

ESSAY

Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law

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Abstract

In *Snyder v. Phelps*, the United States Supreme Court will decide to what extent state tort law may impose liability for “intentional infliction of emotional distress through outrageous conduct” without running afoul of the First Amendment’s guarantee of freedom of speech. The defendants, the Phelps, picketed the funeral of a young Marine who died in the line of duty in Iraq; they carried signs with statements such as “God hates the USA,” “God hates you,” “Fag troops,” and “Thank God for dead soldiers.” Sickened, depressed, and infuriated by the conversion of his son’s funeral into a media circus for an extremist group, the soldier’s father, Albert Snyder, successfully sued the defendants for the torts of intentional infliction of emotional distress through outrageous conduct and invasion of privacy. Several important First Amendment scholars have argued that an emotional harm tort that depends on applying the vague, subjective, and malleable concept of “outrageousness” to political speech cannot withstand First Amendment scrutiny, and that the Court should therefore rule for the defendants.

This Essay examines *Snyder v. Phelps* from a tort scholar’s point of view and, in doing so, puts forward strong reasons for rejecting the outrageousness argument. When one looks into the nature of the emotional distress tort carefully, as one must if one takes federalism seriously, three points become clear: first, that state tort law contains its own well-developed resources for scrutinizing such emotional distress claims and carefully filters out the vast majority of such claims; second, that the concept of outrageousness is used in part to insure that only a narrow range of kinds of cases can succeed; and third, that one of the most longstanding and best established paradigms for liability in emotional distress torts involves persons who have intentionally or recklessly interfered with a plaintiff’s efforts to grieve for a deceased child, parent, or spouse. As a unanimous United States Supreme Court recognized only seven years ago in the privacy case *National Archives and Records Administration v. Favish*, the law *does* acknowledge that “[f]amily members have a personal stake in honoring and mourning their dead” and *does not protect the activity of* one who, by intruding on the family members’ grief, “tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.” To suppose that Snyder’s tort claim cannot be permitted because “outrage” and “emotional harm” are too vague or mercurial is simply to invert legal reality.

Introduction

On March 8 of this year, the United States Supreme Court granted Albert Snyder’s *certiorari* petition in his lawsuit against Frederick Phelps, Rebekah Phelps-Davis, Shirley Phelps-Roper, and the

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Westboro Baptist Church.¹ The Phelps trio and their children and grandchildren travelled from Topeka, Kansas to Westminster Maryland in order to picket the funeral that Albert Snyder had arranged for his son, Matthew Snyder, who was killed in the line of duty in Iraq.² Carrying signs with statements such as: “God hates the USA,” “God hates you,” “Fag troops,” and “Thank God for dead soldiers,” the Phelps staged a public protest that was covered by the media. Although not contending that Snyder was gay, their message was that the killing of American soldiers in general and Snyder in particular was the consequence of America’s increasing moral turpitude, heinously illustrated by its tolerance of gays in society, its widespread adultery, and many other allegedly vile aspects of contemporary American life. Driving home this point was an “epic” posted on their website entitled “The Burden of Marine Lance Corporal Matthew Snyder.”

Albert Snyder was allegedly saddened, sickened, and overwhelmed by this turn of events – by the conversion of a funeral for his fallen soldier son into a publicity circus for an out-of-state religious extremist group. He therefore sued the Phelps contingent for invasion of privacy and intentional infliction of emotional distress through outrageous conduct (IIED), as well as civil conspiracy and defamation. A jury in federal court in the District of Maryland returned a verdict of \$2.9 million in compensatory and \$8 million in punitive damages, which the District Judge reduced to \$2.1 million in punitive damages. However, in September of 2009, a panel of the United States Court of Appeals for the Fourth Circuit held that Snyder’s claims failed as a matter of First Amendment law because the defendants were expressing views on matters of public concern and did not seriously assert anything

¹ Snyder v. Phelps, *cert. granted*, 78 U.S.L.W. 3395 (U.S. March 8, 2010) (No. 09-751). Snyder’s petition for certiorari stated three issues for review: “1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter? 2. Does the First Amendment’s freedom of speech tenet trump the First Amendment’s freedom of religion and peaceful assembly? 3. Does an individual attending a family member’s funeral constitute a captive audience who is entitled to state protection from unwanted communication?” Snyder v. Phelps, Petition for Writ of Certiorari, 2009 WL 5115222 (filed Dec. 23, 2009). In granting the petition, the Supreme Court only stated: “The petition for writ of certiorari is granted.” Snyder v. Phelps, *cert. granted*, 78 U.S.L.W. 3395 (U.S. March 8, 2010) (No. 09-751).

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

provably false about Snyder or his son.³ The Supreme Court will review that decision in the fall of 2010.

I shall suggest in what follows that Fourth Circuit's analysis of First Amendment precedent and its application to *Snyder* was deeply flawed. The critique of the Fourth Circuit's analysis is a prelude to the larger questions of this Essay, however. The principal issue is whether the tort of intentional infliction of emotional distress may be used to support a claim by a grieving family member against those who engage in a peaceful demonstration vigorously expressing extremist political and religious views at the funeral of a private individual. The issue has a First Amendment aspect (which is why it is at the Court) and a tort aspect. The First Amendment question is whether the imposition of tort liability would be a violation of the First Amendment as applied through the Fourteenth. The tort issue is whether tort liability is justifiable under such circumstances, and, if so, on what theory or theories.

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

Part I describes the facts of Albert Snyder's lawsuit and its travels from federal District Court in Maryland through the Fourth Circuit to the United States Supreme Court. Its primary focus is the majority opinion of the Fourth Circuit's reversal of the plaintiff's judgment, and, in particular, the First Amendment analysis underlying that opinion. Part II is a critique of the Fourth Circuit's opinion. A

³ *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009) [*"Snyder II"*].

critical premise of that opinion was that plaintiffs do not avoid the Supreme Court's defamation law precedent merely by asserting nominally different causes of action. While there is some truth in that premise, the Fourth Circuit overinflated its significance and extended libel precedents far beyond their breaking point. *Snyder* is therefore indefensible in the terms proposed by the Fourth Circuit.

Part III focuses on the wider free speech issues presented by *Snyder*'s case, and articulates a stronger and more candid rationale for the Fourth Circuit's opinion. The rationale is that public political protests are protected by the First Amendment and that neither of the torts asserted by plaintiff protects interests clear enough to circumvent the First Amendment shield. More particularly, some scholars have suggested that the IIED cause of action – with its focus on outrageousness -- is inherently malleable in ways that are intolerable to First Amendment values.⁴ The vagueness, moral content, and uncertainty of the tort norms in outrage and intrusion present a particularly sharp challenge to the First Amendment right of peaceful political speech. Or so the argument goes.

In Part IV, I take a break from *Snyder* to make a more general point that falls within the rubric of this Clifford Symposium on Uncertainty and Unpredictability in Tort Law. The general point is that when some area of law appears to be open-textured and to rely heavily upon soft-edged standards rather than hard-edged rules, one cannot ascertain whether this reliance is a problem without knowing much more about how that area of law works, whom it empowers, and for what purposes. The law-like qualities of some domain of putative law will depend on how the courts applying this law conceive of the state's political role, the court's institutional role, the role of the jury, and the place, within tort doctrine,

⁴ Prof. Eugene Volokh is probably the best known of these scholars. See Eugene Volokh, Freedom of Speech and the Intentional Infliction of Emotional Distress Tort, 2010 Cardozo L. Rev. de novo 300, at www.cardozolawreview.com/index.php?option=com_content&view=article&id=149:volokh2010300&catid=21:funerals-fire-and-brimstone&Itemid=26 See also <http://volokh.com/2010/03/08/the-intentional-infliction-of-emotional-distress-tort-and-the-freedom-of-speech-2/> and related posts by Volokh on *Snyder*. There are, however, several articles in the law reviews making this and related points in general and as to *Snyder* in particular. See, e.g., Christina E. Wells, *Privacy and Funeral Protests*, 87 N.Ca. L. Rev. 151 (2008); Clay Calvert, War, Death, *Politics & Religion: An Emotionally Distressing Amalgamation of Freedom of Speech and Expression of Opinion*, 30 Whittier L. Rev. 207 (2008). The Arizona Supreme Court's decision in *Citizens Publishing Co. v. Miller*, 115 P.3d 107 (2005) is also supportive of this line of argument. Volokh's *Freedom of Speech and IIED*, is published in an online symposium entitled *Funerals, Fire, and Brimstone*, in Cardozo Law Review's online component "de novo." The other articles, like Volokh's, address aspects of the *Snyder v. Phelps* case going to the Supreme Court.

of precedent, custom, tradition, and a paradigm-based conception of tort causes of action. The common law of torts utilizes several tools to control and counterbalance the risks of depending too heavily upon open-ended standards and moral principles. A jurisprudential or constitutional critique of a tort must remain attentive to the reasons that tort law proceeds in terms of standards, to the benefits of doing so, and to the adjudicative norms that safeguard our system against the perils of uncertainty.

