm\\_term=.tbBOyAJLVj#.yI9kn3XQdA](https://www.buzzfeed.com/jtes/why-did-jodon-romero-kill-himself-on-live-television?utm_term=.tbBOyAJLVj#.yI9kn3XQdA) [<https://perma.cc/6U6M-R5JL>].

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

stopped at a small dirt clearing.<sup>309</sup> As police officers approached, Romero put the pistol to his head, fired, and crumpled to the ground.<sup>310</sup>

Two helicopters buzzing overhead captured footage of Romero's suicide. One belonged to the Phoenix Police Air Support Unit and the other to KSAZ-TV, the Fox News affiliate in Phoenix.<sup>311</sup> The Fox footage aired live during a nationally broadcast breaking-news program; the ordinary five-second delay for live feeds was not functioning.<sup>312</sup> So, despite the program anchor's on-air commands to technicians to "get off" the feed, Romero's suicide was broadcast live.<sup>313</sup>

At school, two of Romero's teenage sons heard that a suicide had been broadcast on live TV.<sup>314</sup> When they got home, they located a clip of the Fox newscast on YouTube.<sup>315</sup> As they watched, they realized that it was their father who had taken the Dodge at gunpoint and led police on a high-speed chase.<sup>316</sup> The boys then saw footage of their father shooting himself.<sup>317</sup>

The boys' mother, Angela Rodriguez, sued Fox on their behalf for intentional and negligent infliction of emotional distress.<sup>318</sup> On First Amendment grounds, the Court of Appeals of Arizona affirmed the trial court's order dismissing the lawsuit.<sup>319</sup> Applying *Snyder*, Judge Johnsen held that "the Fox broadcast clearly addressed a matter of public concern."<sup>320</sup> She rejected plaintiff's argument that although the police chase was newsworthy, Romero's suicide was a purely private matter. "Without doubt," Johnsen said, "the overall thrust and dominant theme' of the coverage addressed important matters of public concern."<sup>321</sup> On content, Johnsen explained that "[t]he public has a strong interest in monitoring the manner in which law enforcement responds to criminal behavior," and that Romero "posed an immediate and ongoing threat to public safety."<sup>322</sup> On form and context, Johnsen noted that the chase and suicide were broadcast during a news program.<sup>323</sup> The footage was not private speech disguised as a public broadcast.<sup>324</sup> The Supreme Court of Arizona denied a petition for review and the U.S. Supreme Court denied a petition for certiorari.<sup>325</sup>

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<sup>309</sup> *See id.*

<sup>310</sup> *Rodriguez v. Fox News Network, LLC*, 356 P.3d 322, 324 (Ariz. Ct. App. 2015).

<sup>311</sup> *Testa*, *supra* note 305.

<sup>312</sup> *Id.*

<sup>313</sup> *Rodriguez*, 356 P.3d at 324; *Testa*, *supra* note 305.

<sup>314</sup> *Rodriguez*, 356 P.3d at 324.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 326.

<sup>321</sup> *Id.* (quoting *Snyder v. Phelps*, 562 U.S. 443, 454 (2011)).

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Rodriguez v. Fox News Network, LLC*, 136 S. Ct. 2521 (2016).

*c. A Public School Bus Driver in Wisconsin*

Sometime in April 2012, Robert Koebel, a TV reporter employed by Journal Communications, Inc., approached Melissa Dumas in a parking lot, with a camera operator in tow.<sup>326</sup> Through public record requests, Koebel had identified Dumas as a Milwaukee Public School bus driver who, eight years earlier, had been convicted of misdemeanor prostitution.<sup>327</sup> Koebel was investigating a news story for Milwaukee’s NBC affiliate about school bus drivers with criminal histories.<sup>328</sup> The final story aired footage of Koebel confronting a visibly shocked Dumas with her mug shot and police report.<sup>329</sup> Koebel described “salacious details” from the police report.<sup>330</sup> “Koebel also reported that Dumas had been arrested for ‘drugs and driving on a suspended license,’ and that Dumas had been in a school bus accident in 2009 when she worked for a different bus company.”<sup>331</sup> The story also showed footage of Koebel interviewing Dumas’s manager at the bus company.<sup>332</sup> The manager said that he had no knowledge of the conviction.<sup>333</sup> The broadcast concluded with Koebel noting that Dumas had been dismissed.<sup>334</sup>

Dumas sued Koebel and his employer, Journal Communications, for invasion of privacy, IIED, and intentional interference with a contractual relationship.<sup>335</sup> Defendants moved to dismiss the invasion of privacy claim because the information broadcast was a matter of public record.<sup>336</sup> The other two claims, they argued, were barred by the First Amendment.<sup>337</sup> Exhibited to defendants’ motion to dismiss was a video of the broadcast, a transcript of the video published on the internet, and records relating to Dumas’s arrest and driving history.<sup>338</sup> The trial court converted the motion to dismiss into a motion for summary judgment, which it granted on all claims.<sup>339</sup> Judge Curley affirmed for the Court of Appeals of Wisconsin.<sup>340</sup>

Curley first affirmed the dismissal of the invasion of privacy claim, relying on a Wisconsin statute providing that it is not an invasion of privacy to communicate any information “available to the public as a matter of public record.”<sup>341</sup> There was no dispute that Dumas’s misdemeanor conviction is a matter of public record. And

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<sup>326</sup> Dumas v. Koebel, 841 N.W.2d 319, 321–22 (Wis. Ct. App. 2013).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 321.

<sup>329</sup> *Id.* at 322.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 322–23.

<sup>339</sup> *Id.* at 323.

<sup>340</sup> *Id.* at 319–20.

<sup>341</sup> *Id.* at 325 (applying WIS. STAT. § 995.50(2)(c) (2011–12)).

Curley rejected Dumas's contention that her name is not a matter of public record, relying on precedent holding that "the public has a right to know the names of the individuals who are driving their children to and from school."<sup>342</sup>

Relying almost exclusively on *Snyder*, Curley noted that "[t]he Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits,"<sup>343</sup> and held that "[i]f we determine that the allegedly tortious speech is a matter of public concern, we must grant summary judgment on the tort claims alleged."<sup>344</sup> Curley concluded that although defendants' broadcast was "undoubtedly embarrassing" to Dumas, it was nevertheless a matter of public concern entitled to full First Amendment protection.<sup>345</sup> On content, Curley observed that although parts of the story publishing Dumas's history were "salacious," "it did highlight a matter of public import: whether such a history should have prohibited an individual from working as a school bus driver."<sup>346</sup> On context, Curley said that "Koebel confronted Dumas in public and asked her questions about public information, and Dumas did not allege any facts showing that she had a preexisting relationship with either Koebel or Journal Communications that would suggest a veiled attempt at a private attack."<sup>347</sup> And on form, Curley dismissed Dumas's challenge to "the way in which Koebel confronted her," simply saying that it was "clear . . . that any surprise, embarrassment, and indignation arose from the content of Koebel's speech."<sup>348</sup> The Supreme Court of Wisconsin denied a petition for review.<sup>349</sup>

*d. A Disappearance in Connecticut*

Nearly fifteen years ago, Billy Smolinski, Jr., disappeared from his home in Waterbury, Connecticut.<sup>350</sup> Nobody can say what happened to him. Billy had asked his next-door neighbor to walk his German shepherd "because he was travelling north to look at some cars."<sup>351</sup> But when his parents went to his house the next day, Billy's truck was parked in the driveway with his wallet and keys inside.<sup>352</sup> Theories swirled. Billy's mother and sister, convinced that his ex-girlfriend Gleason knew more than she would say, applied pressure.<sup>353</sup> They disparaged Gleason to her friends.<sup>354</sup> They posted many

<sup>342</sup> *Id.* at 325–26 (quoting *Atlas Transit, Inc. v. Korte*, 638 N.W.2d 625, 633 (Wis. Ct. App. 2001)).

<sup>343</sup> *Id.* at 326 (quoting *Snyder v. Phelps*, 562 U.S. 443, 451 (2011)).

<sup>344</sup> *Id.* at 327.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 328.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Dumas v. Koebel*, 848 N.W.2d 859 (Table) (2014).

<sup>350</sup> *Gleason v. Smolinski*, 125 A.3d 920, 927 (Conn. 2015).

<sup>351</sup> Alexander Nazaryan, *Billy Smolinski, Gone Since 2004, Is Part of a 'Silent Mass Disaster'*, NEWSWEEK (Aug. 7, 2014, 6:05 AM), <https://www.newsweek.com/2014/08/15/billy-smolinski-gone-2004-part-silent-mass-disaster-263142.html> [<https://perma.cc/DE3V-WF29>].

<sup>352</sup> *Id.*

<sup>353</sup> *See Gleason*, 125 A.3d at 927.

<sup>354</sup> *Id.*

missing person flyers depicting Billy along Gleason's school bus route (Gleason worked as a school bus driver) and near Gleason's home.<sup>355</sup> After noticing that Gleason and a friend were tearing down some posters, Billy's mother and sister followed Gleason and videotaped her activities.<sup>356</sup> Eventually Gleason went to the police station, where Billy's mother and sister followed, and a confrontation occurred.<sup>357</sup>

Gleason sued Billy's mother and sister for defamation and intentional infliction of emotional distress.<sup>358</sup> The trial court awarded damages on both counts, as well as punitive damages, but no First Amendment argument was preserved at trial.<sup>359</sup> On appeal, the Connecticut Appellate Court rejected defendants' contention, based on *Snyder*, that a First Amendment violation had deprived them of a fair trial.<sup>360</sup> The Appellate Court credited the trial court's finding that defendants' placement of posters was targeted specifically at plaintiff, intended to "break" her into providing defendants with information.<sup>361</sup> The Appellate Court held that, although the posters did not name the plaintiff, "the context and placement of the posters was designed to 'hound' the plaintiff into providing . . . information . . . rather than to raise a matter of public concern."<sup>362</sup>

The Connecticut Supreme Court, on defendants' appeal, reversed the Appellate Court and held that defendants' conduct was protected by the First Amendment.<sup>363</sup> Justice Robinson first reviewed *Snyder* at length,<sup>364</sup> and then turned to "an examination of the objective nature of the speech at issue . . . namely, the defendants' extensive campaign of missing person posters."<sup>365</sup> On content, Robinson held that "matters pertaining

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<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 929.

<sup>357</sup> *Id.* The Connecticut Superior Court, the Appellate Court, and the Supreme Court all discussed: the origins and nature of Billy's relationship with Gleason; an alleged love triangle; the demise of the relationship between Billy and Gleason two days before Billy's disappearance; Billy's reaction; and the foundations for Billy's family's suspicion of Gleason. The trial judge summed it up: "The facts of this case are distressing. Two sets of basically decent people found themselves in conflict and involved in a series of mutually antagonistic events because of a tragic event—the disappearance and apparent death of a young man with his whole life ahead of him." *Gleason v. Smolinski*, No. NNH-CV-06-5005107-S, 2012 WL 3871999, at \*1 (Conn. Super. Ct. Aug. 10, 2012).

<sup>358</sup> Gleason also sued Billy's mother and sister for invasion of privacy and tortious interference with business relationships and expectancies. The invasion of privacy claim wasn't successful at trial and Gleason didn't appeal. The tortious interference claim didn't make it to trial. *Id.* at \*1.

<sup>359</sup> *Id.* at \*17.

<sup>360</sup> *Gleason v. Smolinski*, 88 A.3d 589, 597–99 (Conn. App. Ct. 2014). The standard under Connecticut law for prevailing on a claim of constitutional error not preserved at trial includes a requirement that "the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial." *Gleason*, 125 A.3d at 930 n.10.

<sup>361</sup> *Gleason*, 88 A.3d at 599.

<sup>362</sup> *Id.*

<sup>363</sup> *Gleason v. Smolinski*, 125 A.3d 920, 960 (Conn. 2015).

<sup>364</sup> *Id.* at 938.

<sup>365</sup> *Id.*



to missing persons” are of public concern.<sup>366</sup> Because the flyers solely sought information about Billy and did not name the plaintiff, their content related to a matter of public concern.<sup>367</sup>

Robinson agreed, at least in principle, with the Alaska Supreme Court in *Greene v. Tinker*<sup>368</sup> that *Snyder* is “not an all-purpose tort shield,” and he rejected the “sweeping” argument that “speech involving a matter of public concern is inactionable.”<sup>369</sup> He explained, however, that “the existence of preexisting animus . . . does not necessarily render the messages conveyed . . . matters of purely private rather than public concern.”<sup>370</sup> Defendants’ intention to “hound” plaintiff until she “broke” did not remove First Amendment protection because “the targeted content and location” of the flyers “was consistent with the overarching public concern of gaining information about Bill’s disappearance.”<sup>371</sup> Robinson distinguished the flyers here from the picketing signs in *Snyder* because the signs “referred, at least obliquely, to Snyder.”<sup>372</sup> He also pointed out that the flyers “were placed on or adjacent to public roadways,” and therefore entitled to heightened First Amendment protection.<sup>373</sup>

Interestingly, Robinson said that he was “[g]uided heavily” by *Cleaveland* because it “considered similarly targeted and harassing conduct.”<sup>374</sup> The New Hampshire Supreme Court, explained Robinson, thought it relevant that the challenged conduct was non-violent, took place on public streets and sidewalks, and was intended, at least in part, to persuade the PEOs to quit their jobs.<sup>375</sup> Similarly, defendants’ conduct here was “intended to persuade [plaintiff] with regard to a matter of public concern as in *Cleaveland*,” and it was not intended to “merely torture her gratuitously with regard to a purely private matter.”<sup>376</sup> The defendants’ “ill-motivated flyer campaign,” therefore, was protected by the First Amendment.<sup>377</sup> Rather than direct judgment as a matter of law, Robinson ordered a new trial, because the lower courts ignored defendants’ other harassing conduct—calling the plaintiff offensive names, following her, and videotaping her—which “might well be held to furnish an independent basis” for plaintiff’s IIED claim.<sup>378</sup>

Defendants also appealed the trial court’s defamation verdict. The trial court found three statements by defendants to be defamatory, which together conveyed the

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> 332 P.3d 21 (Ala. 2014).

<sup>369</sup> *Gleason*, 125 A.3d at 939 (quoting *Greene*, 332 P.3d at 34–35).

<sup>370</sup> *Id.* at 939 (citation and internal quotation marks omitted).

<sup>371</sup> *Id.* at 940.

<sup>372</sup> *Id.* at 942.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* at 944.

<sup>375</sup> *Id.* at 942–44 (citing *City of Keene v. Cleaveland*, 118 A.3d 253 (N.H. 2015)).

<sup>376</sup> *Id.* at 944.

<sup>377</sup> *Id.* at 945.

<sup>378</sup> *Id.* at 944–45.

imputation that plaintiff or someone in her family murdered Billy, and that plaintiff knew where Billy was buried.<sup>379</sup> Robinson acknowledged that, beyond the common law, “there are numerous federal constitutional restrictions that govern the proof of the tort of defamation,” which depend on the status of the plaintiff (public or private figure) and the subject of the speech (public or private concern).<sup>380</sup> The parties did not dispute that the statements were of public concern and that plaintiff was a private figure. Robinson, therefore, viewed the inquiry as a question of “the law governing the proof of defamation claims . . . made by private figure plaintiffs, but relating to matters of public concern.”<sup>381</sup>

Relying on a straightforward application of *Gertz*,<sup>382</sup> Robinson rejected defendants’ argument that a private figure plaintiff must prove by clear and convincing evidence that defendant acted with actual malice in making an allegedly defamatory statement on a matter of public concern.<sup>383</sup> Rather, Robinson held that in such a case the “defamatory statements must be provably false, and the plaintiff must bear the burden of proving falsity.”<sup>384</sup> But “neither the trial court nor the Appellate Court ever expressly considered whether the plaintiff proved the falsity of the defamatory statements,” giving rise to a First Amendment violation.<sup>385</sup> Also to no avail was plaintiff’s reliance on the trial court’s finding of actual malice; Robinson held that the record did not support such a finding.<sup>386</sup>

Justice Eveleigh’s dissent, joined by one other justice, denied that the First Amendment protected defendants’ conduct.<sup>387</sup> Eveleigh agreed that the flyers’ content, “without more, ostensibly relates to a matter of public concern.”<sup>388</sup> But he argued that the flyers’ context and form showed otherwise. Eveleigh centered on what he called the trial judge’s “crucial” and “critical” factual finding: defendants’ targeted placement of posters served no purpose beyond harassing the plaintiff and expressed no protected message.<sup>389</sup> The majority, argued Eveleigh, overturned this factual finding *sub silentio*, without locating clear error as Connecticut law required.<sup>390</sup> Instead, the majority substituted its own factual finding—that “the targeted content and location was consistent with the overarching public concern of gaining information about Bill’s disappearance”<sup>391</sup>—absent a prerequisite ruling that the trial judge had clearly

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<sup>379</sup> *See id.* at 946.