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

Snyder is a wholly legitimate application of substantive tort law in Maryland, even as it is also a case in which open-ended moral principles are applied by the jury against unpopular protesters and speakers. For the outrageousness of the Phelps's behavior in this case does not lie predominantly in the sentiments or ideas expressed, but in the life experience with which they intentionally interfered: Albert Snyder's effort to hold a funeral for his son. The tort of intentional infliction of emotional distress through outrageous conduct has a substantial history within a certain category of conduct: interference with funerals in general and with a family's grieving process more particularly. As scores of state courts have recognized in the context of outrage, and the United States Supreme Court itself recognized in its unanimous 2003 decision, *National Archives and Records Administration v. Favish*,⁵ the law *does* acknowledge that "[f]amily members have a personal stake in honoring and mourning their dead" and

⁵ 541 U.S. 157 (2003).

*does not protect the activity of one who, by intruding on the family members' grief, "tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."*⁶

Those who complain that the concept of "outrageousness" is too vague and subjective to withstand First Amendment are ignoring the structure of the common law of torts in general and operating without an adequate understanding of the tort of IIED, in particular. Tort law, unlike criminal law or regulation, is not a series of general prohibitions or restrictions promulgated and then enforced by the state. It is a system for empowering private parties to use the courts to redress wrongful injuries done to them by others. This does not mean due process disappears and vagueness does not matter. But it does mean that the rule-of-law norms that the Due Process Clause is understood to entail, particularly within our federalist system, cannot be evaluated in quite the way one would look at a criminal statute. What is critical (apart from jurisdictional concerns) is that the plaintiff's claim be anchored in an injury to him; that the law's treatment of his conduct as a *wrongful injuring* of the plaintiff be adequately rooted in precedent and social understanding regarding the wrongs and rights of community members, that the precedent and social understanding reflect a conceptualization of correlative rights and duties that it not be illegitimate for a state to hold, and that the individual upon whom liability is imposed can, in some sense, be expected to be aware that the community regards the kind of injuring he did to the plaintiff as a wrongful injuring. Looked at from this point of view, the tort of intentional infliction of emotional distress through outrageous conduct is almost tailor-made to respect community members' rights to be free of tort liability for emotional harm in all but the rarest case. And the conduct of the Phelps in Westminster Maryland fell squarely within the domain in which a private right of action for imposition of severe emotional distress is actionable.

I. *Snyder v. Phelps*

A. Background

The events that gave rise to the litigation in *Snyder v. Phelps* occurred in March of 2006, in the town of Westminster, Maryland, where Marine Lance Corporal Matthew A. Snyder had lived and

⁶ *Id.*

attended high school. Corp. Snyder died in the line of duty in Iraq on March 3, 2006. His father, Albert Snyder [“Snyder”], arranged a funeral at St. John’s Catholic Church in Westminster for March 10, 2006. The funeral was picketed by the defendants Fred W. Phelps, Sr. [“Phelps”], Shirley L. Phelps-Roper, and Rebekah A. Phelps-Davis (two adult daughters of Phelps), as well as four of Phelps’s grandchildren, all of whom traveled from Topeka, Kansas for the purpose of engaging in this funeral picketing.

The defendants “traveled to Matthew Snyder’s funeral in order to publicize their message of God’s hatred of America for its tolerance of homosexuality.”⁷ The Westboro Baptist Church, of which the protesters were members, was also a defendant in the case. The Church was founded by Fred Phelps, and fifty of its sixty or seventy members are progeny or in-laws of Phelps. Phelps and his family members began protesting at funerals of homosexuals many years ago, but switched gears after the Iraq war began. At that point, they realized that they could generate greater publicity for their message by protesting America’s tolerance of homosexuality at the funerals of soldiers killed in the war. They have protested at funerals all around the country, and their protests have indeed garnered substantial public attention. The Fourth Circuit noted that “[t]he Defendants have also been involved in litigation throughout the country relating to their protests,”⁸ and that “as a result of such activities, approximately forty states and the federal government have enacted legislation addressing funeral picketing.”⁹

The protest at Matthew Snyder’s funeral garnered substantial attention in Westminster. In order to comply with legal ordinances, Phelps and his family members notified public authorities in Maryland before their arrival, and, according to Snyder, the Phelpses thereby managed to turn the “funeral for his son into a ‘media circus for their benefit.’”¹⁰ Subsequent to the events in Westminster, Rebekah Phelps-Roper wrote an “epic” about the Snyder family, entitled “The Burden of Marine Lance Cpl. Matthew Snyder,” which she posted on godhatesfags.com, the Church’s website. As the District Court and the

⁷ *Snyder I*, 533 F. Supp. at 571-72.

⁸ *Snyder II*, 580 F.3d at 212, n.1 (citing *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir.2008) and *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir.2008)).

⁹ *Id.* at 212, n.1 (citing Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. Kan. L. Rev. 575, 576 (2007)).

¹⁰ *Snyder I*, 533 F. Supp. 2d at 572.

Fourth Circuit described it, “Phelps-Roper stated that Albert Snyder and his ex-wife ‘taught Matthew to defy his creator,’ ‘raised him for the devil,” and ‘taught him that God was a liar.’”¹¹

Snyder’s arrival at St. John’s Catholic Church for the funeral circumvented the protestors, whom he did not see picketing until watching television that night. Nevertheless, the knowledge that his son’s funeral had been ‘turned into a media circus’ by the picketing of the Phelps, the awareness of his other family members’ reactions to it, and his own transformed experience of the funeral allegedly generated severe emotional injury. Snyder testified to serious physical and emotional effect the Phelps conduct had upon him and presented expert testimony at trial as objective evidence of the physical and emotional harm he suffered.¹²

Approximately three months after the funeral, Snyder sued Fred W. Phelps, Sr. and the Westboro Baptist Church, Inc., in the United States District Court for the District of Maryland (Phelps-Roper and Phelps-Davis were subsequently added). The complaint asserted two counts of invasion of privacy (intrusion on seclusion, publicity given to private life), as well as defamation and intentional infliction of emotional distress; a fifth count of civil conspiracy linked each defendant to the alleged tortious conduct of the others much as criminal conspiracy claims do. On October 15, 2007, Judge Richard D. Bennett granted summary judgment to the defendants on one of the invasion of privacy claims (publicity given to private life) and on the defamation claim.¹³ The remaining three claims were tried to a jury. The jury returned a verdict in favor of Snyder on all three counts as to each of the four defendants, for \$2.9 million in compensatory damages and a total of \$8 million in punitive damages. Judge Bennett denied the defendants’ motions for judgment notwithstanding the verdict and judgment as a matter of law on all claims, but remitted the \$8 million in punitive damages awards to \$2.1 million.¹⁴

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

¹¹ *Id.*

¹² *Id.* at 572-73, 588-89.

¹³ *Id.* at 572-73.

¹⁴ *Snyder I*, 533 F. Supp. 2d at 595-96.

substantive Maryland tort law, and were in any case barred by the First Amendment. In a thoughtful opinion for himself and Judge Duncan, Judge King vacated the judgment and reversed the denial of the motion for judgment as a matter of law, all on First Amendment grounds. The Fourth Circuit opinion holds that, because the defendants' statements "could not be reasonably interpreted" to assert actual facts about an individual, the complaint was barred by the First Amendment as interpreted by the United States Supreme Court in *Milkovich v. Lorain Journal Co.*¹⁵ In March of 2010, the United States Supreme Court granted Snyder's petition for *certiorari* in this case.¹⁶

B. The Fourth Circuit Opinion

The Fourth Circuit's opinion is best understood in the context of examining three quite decisive steps taken by the district court in dealing with the defendants' First Amendment challenge. First, the District Court held that the extent of First Amendment protection the defendants were entitled to would depend on whether the plaintiff Snyder was a public figure,¹⁷ in effect deciding that judgment as a matter of law on First Amendment grounds would not be appropriate unless Snyder was a public figure. Second, it determined that Snyder was not a public figure.¹⁸ Third, it instructed the members of the jury that it was up to them to "balance the Defendants' expression of religious belief with another citizen's right to privacy and his or her right to be free from intentional, reckless, or extreme and outrageous conduct causing him or her severe emotional distress" and also that it was up to them (the members of the jury) to determine whether the defendants' actions were "so offensive and shocking as to not be entitled to First Amendment protection."¹⁹

Proceeding in reverse order, the Fourth Circuit quite justifiably bridled at the district court's entrustment of First Amendment balancing to the jury. The "district court," Judge King wrote, "fatally

¹⁵ 497 U.S. 1 (1990).

¹⁶ *Snyder v. Phelps*, cert. granted, 78 U.S.L.W. 3395 (U.S. March 8, 2010) (No. 09-751).

¹⁷ *Snyder I*, 533 F. Supp. 2d, at 576.

¹⁸ *Id.* at 577.

¹⁹ *Snyder II*, 580 F.3d at 215 (quoting jury Instruction No. 21, at J.A. 3113-14).

erred by allowing the jury to decide relevant legal issues.”²⁰ He therefore concluded that, at a minimum, the judgment for the plaintiff must be vacated and a new trial granted. However, reasoning that “a new trial is unnecessary if the Defendants can prevail as a matter of law after our independent examination of the whole record,” the Fourth Circuit turned to the other potentially dispositive arguments put forward by the defendants.²¹

The Fourth Circuit did not address the second question – whether Snyder was a public figure. Instead, they criticized the district court’s decision that judgment as a matter of law was warranted only if Snyder were a public figure – that the case turned on whether Snyder was a public figure or a private figure under *Gertz v. Robert Welch, Inc.*²² The district court erred by failing to consider the possibility that defendants would be entitled to a judgment as a matter of law on First Amendment grounds *regardless* of whether the plaintiff was a public figure. District Judge Bennett overlooked this possibility because he failed to recognize that “[t]he Supreme Court has created a separate line of First Amendment precedent that is specifically concerned with the constitutional protections afforded to certain *types* of speech, and that does not depend upon the public or private status of the speech’s target.”²³ Under *Milkovich v. Lorain Journal Co.*,²⁴ the Fourth Circuit reasoned, a claim is non-actionable under the First Amendment unless “the pertinent statements could reasonably be interpreted as asserting ‘actual facts’ about an individual.”²⁵

The key question not even asked by the district court, according to the Fourth Circuit, was whether the Phelps’ statements could reasonably be interpreted as asserting actual facts about an individual, “or whether they instead merely contained rhetorical hyperbole.”²⁶ The Fourth Circuit panel took it upon itself to address this question, examining both the statements on the picket signs at the funeral, and the statements within the “epic” posted on the defendants’ website. The panel found that

²⁰ *Id.* at 221.

²¹ *Id.* at 221-221.

²² 418 U.S. 323 (1974).

²³ *Snyder II*, 580 F.3d at 222.

²⁴ 497 U.S. 1 (1990).

²⁵ *Snyder II*, 580 F.3d at 222 (citing *Milkovich* at 20).

²⁶ *Id.*

“no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about Snyder or his son”;²⁷ that the signs “do not assert provable facts about an individual”;²⁸ and that “the clearly contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned.”²⁹ “Whether ‘God hates’ the United States or a particular group, or whether America is ‘doomed’ are matters of purely subjective opinion that cannot be put to objective verification,” reasoned the Fourth Circuit.³⁰ Insofar as Snyder’s action was based on the funeral picketing, it was therefore properly subject to judgment as a matter of law under *Milkovich*, regardless of whether Snyder was a public figure or a private figure.

The same analysis was then applied to the “epic,” which was “patterned after the hyperbolic and figurative language used in the various signs.”³¹ Similarly, when the epic asserted that “the Snyders raised their son ‘for the devil,’ and taught him to ‘defy his Creator, to divorce, and to commit adultery”’ the reasonable reader would understand these assertions as “simply ‘loose, figurative, or hyperbolic language’ not connoting actual facts about Matthew or his parents. [] Thus, a reasonable reader would not understand the epic to assert actual facts about either Snyder or his son.”³²

In light of this analysis of the language in the signs and in the epic, the Fourth Circuit concluded that judgment as a matter of law should have been granted under the authority of *Milkovich*. In a concurring opinion, Judge Shedd reasoned that judgment as a matter of law for the defendants ought to have been granted on non-constitutional grounds under a doctrine of constitutional avoidance, if there were sufficient grounds for so ruling.³³ He then determined that the evidence on all of Snyder’s claims was, under substantive Maryland tort law, too weak to have withstood the defendants’ motion for a judgment as a matter of law. Judge King, who wrote the majority opinion for the panel, and Judge

²⁷ *Id.* at 223.

²⁸ *Id.*

²⁹ *Snyder II*, 580 F.3d at 223.

³⁰ *Id.*

³¹ *Id.* at 225.

³² *Id.* at 226 (quoting the epic, and also quoting *Milkovich*).

³³ *Snyder II*, 580 F.3d 206, 227 (4th Cir. 2009) (Shedd, J., dissenting).

Duncan, who concurred, declined to reach the question of whether the denial of judgment as a matter of law should have been granted below, because defendants waived the point by declining to appeal it.³⁴

II. A Critique of the Fourth Circuit's Opinion

The Fourth Circuit was plainly correct in criticizing Judge Bennett's jury instruction and in concluding that at a minimum, the judgment must be vacated and the case retried. The more controversial aspect of the opinion is the determination that judgment as a matter of law is warranted for the defendants under *Milkovich* even if Snyder was a private figure. In this Part, I argue that the Fourth Circuit's *Milkovich* analysis was weak in application and fundamentally flawed in principle. In so concluding, I do not reach the larger question of whether judgment as a matter of law is warranted on First Amendment grounds; that question is raised in subsequent parts. The only question here is the soundness of the Fourth Circuit's analysis.

The principal flaw in the Fourth Circuit's analysis is its failure to recognize that the tortious wrongdoings for which Snyder was seeking recovery were not reputational attacks. *Milkovich*, *Falwell*, and the rhetorical hyperbole case law leading up to *Milkovich* all confronted the following question: If a speaker makes fiery critical statements about the plaintiff, and does so in the context of staking out a very strong opinion, can the plaintiff sue for the injury inflicted by those statements? Chief Justice Rehnquist wrote, for the Court, that the key issue is not whether the defendant is staking out a strong opinion; statements of opinion may well be actionable under the First Amendment. The issue is whether what the defendant has said about the plaintiff amounts to asserting something that may be provably false. If the language on its face asserts something provably false, it is still possible that it is not actionable, because the context may be such that a reasonable reader would not understand it to be meant literally: for example, in *Greenbelt Co-Op. Publ. Assn., Inc. v. Bresler*,³⁵ the defendant newspaper quoted citizens

³⁴ *Snyder II*, 580 F.3d at 226.

³⁵ 398 U.S. 6, 20 (1970) ("No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary,

using the word “blackmail” to criticize the conduct of the plaintiff, a real estate developer who was pressuring a City Council to approve a project; the Court thought a reasonable reader would not understand the quoted speech as actually asserting that the crime of blackmail had occurred, but rather as criticizing the plaintiff for his use of financial prominence and power in lobbying for himself. In *Falwell*, defendant had published an ‘interview’ in which the Reverend Falwell allegedly described himself as losing his virginity to his mother in an outhouse; read in hindsight, through the lens of *Milkovich*, Rehnquist explained that the defendant plainly had not put forward these statements as genuinely true – Falwell was being attacked for what the defendant regarded as hypocrisy.

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

The Fourth Circuit was aware of this slippage at least to some extent, but it addressed it only briefly. “Although the Supreme Court in *New York Times* specifically addressed the common law tort of defamation, the Court explained that its reasoning did not turn on the precise ‘form in which state power has been applied.’”³⁶ “Accordingly, the Court later applied the First Amendment to other torts not involving reputational damages, []³⁷” “and we have applied the Court’s controlling principles to other state law torts,[] Thus regardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the

even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable”).

³⁶ *Id.* at 217-18 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

³⁷ *Id.* at 218 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (post-*Times v. Sullivan* principles applied to IIED claim)).

defendant's speech."³⁸ The Fourth Circuit's extension of defamation principles is given a boundary by reference to *Cohen v. Cowles Media Co.*³⁹ in its footnote 11: "The Supreme Court has deemed the First Amendment defense inapplicable to a state law tort claim only when the plaintiff seeks damages for actual pecuniary loss, as opposed to injury to reputation or state of mind."⁴⁰

To the extent that the Fourth Circuit's extension of *Milkovich* beyond the torts of libel and slander is based on the idea that the Supreme Court's First Amendment jurisprudence is anti-formalistic, the Fourth Circuit is surely correct. And more particularly, it is clear that the Court will not permit the technicality of what legal claims have been plead in the complaint to determine whether the First Amendment is applicable. Most relevantly, invasion of privacy claims plainly receive significant First Amendment protection, and the Court expressly struck down an IIED verdict, in *Falwell*, on *Times v. Sullivan*-related principles. Finally, the Fourth Circuit's own much heralded opinion in *Food Lion* showed that while a tort claim itself might stand up to First Amendment scrutiny, if the damages sought were essentially the same as they would be in a defamation claim and so the claim appeared to be something of an end run around the protections of *Times v. Sullivan* and its progeny, then tough-minded First Amendment scrutiny would be applied to such a case notwithstanding the different torts involved.