<sup>380</sup> *Id.* at 947–48.

<sup>381</sup> *Id.* at 954.

<sup>382</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>383</sup> *Gleason*, 125 A.3d at 954–55.

<sup>384</sup> *Id.* at 956 (citation and internal quotation marks omitted).

<sup>385</sup> *Id.* at 957.

<sup>386</sup> *Id.* at 957–58.

<sup>387</sup> *Id.* at 960 (Eveleigh, J., dissenting).

<sup>388</sup> *Id.* at 963.

<sup>389</sup> *Id.* at 961–62.

<sup>390</sup> *Id.* at 961.

<sup>391</sup> *Id.*

ered. This was all the more troubling, according to Eveleigh, because the majority disregarded the trial judge's credibility determinations.<sup>392</sup>

Bound by the trial judge's factual findings, Eveleigh emphasized three features of the speech at issue. First, the speech was "uttered in a context that consists of the *sole and exclusive* desire to harm the plaintiff and, concomitantly, no intent to convey a protected idea or message to the public."<sup>393</sup> Second, the speech "is inextricably linked to intimidating conduct that borders on harassment of a private party on a purely private matter."<sup>394</sup> And third, holding defendants liable would "not chill protected speech or pose a risk of self-censorship."<sup>395</sup> No case, argued Eveleigh, has conferred First Amendment protection on speech meeting these three criteria, even if the speech contained "facially acceptable content expressed in a traditional public forum."<sup>396</sup>

Eveleigh distinguished both *Cleaveland* and *Snyder*. *Cleaveland* was distinguishable on two grounds. The first "critical difference" was that *Cleaveland* involved "harassing activity that, as a matter of fact, was inextricably linked to, and intended to advance, [a] protected message to the public—a message protesting the government."<sup>397</sup> But here, defendants' conduct "was not a bona fide expression to the public of a message that the [F]irst [A]mendment protects."<sup>398</sup> In other contexts, defendants' message would be protected. But defendants' admission that their only purpose was to harass the plaintiff "formed the basis of the trial court's credibility determination that this conduct was merely and solely tortious conduct directed at a private party in an antagonistic, private dispute."<sup>399</sup> Second, a judgment for money damages would not chill protected speech here. Defendants in *Cleaveland* "would be penalized for expressing [their] message," and others "would think twice and potentially self-censor."<sup>400</sup> But a judgment against defendants here would "not penalize the defendants for searching for Bill or bringing their grievances about the authorities' lack of diligence to public light."<sup>401</sup> Instead, it would prevent people "from targeting, intimidating, harassing, and *intentionally* inflicting emotional distress upon any person they believe to have previously engaged in the commission of a crime."<sup>402</sup>

As for *Snyder*, according to Eveleigh, "it was the content of the speech—the honestly believed, protected message that the defendants in *Snyder* wished to communicate to the public—that caused the distress, not the context in which the speech occurred."<sup>403</sup>

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<sup>392</sup> *Id.* at 965–66.

<sup>393</sup> *Id.* at 969.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at 970.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 971.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 972.

<sup>403</sup> *Id.*

Here, however, plaintiff's distress "resulted solely from the context in which the speech occurred—the relentless hounding of the plaintiff where she lived and worked—not the content of the posters."<sup>404</sup> Moreover, a judgment here would "not pose any risk of having resulted from differing tastes or views on what the posters conveyed or the ideas they espoused, nor does it pose a risk of suppressing unpleasant expression."<sup>405</sup> Rather, it would impose liability for defendants' continued and aggravated conduct which hounded the plaintiff for the sole purpose of intimidation and harassment.

*e. A History of Animosity in Alaska*

Only one state court case considering the application of *Snyder* in detail has resisted its broad sweep. But its primary reason for refusing to apply *Snyder* was that the cause of action was defamation; only as an afterthought did it repeat the false slogan that *Snyder* is limited to its particular factual record.<sup>406</sup>

Distantly related, and hailing from the Alaskan community of Pilot Station, Beverly Tinker and Karen Greene (and their respective families) had "a history of animosity."<sup>407</sup> In 2007, Tinker, who worked at the Pilot Station Health Clinic, "improperly accessed Greene's medical file."<sup>408</sup> After Greene filed a complaint about the incident with the clinic operator, Tinker was reprimanded and directed to participate in a confidentiality education program or lose her job.<sup>409</sup> The clinic operator also directed Tinker never to access Greene's file again.<sup>410</sup>

It got messier in 2011. In February, when Greene was in the early stages of pregnancy, she visited the health clinic.<sup>411</sup> Greene asked a staff member to ensure that Tinker would not learn of the pregnancy and due date.<sup>412</sup> In addition to her concerns about Tinker's prior misconduct, Greene wanted to keep the pregnancy private because of an earlier miscarriage.<sup>413</sup> Soon enough, Tinker told the staff member of Greene's pregnancy and the due date.<sup>414</sup> The staff member duly informed Greene, who confronted Tinker at the clinic and filed a second complaint with the clinic operator.<sup>415</sup> It turned out, however, that Tinker was informed of Greene's pregnancy "through a gossip chain that began with Greene herself."<sup>416</sup>

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<sup>404</sup> *Id.* at 973.

<sup>405</sup> *Id.*

<sup>406</sup> *See* *Greene v. Tinker*, 332 P.3d 21, 35 (Alaska 2014).

<sup>407</sup> *Id.* at 25.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> *Id.* at 25–26.

<sup>416</sup> *Id.* at 26.

Receiving no response to her second complaint, Greene took the matter to the Pilot Station Traditional Council.<sup>417</sup> Greene “attended several meetings of the tribal council, which according to Tinker was dominated by members of Greene’s extended family.”<sup>418</sup> At one meeting Greene read a letter accusing Tinker of violating confidentiality.<sup>419</sup> An investigation by the clinic operator eventually revealed that Greene’s second complaint was unsubstantiated.<sup>420</sup>

Tinker sued Greene for defamation.<sup>421</sup> Greene counterclaimed.<sup>422</sup> Both parties “sought damages, including punitive damages,” and attorney’s fees.<sup>423</sup> During pretrial motion practice, the trial court rejected Greene’s argument that the alleged disclosures by Tinker were a matter of public concern, so that Greene had an absolute privilege to complain about them.<sup>424</sup> The trial court explained that “three instances of discussion in an arguably public forum such as the Pilot Station [Traditional] Council do not transmute one’s complaints about a specific individual’s actions into a public concern.”<sup>425</sup> Instead of an absolute privilege, the trial court held that Greene “had a conditional privilege to make defamatory statements about Tinker.”<sup>426</sup> The question for the jury was whether Greene had abused her conditional privilege, and the trial court instructed the jury accordingly. The jury awarded Tinker one dollar in nominal damages.<sup>427</sup>

Greene appealed the trial judge’s legal rulings on conditional privilege and the Alaska Supreme Court affirmed.<sup>428</sup> Chief Justice Fabe thought that *Sullivan* represented a “major departure” from the common law of defamation.<sup>429</sup> Fabe then discussed the extension of *Sullivan* to public figures and explained, relying on *Gertz*, that “the First Amendment imposes only the most minimal restrictions on state-law liability in defamation actions brought by private individuals.”<sup>430</sup> For private figure defamation actions, Alaska precedents had not yet determined whether actual malice was required or whether negligence sufficed.<sup>431</sup> Fabe at least hinted that the trial court may have

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<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> *Id.* at 27.

<sup>421</sup> Tinker also sued Greene for intentional interference with contractual relations, but abandoned that claim. *Id.*

<sup>422</sup> Greene’s counterclaims were for invasion of privacy and abuse of process. *Id.* The trial court entered a directed verdict on abuse of process, and the jury found Tinker not liable for invasion of privacy. *Id.* at 30.