Yet the Fourth Circuit went far beyond any of the principles just articulated, for *Snyder* presents an entirely different fact pattern from those above. *Food Lion* involved a claim by a national supermarket chain whose alleged grossly unsanitary practices were the subject of a nationally broadcast ABC investigative report, which included videotape by undercover ABC reporters who had obtained clerical jobs at one or two of the stores. Food Lion's stock plummeted after the ABC broadcast, and it sued ABC, seeking damages for the harm ABC had inflicted on them through its tortious conduct. However, aware of the difficulties of proving a libel case, Food Lion argued that the investigative

³⁸ Id. at 218 (citing *Food Lion v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 523 (4th Cir. 1999) (post *Times v. Sullivan* principles applied to claim for fraud, breach of duty of loyalty, and trespass)).

³⁹ 501 U.S. 663 (1991). The Fourth Circuit's parenthetical reads "(concluding that First Amendment did not bar economic damages resulting from defendant's tortious breach of promise)." *Snyder II*, at 218 n.11 (citing *Cohen*, 501 U.S. at 671).

⁴⁰ *Snyder II*, at 218 n. 11.

reporters trespassed on their land, defrauded Food Lion into offering them jobs, and breached a duty of loyalty to Food Lion once they had become employed by them. The jury found for Food Lion on these tort claims and awarded large compensatory damages because of the stock plunge Food Lion suffered after these broadcasts. The Fourth Circuit accepted the finding of liability on these torts, and nominal damages associated with them, but did not permit the stock plummet damages, essentially because it regarded these as reputational damages for which Food Lion had found a back door.

Snyder's case is quite unlike Food Lion's. The wrongful injuring for which Snyder sought a remedy had nothing to do with a reduction of Snyder in the eyes of his community (which occurred in Food Lion). Indeed, it had nothing to do with the community coming to think of Snyder as a bad person in some way. Like a nuisance claimant, Snyder was alleging that there was activity in his own private life that he was entitled to experience without unreasonable interference, and that the Phelps intentionally (or at least knowingly and recklessly), did interfere with that experience. The Fourth Circuit was correct in noting that the picket signs were not *about Snyder* (with the possible exception of two that use the second person pronoun "You're Going to Hell" and "God Hates You"). Yet it inferred from this the claim would fail the *Milkovich* test. In so doing, it was getting things exactly backwards. The fact that Snyder was not being targeted for a reputational attack shows that the wrong for which Snyder was suing was not some form of reputational attack, and that, therefore, even a broadened version of *Milkovich* cannot dispose of the claim.

An exaggerated hypothetical might clarify the fallacy of the Fourth Circuit. Suppose that the signs held by the Phelps were used as weapons in physical thrashing and beating of persons on the sidewalk in Westminster, Maryland. No one would say that, given the nonverifiability or nonfalsifiability of the contents of the signs, there could be no battery claim. Or suppose that a loud Rap group has a band practice in the house next door to me every night from 1 a.m. until 5 a.m., for six months straight. If I were to sue for nuisance, it would not be necessary for me to prove that some of the lyrics of the Rap songs were verifiable or falsifiable statements about me. The interference with the solemnity and privacy of a funeral for a beloved family member by an extremist political demonstration

was the wrong, not any reputational attack. It is neither here nor there whether the signs held up contained verifiable statements, for the right to say what was said is not what is being contested. The right to interfere with the family's mourning is what is contested, and the legal status of the alleged right does not turn on whether the contents of the signs were verifiable.

The *Milkovich* critique is more plausible as to the aspects of the claim that emerge from consideration of the epic. The epic actually did contain many statements about the plaintiff and was, in some sense, a reputational attack. The Fourth Circuit's analysis of some of the language in the epic was quite justifiable. For example, when the defendants stated that "God rose up Matthew for the very purpose of striking him down, so that God's name might be declared throughout all the earth,"⁴¹ their language would seem to be beyond the realm of the verifiable. Other parts of the Fourth Circuit's analysis are less plausible. The defendants named Matthew Snyder's parents and asserted certain statements about how they raised Matthew: "Albert and Julie . . . taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity...They also, in supporting satanic Catholicism, taught Matthew to be an idolator."⁴²

It is hard to understand the Fourth Circuit's determination that these are not the sorts of statements that could be proved false. The court appears simply to be saying that a reasonable reader would understand the defendants to be engaged in a sort of hysterical venting that were not founded on genuine information as to how Matthew's parents in fact reared him and what they in fact taught him. Perhaps that is so. But that is quite different from statements that contain rhetorical or figurative language. Alternatively, the Fourth Circuit might have believed that a reasonable reader would understand the defendants to mean that the uncontroverted facts of Matthew's upbringing – being raised Catholic by parents who themselves went on to divorce – was equivalent to a "teaching" of the form they decry, and that assertion of an equivalence was itself not verifiable or falsifiable. While such a broad

⁴¹ Id. at 225.

⁴² Id. (*quoting* the epic).

reading of *Milkovich* is consistent with the Fourth Circuit's precedent, there is ample reason to think that Chief Justice Rehnquist was aiming for a far less defendant-indulgent conception of protection for opinion in that case; indeed, it is widely recognized that the fact pattern before the Court in *Milkovich* itself would have been categorized as non-actionable by many courts, in light of the fiery rhetorical context in which it appeared, but the Court insisted that since the content of the assertion was itself factual, the First Amendment protection did not cover it.

Let us put aside the epic, and assume *arguendo* for the remainder of this essay that the Fourth Circuit's disposal of Snyder's claims insofar as they were based on the epic were justifiable. Its analysis of Snyder's claims insofar as they were based on the funeral picketing was clearly unsound. Snyder was not seeking redress for a reputational attack, but for an interference with the privacy of his grieving and the infliction of emotional distress precipitated by the interference. Pointing out that the words on the signs were nonfalsifiable is utterly nonresponsive to these claims. Were the invasion of privacy and IIED claims simply end-arounds, as the fraud and trespass claims in *Food Lion* were, for reputational harm, that would be a different matter. There is no reason to believe that is the case. The end-around in *Snyder* is the Fourth Circuit's, not the plaintiff's; the Fourth Circuit understandably wanted to avoid the difficult question of whether *Falwell* level protection applies to a claim brought by a private figure, and therefore tried to resolve the case with *Milkovich*, which applies to public figures and private figures alike. For better or worse, *Milkovich* does not suffice to resolve *Snyder*.

III. Outrageousness and Volokh's First Amendment Critique of IIED

The Phelps themselves have understandably supported the Fourth Circuit's *Milkovich* analysis in arguing to the Supreme Court that the Fourth Circuit's decision should be affirmed, despite the weaknesses of that opinion. They have also argued that Albert Snyder was a limited purpose public figure – a remarkably implausible position, given that the Snyder conduct upon which they premise his limited purpose public figure status occurred *after* the defendants' allegedly tortious conduct. Ironically, the strongest argument for the Phelps is one suggested by the petitioners' framing of the issue: it is the

proposition that *Falwell*'s requirement of actual malice in an IIED claim should apply to private figures and public figures alike, so long as the speech upon which the plaintiff's claim is predicated concerns a matter of public concern. Although the Phelps do not seem to have taken that position as a general matter, the Supreme Court of Arizona adopted a similar view in *Citizens Publishing Co. v. Miller*.⁴³ Moreover, several amicus briefs in support of Respondents have advocated this view. Most notably, Professor Eugene Volokh, a First Amendment scholar at UCLA School of Law, has written two articles and several blog posts taking this position,⁴⁴ and has submitted (with an education foundation and other First Amendment scholars) an amicus brief advocating this position in *Snyder*.⁴⁵

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

“Outrageousness” in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An “outrageousness” standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.⁴⁶

This set of observations by the *Falwell* Court does not appear to depend at all on the public figure status of the plaintiff. Rather, argues Volokh, it relies on the vague and subjective nature of the concept of outrageousness in the tort of IIED. Vagueness is both a due process problem and speech-chilling

⁴³ 115 P.3d 107 (Ariz. 2005).

⁴⁴ See Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 Cardozo L. Rev. de novo 300, at www.cardozolawreview.com/index.php?option=com_content&view=article&id=149:volokh2010300&catid=21:funerals-fire-and-brimstone&Itemid=26 See also Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, UCLA School of Law Research Paper No. 10-15 (forthcoming in the Iowa Law Review). <http://volokh.com/2010/03/08/the-intentional-infliction-of-emotional-distress-tort-and-the-freedom-of-speech-2/> and related posts by Volokh on *Snyder*.

⁴⁵ Brief of Amici Curiae the Foundation for Individual Rights in Education and Law Professors Ash Bhagwat, David Post, Martin Redish, Nadine Strossen, and Eugene Volokh, 2010 WL 2826987.

⁴⁶ *Falwell*, 485 U.S. 46, 55 (1988).

problem, since one cannot predict which statements will be deemed outrageous and is therefore prone to self-censorship. Subjectivity is a problem for similar reasons; more generally, the law cannot be used as a tool for a community simply to punish speech that its members happen to find offensive. Both of these First Amendment vices exist regardless of whether there is a public figure or a private figure. The logic of the argument therefore implies that unless the speech in question is provably false – in which case it has no First Amendment value – the tort of outrage as applied to a case involving political speech is a violation of the First Amendment, whether the plaintiff is a private figure or a public figure. For the sake of completeness, Volokh adds that the Snyder’s successful invasion of privacy claim under Maryland law was similarly untenable as a matter of First Amendment doctrine because the concept of “offensiveness” critical to that tort is vague and subjective in just the ways that “outrageousness” is in IIED.

This principled argument, allegedly rooted in the reasoning of *Falwell*, is buttressed by a classic first Amendment slippery slope argument. If this hysterical anti-gay speech at a peaceful funeral picketing is deemed to be unprotected, then a huge array of potentially provocative speech may suddenly be subject to legal sanction or restriction: this includes political cartoons ridiculing Muslims, politically incorrect speech on college campuses, regulated by college speech codes, threatening anti-immigration statements in the newspaper, and so on. So long as these kinds of speech might be found “outrageous” by a jury and a plaintiff is willing to say he was emotionally harmed, there is a possible claim. The chilling effect would be enormous.

Volokh anticipates the argument that the Phelps were properly vulnerable to an IIED claim because their speech was put forward at a funeral. He asks whether Maryland’s willingness to impose liability for IIED because the picketing occurred at a funeral could be viewed as a sort of tort law version of content-natural time-place-and-manner restriction. The answer is no, he argues, because the jury was invited to opine on the content of the Phelps’ speech, and not only where and when it occurred.

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

Having lost that battle as a general matter, the plaintiff argued further that since the conduct only generated liability under Virginia law if the jury deemed it "outrageous," the First Amendment protection should give way; in short, Falwell ultimately argued for an exception from the general First Amendment holding based on the fact that an especially egregious sort of conduct was being targeted – that which a jury found "outrageous." The Rehnquist language quoted by Volokh is a rejection of that plea for an exception; Rehnquist expressed a lack of confidence in the capacity of the "outrageousness" concept to cabin the exception to the First Amendment protection for political satire of a public figure that the Court had already decided was critically important. The Court was *not* expressing a view that there was a vagueness and subjectivity problem in the concept of "outrageousness" that prevented IIED from figuring as a defensible state tort.

There is an important reply to this objection to Volokh's argument; to be fair to Volokh, the more limited significance of Rehnquist's language simply shows that *Falwell* itself should not be interpreted as

reaching out to make Volokh's larger point about the tort of IIED. It leaves open the question of whether the Court *should* hold that any version of IIED utilizing the concept of outrage must fall under the First Amendment even in private figure cases. And as to that question, Volokh's position is cogent: the vagueness and subjectivity of "outrageousness" demand rejection of IIED in cases involving political speech. A more detailed articulation of his view is presented on his well-known blog, *The Volokh Conspiracy*:

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

And such speech should also not be restricted using standards that leave jurors, university administrators, and other government decisionmakers free to impose liability based on the viewpoint of speech, under the vague and subjective "outrageousness" test. One defender of the Snyder verdict views the subjectivity as a virtue: "The determination of when this behavior crosses the line into outrageous conduct is rightly left up to a jury that will apply its own notions of reasonableness to decide what conduct should rise to the level of liability." "Civil action judgments 'reflect social conventions and tend to reflect what the majority believes' to be acceptable behavior." But the Supreme Court rightly said that such an approach is not permitted under the First Amendment: "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective

basis, with the attendant dangers of arbitrary and discriminatory application.”⁴⁷

Thus, even conceding that the *Falwell* Court was criticizing the vagueness and subjectivity of the concept of outrageousness only in the context of political satire of public figures, *Snyder* forces us to ask the broader question: Is the concept of outrageousness too vague and subjective to serve as a standard of liability, particularly in cases involving political speech? And once the question is asked, pushes Volokh, the answer is blindingly obvious: *Yes, the concept of outrageousness is too vague and subjective to serve as a standard of liability, especially when political speech is involved.* Alert to the presence in the Phelps’ claim of a privacy tort that does not expressly turn on outrageousness, Volokh cleverly suggests that the central place of the requirement that the privacy invasion be “offensive” in the intrusion tort is essentially a variation of the notion of “outrageousness” in IIED, and suffers from all of its constitutional infirmities, too.

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

Vagueness doctrine in constitutional law is rooted in the Due Process Clause.⁴⁸ Most basically, it has been used to challenge criminal statutes that did not identify prohibited conduct with sufficient

⁴⁷ Eugene Volokh, My Short Essay on *Snyder v. Phelps*, Part I: The Wisdom of *Hustler v. Falwell*, dated March 24, 2010, posted at <http://volokh.com/2010/05/24/my-short-essay-on-snyder-v-phelps-part-i-the-wisdom-of-hustler-v-falwell/#> (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

⁴⁸ See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718 (2010).

specificity to provide adequate notice, and to constrain the conduct of legal decisionmakers, such as judges and prosecutors.⁴⁹ Both in theory and in practice, vagueness arguments have been used to support due process critiques of regulations, ordinance, and regulatory enforcement actions beyond the criminal area.⁵⁰ In the past twenty years, defendants attacking state punitive damages law have persuaded a majority of the Justices to anchor their critiques in the Due Process Clause,⁵¹ and to utilize a combination of arbitrariness and vagueness arguments in supporting that critique.⁵² Vagueness has been used as a shield in several different strands of First Amendment case law.⁵³ To a significant extent, however, the original First Amendment vagueness cases were also criminal law cases: the criminal statutes in question targeted either speech or associations, and sought to inflict criminal responsibility for expression of ideas or association. Vagueness was viewed as a problem of constitutional moment in criminal cases and a fortiori in criminalized speech cases.⁵⁴

To a great extent, vagueness doctrine counteracts law that restricts liberty in two ways: the liberty to be free of the punishment imposed for of doing certain proscribed acts, and the liberty to do the proscribed acts. In criminal free speech cases, the proscribed conduct is speech, thereby making the liberty interest especially important in Constitutional jurisprudence. Thus, to a great extent, vagueness critiques in free-speech cases are simply a special application of vagueness doctrine more generally, with special solicitude for the substantive liberty (freedom of speech) that is, in effect, restricted by overly vague law.⁵⁵ Insofar as vagueness critiques are available where civil rather than criminal liability is in play, this is in part because the notice shortcomings that bedevil vague laws have a chilling effect, thereby diminishing the public good that the Court has deemed part of the purpose of the First Amendment, and in part because the protected liberty is deemed of such constitutional moment. Finally, as Richard Fallon

⁴⁹ See, e.g., *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Kolender v. Lawson*, 462 U.S. 352 (1983).

⁵⁰ *Hoffman Estates*, 455 U.S. at 498-500. See, e.g., *Diversified Numismatics, Inc. v. City of Orlando, Florida*, 615 F. Supp. 141 (M.D. Fla. 1985).

⁵¹ See *BMW of N. America, Inc., v. Gore*, 517 U.S. 559 (1996).

⁵² See, e.g., *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 417-18 (2003).

⁵³ See generally, Richard D. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853 (1991) (setting forth and analyzing role of vagueness in free speech cases and placing it in context of overbreadth doctrine).

⁵⁴ See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

⁵⁵ *Id.*

has explained, vagueness in free speech cases that is playing a role different from that which it plays in non-free speech cases is essentially a form of First Amendment overbreadth analysis.⁵⁶ Because overbreadth analysis is essentially about whether legislative text should be struck down facially, and *Snyder* is a common law case, Volokh's vagueness argument is not properly interpreted as an overbreadth analysis.

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

IV. Interlude: the Open Texture of Tort Law

In his landmark book *The Concept of Law*, H.L.A. Hart recognized that legal terms and concepts operate with various different levels of precision, crispness, and clarity.⁵⁷ In many cases, lawmakers formulate a policy and then enact a piece of legislation with clean edges in order effectively and clearly to implement that policy. For example, one might wish to minimize the occurrence of injuries caused by intoxicated drivers, and therefore enact a statute under which any person driving with a blood alcohol level of .08% was committing a felony. In other cases, however, one might want to provide guidance for the resolution of various disputes in a manner that accorded with social norms and was deemed fair and balanced, and one might to this end entrench in the law a far less clear norm. For example, one might hold persons liable for accidental injuries they caused only if the person failed to exercise the care a reasonably prudent person would have exercised under the circumstances. Hart described the occurrence

⁵⁶ Fallon, *supra* note __, at 905.