<sup>423</sup> *Id.* at 27.

<sup>424</sup> *Id.* at 28.

<sup>425</sup> *Id.* (internal quotation marks omitted).

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* at 24.

<sup>428</sup> *Id.* at 36.

<sup>429</sup> *Id.* at 33.

<sup>430</sup> *Id.* at 34.

<sup>431</sup> *Id.* at 34. *See also id.* at 34 n.43.

been *overprotective*, because it instructed the jury as though Tinker were a public figure who was required to show actual malice.<sup>432</sup>

Greene argued at length that, after *Snyder*, “speech involving a matter of public concern is inactionable.”<sup>433</sup> Fabe was having none of it: “the First Amendment is not an all-purpose tort shield, and *Snyder* did not change this.”<sup>434</sup> She thought that “it requires some hard squinting to read *Snyder* as creating such a sweeping rule.”<sup>435</sup> *Snyder*, Fabe announced, “contains no indication that the Court intended to depart at all—much less depart dramatically—from its carefully drawn defamation precedents.”<sup>436</sup> And, of course, “the Court explicitly limited its holding in *Snyder* to the facts before it.”<sup>437</sup> The major factual difference was that *Snyder* involved a demonstration on public land adjacent to a public street,<sup>438</sup> whereas “Tinker’s defamation claim was based entirely on Greene’s complaint to Tinker’s supervisor.”<sup>439</sup>

### 3. *Snyder* Is Absolutist

These cases leave little doubt that, certainly outside defamation, state courts have wholeheartedly embraced *Snyder* even at the expense of their own common law. It is easy to see why: *Snyder*’s reasoning is freely generalizable. Rather than limiting its reasons to the Maryland IIED tort, *Snyder* is expressed in terms of “tort liability.”<sup>440</sup> The major premise of the Court’s opinion is that the “Free Speech Clause of the First Amendment . . . can serve as a defense in state tort suits,” and its minor premise is merely that IIED is one of those torts.<sup>441</sup> The only court to have denied a broadly stated First Amendment defense to a state tort is the Alaska Supreme Court, but in that case the cause of action was defamation, to which *Sullivan* and its progeny directly applied.

The similarities between Roberts’s opinion for the Court in *Snyder* and Black’s absolutist concurrence in *Sullivan* are instructive and striking. Black would have held that the First Amendment does not merely limit state libel laws but completely

<sup>432</sup> *See id.*

<sup>433</sup> *Id.* (internal quotation marks omitted).

<sup>434</sup> *Id.* at 35.

<sup>435</sup> *Id.* at 34.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at 35.

<sup>438</sup> *See generally* *Snyder v. Phelps*, 562 U.S. 443 (2011).

<sup>439</sup> *Greene*, 332 P.3d at 35. Fabe also dealt with analogous arguments under the Alaska Constitution’s free speech guarantee. *See id.* at 35–36.

<sup>440</sup> *Snyder*, 562 U.S. at 447 (“The question presented is whether the First Amendment shields the church members from tort liability for their speech in this case.”). *Id.* at 461 (“As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.”).

<sup>441</sup> *Id.* at 451.

prohibits a state's power to award damages to public officials against critics of their official conduct. Black's thoughts on Brennan's actual malice requirement parallel Roberts's on outrageousness. "Malice," argued Black, "is an elusive, abstract concept, hard to prove and hard to disprove."<sup>442</sup> It is "at best an evanescent protection for the right critically to discuss public affairs."<sup>443</sup> Just as Roberts observed that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate,"<sup>444</sup> so Black thought that "[t]his Nation" cannot "live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials."<sup>445</sup> Black could have been summarizing the *Snyder* holding when he concluded that "[a]n unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."<sup>446</sup>

*Snyder* is absolutist.<sup>447</sup> Its conception of the First Amendment precludes state common-law tort liability attaching to speech whose content is of public concern, irrespective of context, form, factual record, and basis of liability. To sum up the state court use of *Snyder*—despite judicial protestations to the contrary—speech whose content is of public concern is not actionable. Defamation is a significant exception. But the important state court cases applying *Snyder* demonstrate its absolutism. They show that *Snyder*'s two purported limitations are not real: first, the content-form-context trilogy is dominated by content alone, and second, *Snyder*'s avowed factual narrowness is a tepid limitation.

First, despite judicial assurances that no one element of the content-form-context trilogy is dispositive,<sup>448</sup> it turns out that content *is* dispositive and a circumstantial analysis generally changes nothing. Consider the two state cases where context and form mattered most: *Cleaveland* and *Gleason*. In *Cleaveland*, the targeted harassment of the PEOs, which included personal insults, was insufficient to deny First Amendment protection to speech whose content was of public concern.<sup>449</sup> And in *Gleason*, defendants covered telephone poles at plaintiff's home and work with flyers relating

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<sup>442</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring) (internal quotation marks omitted).

<sup>443</sup> *Id.*

<sup>444</sup> *Snyder*, 562 U.S. at 461.

<sup>445</sup> *Sullivan*, 376 U.S. at 297 (Black, J., concurring).

<sup>446</sup> *Id.*

<sup>447</sup> First Amendment "absolutism" is associated with Justice Hugo Black's insistence that the First Amendment "says 'no law,' and that is what I believe it means," Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 554 (1962), "without any 'ifs' or 'buts' or 'whereases,'" *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

<sup>448</sup> "In considering content, form, and context," Roberts said in *Snyder*, "no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech." *Snyder*, 562 U.S. at 454.

<sup>449</sup> See *City of Keane v. Cleaveland*, 118 A.3d 253, 260 (N.H. 2015).

to her former lover's unexplained disappearance—concededly for the sole purpose of hounding and breaking the plaintiff.<sup>450</sup> As the *Cleaveland* court acknowledged, prompted by *Snyder*, absent actual physical violence, the context and form of the speech is irrelevant.<sup>451</sup> And the *Gleason* court held that so long as targeted, public harassment is “consistent with the overarching public concern”<sup>452</sup> of the speech, then the First Amendment insulates the speaker from tort liability.<sup>453</sup>

In the result, an expansive conception of public concern shields a speaker from tort liability that would otherwise attach.<sup>454</sup> True, there are some qualifications: if there is physical violence, for example, or if the speech constitutes personal harassment out of public view. But sustained personal vilification in a public place is protected by the First Amendment, so long as there is a connection between the content of the speech and a matter of public concern. As Daniel Solove and Neil Richards anticipated in their important work on free speech and civil liability, this approach “provides too broad a scope of First Amendment protection.”<sup>455</sup>

Second, *Snyder*'s promise that its “holding . . . is narrow,” and that its “reach . . . is limited by the particular facts,”<sup>456</sup> has been honored only in the breach. In light of the dominance of content in the content-form-context trilogy, the factual record is relatively unimportant. Identifying the content of speech is a rarely contested issue of fact; but whether that content is of public concern is an oft-contested question of law. Similarly, the location of speech is a question of fact, but it is not a nuanced factual inquiry; and it suffices for First Amendment protection if the speech is in public view (or even better, located on or adjacent to a public street). And the location of speech when broadcasting images is *not* the same as the location of events depicted by those images. *Rodriguez* shows that the public broadcast of *events* not in public view (for example, a suicide in the remote Arizonan desert) nevertheless counts as *speech* in public view.<sup>457</sup> In sum, peaceful speech in public view whose content is of public concern is protected.

This factual inquiry—identifying the content, location, and violence of the speech at issue—does not ordinarily require a developed record. Indeed the irrelevance of

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<sup>450</sup> See *Gleason v. Smolinski*, 125 A.3d 920, 940, 940 n.20 (Conn. 2015).

<sup>451</sup> See *Cleaveland*, 118 A.3d at 260.

<sup>452</sup> *Gleason*, 125 A.3d at 940.

<sup>453</sup> See *id.*

<sup>454</sup> In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974), Justice Powell argued that the public concern test, which *Snyder* embraced, would overly restrict a state's legitimate interest in enforcing a legal remedy for defamation of a private individual. “And,” Powell argued, “it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of ‘general or public interest’ and which do not—to determine, in the words of Mr. Justice Marshall, ‘what information is relevant to self-government.’” *Id.* at 346 (citation omitted). Powell “doubt[ed] the wisdom of committing this task to the conscience of judges.” *Id.*

<sup>455</sup> Solove & Richards, *supra* note 132, at 1683.

<sup>456</sup> *Snyder v. Phelps*, 562 U.S. 443, 460 (2011).

<sup>457</sup> See *Rodriguez v. Fox News Network, LLC*, 356 P.3d 322, 326 (Ariz. Ct. App. 2015).



the factual record is confirmed by the procedural posture of the state cases applying *Snyder*. *Rodriguez* was determined on a motion to dismiss—that is, on the pleadings prior to fact discovery.<sup>458</sup> The Court consciously decided to “address Fox’s constitutional defense” to “avoid a ‘prolonged, costly, and inevitably futile trial.’”<sup>459</sup> Similarly, in *Dumas*, a motion to dismiss filed prior to discovery (converted to a motion for summary judgment because it exhibited a video and transcript of the broadcast and records relating to *Dumas*’s arrest and driving history) terminated the litigation.<sup>460</sup> The tort claims in *Gleason* went to trial, but the First Amendment was only raised on appeal.<sup>461</sup> Only in *Cleaveland*—terminated on a motion to dismiss but after a three-day evidentiary hearing—did the trial court decide the First Amendment issue on a relatively developed factual record.<sup>462</sup> The clear tendency is that in cases applying *Snyder*, much of the factual record is simply irrelevant to the First Amendment inquiry.

The incapacitation of the jury is an obvious corollary of the irrelevance of the factual record. *Snyder* went out of its way to justify jury distrust: a jury may not, said Roberts, “impose liability on the basis of the jurors’ tastes or views, or . . . on the basis of their dislike of a particular expression.”<sup>463</sup> Scholars have supported the distrust of the jury to properly enforce the First Amendment. In 1970, Henry Monaghan contended that, “[i]n general, any expansive conception of the jury’s role is inconsistent with a vigorous application of the First Amendment.”<sup>464</sup> Even though *Sullivan* preserved a role for the jury in principle, Monaghan noted that Brennan refused to remand the case against the New York Times back to the hostile state courts and juries.<sup>465</sup> More recently, Eugene Volokh argued that “[m]any statements might be labeled ‘outrageous’ by some judge, jury, university administrator, or other government actor.”<sup>466</sup>

There is, of course, real reason to worry that juries might fail to vigorously enforce the First Amendment. But why can’t this distrust be averted in the usual way, by proper jury instructions? *Snyder* does not explain. And *Snyder* ignored the possibility that the First Amendment could be enforced by requiring the bench to decide the “outrageous” element. Neither juries nor judges, apparently, can be trusted to decide whether speech is “outrageous” (*Snyder*)<sup>467</sup> or “improper” (the trial judge in *Cleaveland*).<sup>468</sup> Guided by the judicial articulation of innumerable other “highly malleable” and “inherent[ly]

<sup>458</sup> See *id.* at 324.

<sup>459</sup> *Id.* at 325 (citation omitted).

<sup>460</sup> See *Dumas v. Koebel*, 841 N.W.2d 319, 323 (Wis. Ct. App. 2013).

<sup>461</sup> See *Gleason v. Smolinski*, 125 A.3d 920, 928 (Conn. 2015).

<sup>462</sup> See *City of Keene v. Cleaveland*, 118 A.3d 253, 256, 258 (N.H. 2015).

<sup>463</sup> *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (internal quotation marks omitted) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

<sup>464</sup> Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 527 (1970).

<sup>465</sup> See *id.* at 527 n.37, 528.

<sup>466</sup> Volokh, *supra* note 246, at 300.

<sup>467</sup> See *Snyder*, 562 U.S. at 458.

<sup>468</sup> See *City of Keene v. Cleaveland*, 118 A.3d 253, 258 (N.H. 2015).

subjective[.]” legal standards,<sup>469</sup> juries have been deciding such questions for centuries. Whether conduct is reasonable or reckless—that is the bread and butter of the modern jury. But whether speech is outrageous—nope. At the risk of repetition, it is true that the role of the jury has been justifiably limited in many contexts. It is true, too, that the First Amendment evolved long ago from a guarantee of “protection of the people collectively from unrepresentative government” to the “protection of currently unpopular ideas from a current majority.”<sup>470</sup> *Snyder*, however, did not adequately explain its scope, and ignored open alternatives (proper instructions or judicial determination of the problematic element). Notice also that *Greene v. Tinker*, the Alaskan defamation case applying *Sullivan*, preserved a role for the jury consistently with the First Amendment (the question for the jury was whether the conditional privilege had been abused).<sup>471</sup>

The net result is that *Snyder* enforced an absolutist First Amendment, notwithstanding the solemn curial pledges that *Snyder* is a narrow decision. The application of the First Amendment to state speech torts fixes on a small number of discrete and rarely contested facts. In reality, one factual finding—the content of the speech—is a simple predicate that swings open the wide First Amendment door.

### III. *SULLIVAN*, NOT *SNYDER*

This Part argues that *Sullivan*’s methodology should be preferred over *Snyder*’s, because *Sullivan* embraced cooperative judicial federalism. *Sullivan*’s model of First Amendment enforcement has underwritten fifty years of productive state–federal judicial dialogue. In just seven years, *Snyder* has suppressed every significant opportunity for intersystemic conversation. One of *Sullivan*’s unheralded virtues, then, is that it created the right conditions for a genuinely cooperative judicial federalism.

#### A. Cooperative Judicial Federalism

Cooperative judicial federalism goes by various names in the scholarship: dialectical,<sup>472</sup> interactive,<sup>473</sup> polyphonic<sup>474</sup> or relational federalism,<sup>475</sup> or intersystemic<sup>476</sup> or

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<sup>469</sup> *Snyder*, 562 U.S. at 458.

<sup>470</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 242 (1998). See also Monaghan, *supra* note 464, at 527–29.

<sup>471</sup> *Greene v. Tinker*, 332 P.3d 21, 28, 30 (Alaska 2014).

<sup>472</sup> Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1046–47 (1977).

<sup>473</sup> Martin H. Redish, *Supreme Court Review of State Court “Federal” Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 864 (1985).

<sup>474</sup> ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* 7 (2009).

<sup>475</sup> Charleton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 WM. & MARY BILL OF RTS J. 511, 512 (2011).

<sup>476</sup> Gluck, *supra* note 155, at 1906.

interjurisdictional<sup>477</sup> adjudication. The broad thrust of this literature is that federal-state judicial dialogue is valuable, and that *Erie* did not foreclose that dialogue. Concurrent jurisdiction creates opportunities for cooperative judicial federalism, because both state and federal courts are authorized to decide the same legal questions. A court of one system often decides a question arising under the laws of the other. Although federal courts are not authoritative on questions of state law, there is nevertheless real room for intersystemic conversation when they interpret state statutes and constitutions.<sup>478</sup>

The scholarship says that dialogue between federal and state courts is valuable. In a seminal work on dialectical federalism, Cover and Aleinikoff argued that the development of criminal procedure doctrine is “a conversation among equals,” which “demonstrate[s] a remarkable breadth of views and concerns,” has “a profound impact on the development of constitutional law,” and “may be justified because it articulates a basic tension in our society’s view of the criminal process.”<sup>479</sup> Similarly, Gluck invites us to “imagine the possibilities” were statutory interpretation methodology to be given stare decisis effect.<sup>480</sup> Courts would be encouraged to experiment with their statutory interpretation methodology, creating “a realistic possibility for cross-systemic pollination of interpretive theory.”<sup>481</sup> Of course, federal-state judicial dialogue was commonplace before *Erie*, because general common law was a legitimate source that both state and federal judges could interpret and develop.<sup>482</sup>

Cooperative judicial federalism should flourish particularly when state rights of action embed federal issues, or federal rights of action embed state issues. Because these cases generate questions of state and federal law, they present real opportunities for state and federal courts to engage in productive dialogue, to respond to each other’s opinions, and to shape the contours of their own (and each other’s) law, ensuring state law compliance with federal commands. As Martin Redish argued, “both state and federal systems have much to gain from institution of a dialogue between the courts of both systems,” especially when state and federal law can’t be easily separated.<sup>483</sup>

Enforcing the First Amendment against state torts therefore presents an opportunity for cooperative judicial federalism. *Sullivan* and *Snyder* both deployed the First Amendment to set aside a jury verdict underwritten by state law. They both required that a state’s common law speech tort embed a mandatory First Amendment issue.