⁵⁷ H.L.A. Hart, *The Concept of Law* (2d ed. 1994).

of such legal concepts as reasonableness as “the open texture of the law.”⁵⁸ He rightly commented that, in statutes, where language is used to articulate rules, the language is often not as sharp-edged as some would wish. The fuzziness of language around the edge is one of the ways in which law is open-textured. In common law systems where precedent, rather than text, serves the guiding role, the need to find the most pertinent dimension(s) of resemblance to precedent obviously serves to make the law quite open-textured. A rich vein of academic writing since Hart has used the term “standards” to refer to more relatively open-textured provisions of the law, and “rules” to refer to provisions with greater clarity, and has set forth with great sophistication the pros and cons of rules and standards.⁵⁹ In any event, it was clear to Hart and should be equally clear to us today that tort law is chalk full of standards – tort law is as open-textured as any area. To the extent that Volokh’s challenge is based upon what is essentially the open-textured nature of the concept of outrageousness in the tort of IIED, we must be ready to ask ourselves how much of tort law would survive the constitutional scrutiny that Volokh and the Phelps are aiming to apply.

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

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

⁵⁸ *Id.* at 128.

⁵⁹ See, e.g., Kathleen M. Sullivan, *1991 Term Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1991).

punished for non-compliance must have been given notice of the rules. Each citizen's vulnerability to sanction for non-compliance with a rule is conditioned on the rule's having been sufficiently published to constitute prior notice. Norms demanding some level of clarity (and concomitantly prohibiting certain levels of vagueness) are part-and-parcel of the criteria for sufficient ex ante publication of the enforceable rules of conduct.

Tort liability does not work this way.⁶⁰ The imposition of liability is not the sovereign's carrying through on the threat of liability for non-compliance with an enforceable rule of conduct. Tort claims – unlike criminal prosecutions or regulatory enforcement actions – are claims by allegedly injured parties seeking redress for having been wrongfully injured. A tort plaintiff uses the court to do so; he aims to exercise a right to exact damages from the one who wrongfully injured him. When a court imposes liability on a defendant, it accedes to the plaintiff's demand that liability be imposed on the defendant to the plaintiff. Liability imposition is not a sanction for non-compliance, but an empowerment of a wrongfully injured party. The reason a defendant is vulnerable to the plaintiff's claim, as facilitated by the court, lies in the defendant's having wrongfully injured the plaintiff, not the defendant's having broken a rule. To be sure, the defendant's vulnerability to a tort claim also depends on law, but it depends on the precedents for such acts of empowerment by courts. The precedents will, in turn, build upon various notions of wrongs – like battery, trespass to land, medical malpractice, negligent infliction of physical injury, libel, fraud – but the common law has never been understood by our constitutional tradition to require any sort of crisp definition of those wrongs as a condition of the constitutional permissibility of tort judgments. Indeed, while we ought to remain vigilant of the importance of protecting a defendant's vulnerability to a private individual's tort claims, we also ought to remain vigilant of the importance of protecting a plaintiff's individual right to redress. Although there is an important sense in which tort law implicitly contains norms of conduct and duties of conduct as part and

⁶⁰ The account of tort law and tort liability set forth here is fundamentally interpretive and positive, not normative, and has been set forth in detail in several other places. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *The Oxford Introductions to U.S. Law: Torts* (2010) (explaining Civil Recourse theory of tort law, and distinguishing tort law from criminal and regulatory law); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 *Vand. L. Rev.* 1 (1998).

parcel of those norms, tort law's norms in the first instance are about which injuries of others will count as *injurious* for which another individual can be held accountable. The state's role is one of referee and enforcer when one individual demands to have another held responsible to her; that is very different from the role of prosecutor and punisher. The requirement for clear advanced notice of the rules is – to at least some degree – a safeguard of individuals insofar as they face prosecution and punishment by the state.

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

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

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

With regard to judges, jurors, and citizens, the common law's rootedness in social norms and social conventions provides another important constraint. The reasonably prudent person standard of negligence law, for example, is meant to be an elaboration of the notion of *ordinary* care. This standard is not aimed to draw attention to what economic rationality would demand or what unvarnished moral truth

would require; it is aimed to draw attention to what we conventionally expect of one another by way of taking care, and to place that inquiry in the hands of ordinary people. Many of the standards of tort law are thus aimed to be unambitious, undemanding, intuitive, and almost second nature. While this is hardly notice in the sense that we conceive the constitution to require of the criminal law, it is a kind of law and a kind of responsibility where one does not need to be told.

A fifth sort of constraint relates to a large portion of tort law, that which involves accidents. To a significant extent, the liability in tort for accidents arrives with a sort of responsibility attribution that has been morally declawed; the social meaning of tort liability for a wide range of accident cases is a far cry from punishment, and, while not fault-free, is plainly much less rooted in blame. At a concrete level, tortfeasors are able to insure for their tort liability, and for a wide range of legal actors, tort liability comes closer to being a cost of doing business than a form of legal culpability. Although I, along with Professor Goldberg and many corrective justice theorists, have cautioned against an overinterpretation of tort law as accident law, and have insisted that even accidentally caused injuries are still framed by our tort law as “wrongs,” it is fair to observe that tort law as to many accidental injuries plainly serves a compensatory and loss-shifting role (among others) in our legal system. The constitutional norm of advance notice for punishable wrongs is attenuated to the extent that our society’s social understanding of tort law involves an understanding of wrongs in this attenuated sense.

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

patent wrongfulness of these torts and the intentionality built into their definitions counterbalance, to a significant degree, their open texture.

V. The Putative Vagueness of “Outrageousness” in the Tort of IIED

We now turn from the open-textured nature of tort law generally, and the law’s means of controlling that, to the open-textured and in some ways subjective nature of the tort of IIED, particularly in light of the central place of the concept of outrageousness in that tort. When we understand just how IIED works and how outrageousness figures within it, and when we recognize the many tools that tort law uses to remain tolerable from a due process point of view, we will see why the imposition of liability for IIED is in principle far less problematic than it might first appear to be.

To the eyes of those who are unfamiliar with tort law in general or with IIED in particular, it might seem that a tort with the name “Intentional Infliction of Emotional Distress,” which turned on findings of “outrageousness,” was among the most untethered. This would be exactly backwards. In fact, because the kind of harm involved – emotional distress – has always generated concerns about fraudulent plaintiffs, IIED is among the most heavily guarded torts. This begins with the anchor in harm. Not only is it clear that plaintiff must demonstrate harm and not only must the harm be deemed “extreme,” it is often the case that courts erect tough evidentiary requirements about the proof of the extent of the harm before they are willing to recognize any liability at all. Some jurisdictions will require medical testimony or affidavits, documenting psychological damage for which defendant is allegedly trying to avoid blame. There is no question that the capacity to recover any verdict at all requires having demonstrated such damage to the jury.

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

level expected for the tort. Thus, for example, sexually inappropriate behavior and the hurling of racist epithets usually do not generate liability because defendants argue that these sorts of conduct are quite common. Courts frequently reject IIED claims as a matter of law on the ground that the conduct was wrongful but not beyond the pale, not outside of what (unfortunately) is the range of bad acts people frequently engage in, just as they frequently recognize *genuine* emotional distress, but decline to recognize a cause of action because its severity is not sufficient. The open texture of the tort of IIED facilitates a remarkably supple means for defendants to craft arguments that succeed in extricating them from liability.

The law of IIED involves special sorts of judicial gatekeeping at both the procedural and the substantive levels. The tort is typically treated as having three or four elements (depending on whether, as in Maryland, causation is separated out⁶¹): (a) conduct by the defendant that is outrageous and extreme; (b) engaged in by defendant with the *intention* of causing emotional distress, or with *knowledge* of or *recklessness* regarding the emotional distress it will inflict on others; (c) which causes severe emotional distress.⁶² Although each of these is a fact issue for the jury, the great majority of courts (including those of Maryland) take the view on element (a) that the court must make a preliminary determination on the issue of whether the conduct could be found by a jury to be outrageous. The brand new Restatement (Third) of Torts explains this unusual feature: “A finding of extreme and outrageous conduct is as much a normative judgment as it is a finding of historical fact (although that is often true of a finding of negligence). The court, however, plays a more substantial screening role on the questions of extreme and outrageous conduct and the severity of the harm.”⁶³ The institutional need to keep bounds on the drift of the tort, and the liberty-based need to protect defendants against the whim of juries are the principal rationales for this widely accepted feature of the tort.