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<sup>477</sup> Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, in *NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS* 103 (James A. Gardner & Jim Rossi eds., 2011).

<sup>478</sup> See SCHAPIRO, *supra* note 474, at 102; Gluck, *supra* note 155.

<sup>479</sup> Cover & Aleinikoff, *supra* note 472, at 1055, 1065–66.

<sup>480</sup> Gluck, *supra* note 155, at 1992.

<sup>481</sup> *Id.*

<sup>482</sup> See Cover & Aleinikoff, *supra* note 472, at 1048 n.66.

<sup>483</sup> Redish, *supra* note 473, at 901.

But the similarities stop there. *Sullivan* seized the opportunity for cooperative judicial federalism; *Snyder* spurned it. In the following decade, state courts absorbed *Sullivan* and its progeny into the specifics of their common law.<sup>484</sup> This process epitomizes cooperative judicial federalism because the Supreme Court's broad pronouncement made "much room for federal-state dialogue."<sup>485</sup> But *Snyder* paid almost no attention to state law, leaving no breathing space for federal-state dialogue. *Snyder*'s absolutism, part and parcel of the First Amendment's unstoppable march, shut down the articulation of state law and with it the possibility of federal-state judicial dialogue.

### *B. The Common Law and Cooperative Judicial Federalism*

Why did the *Sullivan* paradigm for enforcing the First Amendment against state common law torts generate a cooperative judicial federalism? *Sullivan*'s inauguration of cooperative judicial federalism is partly (and inseparably) about the role and status of the common law in the United States. In "Our Federalism,"<sup>486</sup> the common law is primarily located in the states. This is a consequence of two facts: first, Henry Hart's celebrated axiom that federal law is "interstitial in its nature," designed to achieve a specialized or targeted purpose;<sup>487</sup> and second, Brandeis's famous declaration in *Erie* that "[t]here is no federal general common law."<sup>488</sup> These are not absolutes, but they resonate when the First Amendment limits state common law torts. In effect, *Sullivan* imposed an affirmative duty on state and federal judicial officers in some common law cases. *Snyder* imposed a congruent affirmative duty too; that duty, however, ignores and preempts state common law, straining the systemic fact that the primary location of the common law is in the states.

*Sullivan* generated cooperative judicial federalism because it took an internal point of view with respect to Alabama's common law of libel. By taking a practical attitude of rule acceptance to state common law, the Court in *Sullivan* pictured federal and state courts engaged in the same enterprise: molding or revising state common law to comply with the First Amendment. *Sullivan* was an interstitial decision: it identified a "gap" in state law (namely, the rule permitting an official to recover libel damages for a publication criticizing official conduct), and filled the gap using the First Amendment.<sup>489</sup> And Brennan did not create a federal general common law of

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<sup>484</sup> Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 344 (2009) (describing the doctrinal landscape defined by *Sullivan* as "relatively settled and stable").

<sup>485</sup> Cover & Aleinikoff, *supra* note 472, at 1049.

<sup>486</sup> *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>487</sup> HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 435 (1953).

<sup>488</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>489</sup> *See New York Times Co. v. Sullivan*, 376 U.S. 254, 261, 283–85 (1964).

libel. It's fashionable to say that *Sullivan* "federalized" or "constitutionalized" defamation; sometimes *Sullivan* is described very differently as "h[o]ld[ing] Alabama's defamation tort unconstitutional."<sup>490</sup> These are exaggerations, and the truth lies somewhere in the middle. Brennan introduced a federal element for public officials alleging that criticism of their official conduct was defamatory. That federal rule did not colonize state common law wholesale.

*Sullivan* created the right conditions for cooperative judicial federalism by ensuring that the First Amendment operated against the background of the state common law. On this view, the First Amendment functions by altering or supplanting legal relationships established by the states. It is therefore necessary first to look at the substantive operation of state common law by reference to the rights, duties, privileges, powers, and immunities that it creates, changes, or abolishes. Once the substantive operation of the state common law is discerned, the First Amendment modifies that substantive operation if necessary. This methodology encourages cooperative judicial federalism because it does not pit federal law against state law. The federal question is reached only if, from the perspective of a judicial officer who accepts state common law as a practical guide for action, the substantive operation of the state's common law infringes the First Amendment. This generates varied questions of state and federal law in which both state and federal courts are competent, creating opportunities for intersystemic dialogue.

A sampling of recent defamation cases in state courts vividly illustrates that *Sullivan* embraced cooperative judicial federalism. In *D Magazine Partners, L.P. v. Rosenthal*,<sup>491</sup> for example, the Texas Supreme Court amply demonstrated that its common law had assimilated the federal constitutional requirements while leaving room for an analysis of defamation elements under state law (including defamatory "gist," requirements of a prima facie case, and various defenses). In *Elliott v. Murdock*,<sup>492</sup> the Supreme Court of Idaho held that a statement was not defamatory

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<sup>490</sup> Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1395 (2017). See also John C.P. Goldberg, *Benjamin Cardozo and the Death of the Common Law*, 34 Touro L. REV. 147, 151 (2018) ("[S]tarting with *New York Times v. Sullivan*, the Supreme Court has shown itself prepared to deem entire swaths of state tort law null and void, often in the name of protecting business interests.").

<sup>491</sup> 529 S.W. 3d 429, 433 (Tex. 2017) (noting "the longstanding yet delicate balance" between the First Amendment's "need for a vigorous and uninhibited press" and the state's "legitimate interest in redressing wrongful injury"); *id.* at 440 (applying, consistently with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), "a negligence standard in cases involving a private plaintiff seeking defamation damages from a media defendant").

<sup>492</sup> 385 P.3d 459, 465–66 (Idaho 2016) ("This Court, in reliance on the United States Supreme Court's reasoning in *Gertz*, has held that an individual can become a public figure on a limited range of issues through voluntary public engagement on those issues."); *id.* at 466 (observing that "[e]ven if, for the purposes of argument, the statements are accepted as defamatory, [plaintiffs] fail to raise a genuine issue of material fact as to whether [they] are public figures" to whom *Sullivan*'s actual malice standard applies).

under state law before deciding that, in any event, plaintiff was a public figure. The Supreme Judicial Court of Massachusetts, in *Edwards v. Commonwealth*,<sup>493</sup> assessed the adequacy of a defamation complaint according to federal standards as incorporated into Massachusetts law. And the Court observed that an independent basis existed under state law to impose the actual malice standard. In *SIRQ, Inc. v. The Layton Companies, Inc.*,<sup>494</sup> the Utah Supreme Court applied state law as guided by *Sullivan* and reversed the trial judge's failure to properly conduct an initial inquiry to ensure that only statements capable of defamatory meaning made it to the jury in a false light claim. The Maryland Court of Appeals has incorporated *Sullivan* as a "First Amendment conditional privilege."<sup>495</sup> "Although defamation jurisprudence traces its origins to a number of seminal First Amendment cases of the United States Supreme Court," the Court insisted that "the resolution of defamation claims brought by private individuals has largely been left to the province of state courts."<sup>496</sup>

*Snyder* operated very differently. It sidestepped Maryland law altogether: IIED was mentioned in passing and intrusion upon seclusion was silently preempted.<sup>497</sup> The First Amendment inquiry was acontextual, divorced from the substantive operation of state common law. The First Amendment, in other words, did not operate interstitially "against the background of the total *corpus juris* of the states";<sup>498</sup> rather, the federal question overtook the whole litigation. And its application to a whole swathe of torts—IIED, intrusion upon seclusion, intentional interference with contractual relations, and negligent infliction of emotional distress—strongly suggests that *Snyder* created a federal general common law, which largely preempts state speech torts. Nor has *Snyder* developed in the usual common law way. It has not sparked an incremental reform of IIED law; rather, it has sparked an absolutist application of the First Amendment, underwritten by an expansive public concern test.<sup>499</sup> A natural consequence of this absolutism is the hyperstability and predictability of the doctrinal regime thus generated. A federal law, severed from an underlying state right of action, has preempted a static, external vision of state common law.

State courts applying *Snyder* engage in *backwards avoidance*. They decide a momentous federal constitutional question to avoid ordinary issues of state private

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<sup>493</sup> 76 N.E.3d 248, 256–59 (Mass. 2017) (citing Massachusetts cases incorporating *Sullivan*'s actual malice requirement into state law).

<sup>494</sup> 379 P.3d 1237, 1245 (Utah 2016) (quoting state court opinions for the proposition that false light claims are "predicated on publication of a defamatory statement" and "reside in the shadow of the First Amendment") (quoting *Russell v. Thompson Newspapers, Inc.*, 842 P.2d 896, 907 (Utah 1992) and *Jensen v. Sawyers*, 130 P.3d 325 (Utah 2005)); *id.* at 1246 ("[F]alse light claims that arise from defamatory speech raise the same First Amendment concerns as are implicated by defamation claims.").

<sup>495</sup> *Seley-Radtke v. Hosmane*, 149 A.3d 573, 576, 581 (Md. 2016).

<sup>496</sup> *Id.* at 575.

<sup>497</sup> *See Snyder v. Phelps*, 562 U.S. 443, 458–60 (2011).

<sup>498</sup> HART & WECHSLER, *supra* note 487, at 435.

<sup>499</sup> *Snyder*, 562 U.S. at 451–53.

law. We have seen, for example, that state courts applying *Snyder* to economic torts like intentional interference do not consider whether those torts actually contravene the First Amendment. In *Cleaveland*, the trial judge was “skeptical that a claim for tortious interference with contractual relations exists in circumstances such as those presented here,” but held that the Court “need not reach this issue as the enforcement of such a tort is an infringement on the Respondents’ right to free speech and expression under the First Amendment of the Federal Constitution.”<sup>500</sup> The Supreme Court of New Hampshire mirrored this reasoning.<sup>501</sup> The Court consciously refused to follow its usual practice of “normally address[ing] constitutional questions first under the State Constitution and rely[ing] on federal law only to aid in [its] analysis.”<sup>502</sup> Instead, although the Court “share[d] the trial court’s skepticism” concerning the intentional interference tort, it agreed that “[it] need not decide whether a viable tortious interference claim can exist under the circumstances present in this case,” because *Snyder* precluded recovery.<sup>503</sup>

Although it ignored Maryland law, *Snyder* nevertheless held that there was only one way that Maryland law could be reconciled with the First Amendment, namely, the creation of an all-purpose federal defense.<sup>504</sup> It is one thing to say, as *Snyder* does, that the First Amendment incorporated by the Fourteenth Amendment limits state common law.<sup>505</sup> No one disputes that, and it is consistent with the scribal attitude of the federal courts towards state law (I argued above that federal courts take a scribal attitude to state law, and state courts take an authorial attitude to state law). It is entirely

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<sup>500</sup> *City of Keene v. Cleaveland*, Nos. 213-2013-cv-00098, 213-2013-cv-0241, 2013 WL 8691664, at \*10 (N.H. Super. Ct. Dec. 3, 2013).

<sup>501</sup> *See City of Keene v. Cleaveland*, 118 A.3d 253, 260–61 (N.H. 2015).

<sup>502</sup> *Id.* at 258.

<sup>503</sup> *Id.* at 259. In *Rodriguez*, the Arizona court noted that starting with the First Amendment rather than state law would “avoid a ‘prolonged, costly, and inevitably futile trial.’” *Rodriguez v. Fox News Network L.L.C.*, 356 P.3d 322, 325 (Ariz. Ct. App. 2015) (internal citation omitted). The flip side of this concern, however, is that an incorrect First Amendment determination in state court will truncate the application of state law, resulting in a costly appeal and remand process. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) (“The Minnesota Supreme Court’s incorrect conclusion that the First Amendment barred Cohen’s claim may well have truncated its consideration of whether a promissory estoppel claim had otherwise been established under Minnesota law and whether Cohen’s jury verdict could be upheld on a promissory estoppel basis. Or perhaps the State Constitution may be construed to shield the press from a promissory estoppel cause of action such as this one. These are matters for the Minnesota Supreme Court to address and resolve in the first instance on remand.”). Henry Monaghan observed that in *Snyder* the Court exercised its power to select the precise issues for determination. Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 696–97 (2012).

<sup>504</sup> *Snyder*, 562 U.S. at 451.

<sup>505</sup> *See id.* at 460 (“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.’”).

another to say, also as *Snyder* does, that there is only one way to enforce that limit. That is a separate and stronger claim that the First and Fourteenth Amendments completely determine the application of the limit across a whole class of state torts (common law and statutory).

The difficulty associated with the stronger claim—that state tort law can be reconciled with the First Amendment *only* by creating an all-purpose federal defense—is that it robs state courts of their authorial attitude, that is, their capacity to develop their own law by taking a critical reflective attitude towards it. As we have seen, the state courts applying *Snyder* ignore their own tort law and their own constitutions, and do not decide *how* to square their own law with the First Amendment.<sup>506</sup> Instead, they are required to unthinkingly obey *Snyder*'s command. And this command translates to directives to state courts: do not bother fussing over your local law; do not worry about the possibility of a different division of authority between judge and jury; do not fret about pointless jury instructions.

*Snyder* makes state courts mere scribes of their own law. The federal structure contemplates that a state-created right of action is governed by state law, unless federal law applies. The starting point is state law, followed by the enforcement of an interstitial national law to achieve its special and targeted objective. *Snyder*'s absolutism flips the starting point.<sup>507</sup> As it has been applied in state courts, the starting point is not the state law purporting to legitimize the jury verdict, but instead whether the speech is protected.<sup>508</sup> And this requires state courts to take a brief static snapshot of state tort law to predict the likelihood of liability attaching to speech. Rather than ask whether the state common law in fact impinges on the First Amendment and, if so, how it could be modified to remove the inconsistency, *Snyder* simply invalidates the state law in its predicted application.

*Snyder* therefore raises the question: if the First and Fourteenth Amendments, and *Erie*, embody judicially developed federal commands, and the IIED tort is a judicially developed state right of action, why not allow state courts to do the heavy lifting? Why deny state courts the capacity to develop their own common law, over which they are ordinarily sovereign (in the absence of applicable federal law), consistently with the First and Fourteenth Amendments, rather than require them to obey a defense effectively legislated by the Supreme Court?

Had he looked a little harder, Roberts might have embraced cooperative judicial federalism and the internal perspective towards state common law. *Snyder*, in its rejection of the authorial perspective, failed to notice the true nature of IIED's outrageousness requirement. It failed to realize, moreover, that IIED targets conduct that is not just outrageous, but both extreme and outrageous; a "double limitation" which "requires both that the character of the conduct be outrageous and that the

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<sup>506</sup> See *supra* notes 500–05.

<sup>507</sup> Cf. Kalven, *supra* note 52, at 191–92.

<sup>508</sup> See *supra* notes 500–05.



conduct be sufficiently unusual to be extreme.”<sup>509</sup> And *Snyder* refused to consider the different roles of judge and jury in an IIED claim—discussed in *Harris v. Jones*<sup>510</sup> and described in the Third Restatement as the “court play[ing] a more substantial screening role on the questions of extreme and outrageous conduct and the severity of the harm”<sup>511</sup>—as a potential cure for the constitutional defect. The judge “first makes a judgment . . . as to whether the conduct alleged could be found extreme and outrageous and the harm sufficiently severe such that liability is permissible,” and, if so, “submits the case for the jury to determine whether the defendant engaged in extreme and outrageous conduct and whether the plaintiff suffered severe emotional harm.”<sup>512</sup> *Snyder* simply did not explain why these common law rules ran afoul of the First Amendment.

Put differently, *Snyder* is functionally equivalent to a First Amendment collateral attack. This external, collateral attack simply fixes on a verdict enforcing a state right of action against a speaker. The state law basis underwriting the verdict—for example, the tort or theory of liability, the legal source (common law, legislation, or both)—is entirely ignored. The effect of *Snyder*’s methodology is to change the right of action completely. The state courts practicing backwards avoidance transform the plaintiff’s state tort allegation into a First Amendment claim of the defendant. *Snyder* thus contributed to the “epidemic pathology” that state courts parrot U.S. Supreme Court reasoning on constitutional issues.<sup>513</sup> In the result, neither federal nor state courts answer questions of state law that cry out for resolution, silencing state-federal judicial dialogue and denying intellectual and decisional resources—the “guidance,

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<sup>509</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (AM. LAW. INST. 2012).