⁶¹ *Snyder II*, at 231 (Shedd, J., dissenting) (characterizing District Court’s jury instruction, following Maryland’s four-element IIED formulation in *Harris v. Jones*, 370 A.2d 611, 614 (Md. 1977)).

⁶² *See, e.g.*, *District of Columbia v. Tulin*, 994 A.2d 788, 800 (D.C. 2010).

⁶³ Restatement of Torts (Third): Liability for Physical and Emotional Harm § 45, comment f (“Judge and Jury”).

As the quoted passage from the Restatement indicates, courts also are more vigilant in scrutinizing the third element – the severity of distress – than is the case with other torts, for largely the same reasons as those just mentioned. Moreover, in many jurisdictions, there is either a requirement that the claim of severe emotional distress receive substantial evidentiary support, either by reference to physical symptoms of the distress, or by expert psychological or psychiatric testimony, or both.

Most importantly, the judicial role in IIED is crucial at a substantive level. Indeed, it is quite misleading to think of IIED as a single tort whose principal conduct element is simply “outrageous conduct.” One must understand that part of what it is to articulate the contours of a tort – as Prosser famously did in his classic 1939 article on IIED,⁶⁴ and also in the Restatement – is to identify what is in common in various scenarios in which liability is imposed for a certain kind of injury. In doing so, however, a tort scholar could be saying that what makes the infliction of the injury constitute an actionable wrong is that this impermissible aspect of conduct exists in each instance – outrageousness, along with intentionality and severe emotional distress makes a sufficiently wrongful act to warrant the imposition of liability, all considered. But that is not the only way to understand how it is that some attribute of conduct comes to count as an element in the structure of a tort. Sometimes what is happening is that courts have identified a variety of different kinds of injurious acts that they are willing to treat as wrongs, but theorists and courts – for a variety of systems-reasons – need to identify a differentia or differentiae in common among these in order to classify them as one tort. This is arguably the best way to understand even such a basic tort as negligence: medical malpractice and carelessly inflicted injuries in auto accidents both count as the tort of negligence, but the element of ‘negligence’ (or ‘breach’ or falling below “due care”) common to both is not so much the essence of the wrong as the differentia because of which they each count as instances of the same tort.

As a historical matter – and perhaps as a conceptual matter too – this is how “outrageousness” has functioned in the tort of IIED. Over decades and even centuries, courts recognized clusters of cases in the following areas: striking effrontery in dealing with passengers or guests, vicious practical jokes, gross

⁶⁴ William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874, 885-86 (1939).

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

It is therefore a serious understatement to say that there is substantial judicial gatekeeping as to juries’ findings on “outrageousness.” For not only will courts make a preliminary determination as to whether juries could so find, and not only will they scrutinize the record after the fact to think about this as a matter on which courts carry power. Part of the task of ascertaining whether there is outrageousness is the task of placing the fact pattern within the set of scenarios that do or should count as emotional tort wrongs at all. The tort is not acting outrageously and thereby causing severe emotional distress. The tort is a family of torts loosely captured through the notion of outrageous conduct, and courts engage in

precedent-based reasoning with only incremental movement forward in order to answer the question of whether the fact-pattern warrants thinking there is any tort there at all.

Two other aspects of our discussion of process-protections in tort law are exemplified by IIED: conventionalism, and the insurability/intentionality feature. It is often stated that conduct qualifies for the tort only if it is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”⁶⁵ Likewise, in the much quoted words of the Restatement (Second), “[g]enerally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”⁶⁶ These are highly conventionalistic statements. The first effectively states that the conduct will not qualify unless clearly falls well outside of the periphery of basic standards of socially acceptable conduct. The second makes effectively the same point, utilizing the automatic subjective responses of the socialized ordinary person as a barometer of the degree to which the conduct deviated from socially acceptable conduct; the conduct must fly off the conventionalism chart if it is to count as inculcating the defendant for the tort.

Scholars naturally criticize the vagueness and apparent circularity of these principles, but this is really to miss what is happening. If one thinks of the tort itself as imposing liability for intentionally, knowingly, or recklessly causing severe emotional distress through intentional conduct done within certain kinds of scenarios (e.g., cruel practical jokes, extortion) then the tort would be quite cogent, but it would seem to carry quite a broad domain of liability. The requirement of conduct that everyone would call “outrageous” is in effect a decision narrowing this domain of liability in a special way: by insulating defendants from liability *except in the case where the most basic familiarity with social norms and conventions would lead everyone to recognize that the conduct was well beyond the bounds of decency.* My point here is not that this built-in protection suddenly makes the tort irreproachable; it is simply that

⁶⁵ Restatement (Second) of Torts § 46(2), comment d.

⁶⁶ *Id.*

the conventionalism of the law's understanding of "outrageousness" serve to diminish, rather than exacerbate the notice problems others have attributed to the tort.

Finally, like many torts that provide redress for non-physical harm, the tort of IIED is by definition an intentional tort. There are many reasons for an intentionality requirement – one is that, as in *Times v. Sullivan* (where the Court permitted liability for knowing defamation or its equivalent) the broad inclination toward a non-liability regime runs into a contrary instinct where legal actors are willfully, maliciously, or recklessly inflicting injury upon others. Another reason, however, relates again to notice and therefore indirectly to due process. Those who wish to avoid liability have it completely under control whether they do so; the intentionality requirement ensures that we do not have accidental liability here, but only liability where someone has deliberately chosen to behave in way that they know will inflict serious injury upon others.

VI. *Snyder v. Phelps* Revisited

The analysis above allows us to think more carefully about the vagueness attack on IIED in the context of *Snyder*. Preliminarily, IIED claims are very much on the tort side of the tort/criminal division. The state has not passed a statute condemning outrageous conduct or speech, nor has it laid down a recommendation to that effect. Curiously, many states did in fact enact statutes to protect those at funerals against picketers – the Phelpses were the principal precipitators of state legislative action.⁶⁷ Those statutes have been challenged in several courts around the country, with mixed results.⁶⁸ In any case, however, the plaintiff Snyder is not acting as a private attorney general of Maryland demanding that

⁶⁷ See *Snyder II*, 59 F.3d at 212, n. 1, which reads: "The Defendants have a substantial history of protesting at venues other than soldiers' funerals. For example, on the day of Matthew Snyder's funeral, they also protested in Annapolis at the Maryland State House and at the Naval Academy. The Defendants have also been involved in litigation throughout the country relating to their protests. See, e.g., *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir.2008); *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir.2008). As a result of such activities, approximately forty states and the federal government have enacted legislation addressing funeral picketing. See Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. Kan. L.Rev. 575, 576 (2007)." (citation form altered).

⁶⁸ Compare, e.g., *Phelps-Roper v. Heineman*, --- F.Supp.2d ----, 2010 WL 2545780 (D.Neb.,2010) (denying motion to grant preliminary injunction) with *Phelps-Roper v. Nixon*, 585 F.3d 685 (8th Cir. 2008) (ruling that Phelpses' First Amendment right prevailed against state interests underlying funeral picketing statute).

some criminal or regulatory fine be handed out; Snyder is suing for a wrong to him.⁶⁹ The question is not whether Maryland may utilize the concept of outrageousness in a legal framework aimed at punishing the Phelps for something they did wrong, in which ex ante warnings of the legal duty would be necessary. Similarly, we are not here dealing with a campus speech code. Such codes – concern over which supplies the driving force of the First Amendment scholars amicus brief to the Supreme Court in *Snyder* – are campus-community analogues of criminal or regulatory prohibitions, which come from on high a set of conduct rules demanding compliance.⁷⁰

The question in *Snyder* is rather whether Maryland may use the tort of IIED, with the concept of outrageousness that functions within it, to empower Snyder to redress the injury to him done by the Phelps.⁷¹ The fact that Snyder sought and received a substantial punitive damages verdict does merit

⁶⁹ Snyder sought and obtained a large punitive damages verdict (\$8 million, on top of a compensatory damages verdict of \$2.9 million) which the District Court Judge substantially reduced (from \$8 million to \$2.1 million) under the Maryland decision *Bowden v. Caldor, Inc.*, 710 A.2d 267 (Md. 1998). *Snyder I*, 533 F. Supp. 567, at 594-97. *Bowden* requires trial judges to ensure that punitive damages verdicts are commensurate with defendants' abilities to pay, are not duplicative, and comply with several other factors including those that the Supreme Court has identified as critical. The District Judge also ruled that the punitive damages verdict complied with *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). *Id.*, at 589-94; the verdict was, after all, *below* a 1:1 ratio to compensatories. The Fourth Circuit summarily rejected the Phelps' appeal of the decision on constitutional due process, including it among several bases of appeal that the Fourth Circuit deemed to be "plainly without merit." *Snyder II*, 580 F.3d 206, at 216. The Phelps did not petition for certiorari on any punitive damages issues.