<sup>510</sup> 380 A.2d 611 (Md. 1977). *Harris v. Jones*, the case Roberts cited to establish that Maryland recognized IIED, was sensitive to the “particularly troublesome question” of “[w]hether the conduct of a defendant has been ‘extreme and outrageous.’” *Id.* at 614. Citing other state courts, the Maryland Court of Appeals held in *Harris v. Jones* that “[i]t is for the court to determine, in the first instance, whether the defendant’s conduct may reasonably be regarded as extreme and outrageous,” and, where reasonable minds may differ, “it is for the jury to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.” *Id.* at 615.

<sup>511</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (AM. LAW. INST. 2012).

<sup>512</sup> *Id.*

<sup>513</sup> Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 726 (2016). For defamation actions, where one might think that the gravitational force of *Sullivan*’s “federal rule” would be overwhelming, it is noteworthy that state courts claim a significant degree of decisional independence. *See, e.g.,* Seley-Radtke v. Hosmane, 149 A.3d 573, 575 (Md. 2016) (“[T]he resolution of defamation claims brought by private individuals has largely been left to the province of State courts.”); *Havalunch, Inc. v. Mazza*, 294 S.E.2d 70, 73 (W.Va. 1981) (critical of the state of defamation law after *Sullivan*, but noting that “*Sullivan* and its progeny . . . placed a first amendment, free speech gloss upon all prior law of defamation” and “permitted the states to adopt their own standards of liability in defamation actions”).

perspective, inspiration, reassurance, or cautionary tales”<sup>514</sup>—offered by the discursive method of the common law.

### C. *Making Snyder Cooperative*

How, then, should *Snyder* have been written to embrace cooperative judicial federalism? One approach is to mimic *Hustler* for private-figure IIED lawsuits, which would require a plaintiff to show *Sullivan*-brand actual malice.<sup>515</sup> Falwell failed to make out his IIED claim because the advertising parody of which he complained did not contain a false statement of fact made with knowledge, or in reckless disregard, of its falsity.<sup>516</sup> But actual malice is custom-made for public figures, who attain that status by position alone or by “thrusting their personality into the vortex of an important public controversy.”<sup>517</sup> Another reason that actual malice is inapt stems from its commitment to a conception of truth and falsity. Truth or falsity is part of the defamation cause of action (and, for that matter, a false-light invasion of privacy cause of action); but in an IIED suit, extreme and outrageous speech that is not readily characterizable as true or false can nevertheless cause severe emotional harm.

A second option is to take up the Restatement’s suggestion and imbue certain aspects of the IIED cause of action with constitutional significance. This could require, for example, a judge to make an initial assessment of whether the defendant’s extreme *and* outrageous conduct reaches a necessary First Amendment threshold, before submitting the case to the jury. A third option is to adopt the newsworthiness privilege that exists in various state law privacy torts. To be sure, the newsworthiness privilege may have its own problems and may closely resemble *Snyder*’s public concern test. But it would place responsibility on state courts, as primary authors, to ensure that their common law conforms to the First Amendment.

The point isn’t to advocate one view over another, but to show that the problem confronted in *Snyder* could have been solved in many ways, and that the solution chosen by *Snyder* sacrificed state common law and cooperative judicial federalism on the altar of an absolutist First Amendment. The second and third options outlined very briefly here are akin to *Sullivan*. They pick up state common law trends, showing at least some comity and respect to the states as sovereign authorities backing state common law, and to the state courts writing that common law. Within the confines of the First Amendment, these alternatives allow states to author their own common law.

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<sup>514</sup> Margaret H. Marshall, “*Wise Parents Do Not Hesitate to Learn from Their Children*”: *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1642 (2004).

<sup>515</sup> *See Hustler Magazine Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

<sup>516</sup> *See id.* at 56–57.

<sup>517</sup> *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967).

## CONCLUSION

The application of the First Amendment to state common law torts is a continual, sometimes urgent, problem. In 1967, the Supreme Court of Texas decided *Fisher v. Carrousel Motor Hotel, Inc.*,<sup>518</sup> the well-known “plate grabbing” case. Emmitt E. Fisher, a black NASA mathematician, had been invited to attend a conference in Houston.<sup>519</sup> After the morning session, attendees adjourned for a buffet lunch at a whites-only private club.<sup>520</sup> As Fisher stood in line, an employee approached him, snatched the plate from his hand, and shouted that he could not be served in the club.<sup>521</sup> There was no direct physical contact and Fisher did not apprehend any physical injury.<sup>522</sup> He was highly embarrassed and hurt by the hotel employee’s conduct in the presence of colleagues.<sup>523</sup> The Texas Supreme Court held “that the forceful dispossession of . . . Fisher’s plate in an offensive manner was sufficient to constitute a battery.”<sup>524</sup>

After *Snyder*, there is a real question as to whether *Fisher*—“a landmark racial discrimination case”<sup>525</sup>—remains good law. In 2014, when considering a discussion draft of the Third Restatement of intentional torts to persons, two ALI members doubted *Fisher* on First Amendment grounds.<sup>526</sup> This Article has endeavored to explain that the danger is not only that cases like *Fisher* come out differently after *Snyder*. The danger is also systemic: that *Snyder* forecloses plaintiffs and courts from alleging, reasoning, and judging that certain conduct is right or wrong under the local standards of state tort law.

*Sullivan*, as we have seen, does not pose the same systemic risk,<sup>527</sup> because it took state common law seriously. Its methodology recognizes not only that state common

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<sup>518</sup> 424 S.W.2d 627 (Tex. 1967).

<sup>519</sup> *Id.* at 628.

<sup>520</sup> *Id.*

<sup>521</sup> *Id.* at 628–29.

<sup>522</sup> *Id.* at 629.

<sup>523</sup> *Id.*

<sup>524</sup> *Id.* at 630.

<sup>525</sup> Richard Delgado, *One Man’s Dignity: An Interview with Emmitt E. Fisher*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* 23 (Laura J. Lederer & Richard Delgado eds., 1995).

<sup>526</sup> See *Proceedings of 2014 Annual Meeting*, 91 AM. LAW. INST. PROC. 129–30 (2014). Peter F. Langrock argued *Fisher* “raise[d] . . . certain First Amendment questions, which are not dealt with,” and “[n]o matter how offensive the language may be, there is still the First Amendment, and we’ve got to protect that.” *Id.* at 130. Professor George C. Christie also acknowledged *Fisher*’s “First Amendment issues.” *Id.* at 135.

<sup>527</sup> Consider, for example, Iowa, where “[t]he judicial heavy lifting necessitated by” *Sullivan* “has abated” but where “[t]he dialectal heat generated by the competing interests of [common law] reputation and freedom of speech continues to simmer.” Patrick J. McNulty & Adam D. Zenor, *Iowa Defamation Law Redux: Sixteen Years After*, 60 DRAKE L. REV. 365, 368 (2012) (“Most of the cases decided by the Iowa Supreme Court in the last sixteen years are private disputes involving application of common law principles,” including significant cases “in which the principles of the common law and the First Amendment intersect.”).

law counts as law under *Erie*, but also that a state common law judgment represents the local political community's collective opinion that the defendant wronged the plaintiff. At the same time, it recognizes that the defendant should not pay for the wrong. Importantly, moreover, *Sullivan*'s approach recognizes that local standards—the rules and principles of state common law—can themselves be offensive to the First Amendment and, if so, should be changed accordingly. *Sullivan* says that the First and Fourteenth Amendments changed the Alabama law that purported to hold the Times and the four ministers liable for criticizing an elected public official.<sup>528</sup> Because *Sullivan* adopted the internal point of view vis-à-vis state common law, it permitted state common law to be revised.

*Snyder*'s methodology is broad; *Sullivan*'s is deep. *Snyder* applies across all state torts; *Sullivan* responds to the special contours of the right of action. *Snyder* fixes only on a verdict; *Sullivan* reaches into state common law. Neither *Sullivan* nor *Snyder* is an unconstitutional judicial overreach. The better approach is determined, then, by asking: what is lost or gained in choosing one over the other? What we gain in choosing *Sullivan* is the best vision of our judicial federalism. Choosing the internal point of view towards state common law creates opportunities for cooperative judicial federalism. *Sullivan*'s classical common law approach does not silence but encourages discourse and state-federal judicial dialogue.

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<sup>528</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 283–85, 292 (1964).