Notwithstanding my view that the District Court fairly ruled that the damages verdict were within the letter of *Gore* and *Williams*, under the rational reconstruction and extension of *Williams* I have proposed in another article, the punitive damages verdict in *Snyder I* might still be deemed highly constitutionally problematic. Benjamin C. Zipursky, *Punitive Damages After Philip Morris USA v. Williams*, 44 COURT REVIEW 134 (2008-09). The framework set forth in that article would require that, insofar as the punitive damages are awarded to vindicate plaintiff and are believed by the jury to represent an award the plaintiff is himself entitled to exact from defendants, it is constitutionally permissible (under the Due Process Clause) that such an award be arrived at and enforced through the processes of the common law of torts, but insofar as Snyder is serving as a private attorney general for what is, in effect, a Maryland criminal or regulatory regime, they are not, in principle, permissible under Due Process standards. *See also*, Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 Texas L. Rev. 105 (2005).

⁷⁰ Brief of Amici Curiae the Foundation for Individual Rights in Education and Law Professors Ash Bhagwat, David Post, Martin Redish, Nadine Strossen, and Eugene Volokh, 2010 WL 2826987.

⁷¹ The United States Supreme Court's most important decision cutting into state tort law is probably *New York Times v. Sullivan*, and it is no accident that this case conspicuously veered near criminal law, in the eyes of the Justices. The plaintiff was not exactly a private party; he was the Commissioner of Montgomery, Alabama, suing in response to a statement that did not name him as a private person but criticized governmental "authorities." There was no evidence of any actual injury or any reputational harm to *him*, and the Court understood the claim as virtually an equivalent of a criminal libel action brought through the instrument of state libel law. Of course, First Amendment libel law has progressed enormously since *Times v. Sullivan*, and I am not suggesting a quasi-criminal aspect to a case is necessary in a tort case for First Amendment scrutiny in particular or Constitutional scrutiny

analysis, however even apart from the fact that the District Court conscientiously applied Maryland law to remit the damages award,⁷² our analysis of IIED and *Snyder* must address, in the first instance, the right to obtain a judgment providing compensatory damages.

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

First and foremost, the fact pattern in *Snyder* falls easily within one of the best-established clusters of IIED cases: defendants who inflict emotional harm when dealing with emotional sensitivities of those who attempting to cope with the death of a loved one. Magruder’s and Prosser’s classic articles

generally to apply. The point is simply to note that our understanding of tort law generally as standing apart from the constitutional scrutiny of legislation is not inconsistent with the broad swath of cases flowing from *Times v. Sullivan*; rather, *Times v. Sullivan*’s identity as the vehicle through which the Court entered state tort law into Fourteenth Amendment scrutiny is yet further evidence that the state-driven nature of the attack on a defendant is part of what renders constitutional scrutiny especially appropriate, and the privately-driven nature is part of what has sustained a different and in some ways more deferential level of constitutional scrutiny.

⁷² See Zipursky, *supra* note 21 (discussing punitive damages in *Snyder* and explaining private law conception of punitive damages).

on emotional distress torts indicate, “mishandling of corpses has given rise to another large group of cases where the courts have given redress for injured feelings.”⁷³ As Prosser recognized, the law’s willingness to recognize a right of action here is *not* rooted in the idea that the corpse is a piece of property that must not be damaged.⁷⁴ Indeed, some of the oldest emotional distress torts involve imposition of liability on telegraph companies who wrongfully delay transmission of a telegraph informing someone’s death, thereby causing someone to miss the funeral of a close family member.⁷⁵ The idea is that, even if individuals do not generally have a special claim on others to be vigilant of their emotional well-being – or at least not a claim that rises to the level of salience and seriousness that warrants recognition as an actionable legal right – where the emotional well-being concerns efforts of an immediate family member to endure the death or dying of a family member, *individuals do have a claim upon others that they not act carelessly or recklessly to risk significantly interfering with that emotional sensitivity.*

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

A successful claim for outrage and invasion of privacy from Florida aptly illustrates this cluster of cases. *Armstrong v. H&C Communications, Inc.*,⁷⁶ like *Snyder v. Phelps*, involved a father (and mother) who claimed that the defendant’s outrageous conduct interfered with their grieving the loss of a

⁷³ Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1064 (1936). See also, William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874, 885-86 (1939) (“A number of decisions have involved the mishandling of dead bodies, whether by mutilation, disinterment, interference with burial, or other forms of intentional disturbance.”).

⁷⁴ Prosser, *supra* note __, at 886.

⁷⁵ See, e.g., *Young v. Western Union Tel. Co.*, 107 11 S.E. 1044 (N.C. 1890).

⁷⁶ 575 So.2d 280 (Fla. 5th D.Ct.App. 1991).

deceased child. Robert and Donna Armstrong's six-year old child, Regina Mae, was abducted in June of 1985 and her remains were found by a construction worker three years later. A memorial service was held on August 22, 1988 in Orlando. That same day, a reporter for the defendant, which produced Channel 2 News, went to the Police Department that held the child's skull (the Oviedo Police Department) and videotaped the skull. The evening of August 22, the Armstrongs were watching Channel 2 News, which showed film footage of the memorial service that had occurred as well as a videotape of animal remains that originally were believed to be the remains of child. "Then the cameramen cut directly to the Oviedo Police Chief removing her skull from the box, zoomed in for a frontal close-up of the tilted skull facing directly at the camera"⁷⁷ and the voice-over described the skull as that belonging to Regina Mae Armstrong, who was being memorialized that day. The Florida appellate court had "no difficulty in concluding that reasonable persons in the community could find that the alleged conduct of Channel 2 was outrageous in character and exceeded the bounds of decency so as to be intolerable in a civilized community." "Indeed," concluded the court, "if the facts as alleged herein do not constitute the tort of outrage, then there is no such tort."⁷⁸

Similarly, the Appeals Court in *Green v. Chicago Tribune Co.*,⁷⁹ recognized a mother's cause of action for IIED and invasion of privacy against a defendant who had interfered with her time with her fatally wounded son at a local hospital, both before and after the son died. "Reasonable people could find that . . . the Tribune's actions . . . suggest an alarming lack of sensitivity and civility, and reasonable people, in essence, a jury, could find the Tribune's behavior extended beyond mere indignities, annoyances, or petty oppositions and constituted extreme and outrageous conduct."⁸⁰ *Green* followed a similar case from California, *Miller v. National Broadcasting Co.*,⁸¹ in which a television crew entered a family home and filmed paramedics making an unsuccessful attempt to rescue the plaintiff's husband and then broadcast the film on television. Noting that the defendants appeared to imagine they could act with

⁷⁷ *Id.* at 281.

⁷⁸ *Id.*

⁷⁹ 675 N.E.2d 249 (App. Ct. Ill. 1996).

⁸⁰ *Id.* at 257.

⁸¹ 187 Cal. Rptr. 3d 1463 (Cal. App. 1986).

“impunity,” and remarking that the defendants’ conduct suggested “an alarming absence of sensitivity and civility,” the court recognized a cause of action for IIED, in addition to one for trespass and invasion of privacy.⁸²

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

Tort law’s protection of the sensibilities of grieving family members is of course rooted in our culture’s respect for the importance and solemnity of familial death. It is therefore no surprise that the same value is also entrenched in the law of privacy – the other tort asserted by Snyder. Strikingly, the most articulate expression of this principle in the law is a unanimous decision issued by the United States Supreme Court in 2003, *National Archives and Records Administration v. Favish*.⁸³ *Favish* required the Supreme Court to decide the privacy rights of family members of Vincent Foster, Jr. (deputy counsel to President Clinton). Foster committed suicide by shooting himself, and his body was found in Fort Marcy Park, on the outskirts of Washington, D.C. Color photographs were taken of the death scene. After investigations by the FBI, House and Senate Committees, and the Office of Independent Counsel (OIC) all ruled that it was suicide, a skeptical citizen (Allen Favish) made a FOIA request for the materials underlying those investigations, including the photographs. The question before the Court concerned the scope of a statutory exemption to FOIA that excuses the government from the need to disclose records that “could reasonably be expected to constitute an unwarranted invasion of personal privacy”⁸⁴ which

⁸² *Id.* at 1488.

⁸³ 541 U.S. 157 (2003).

⁸⁴ *Id.* at 160 (quoting 5 U.S.C. § 552(b)(7)(C)).

exemption the OIC had claimed as a ground for declining to turn over the photographs (in light of the privacy interests of the Foster family members).

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

... we think it proper to conclude from Congress' use of the term "personal privacy" that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions.⁸⁵

Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.⁸⁶

Although *Favish* ultimately addressed a question of statutory interpretation, a crucial premise of the decision was the Court's utterly confident and well supported assertion that the common law recognizes a right of individuals grieving the loss of a family member against intrusion of those asserting their First Amendment rights.

In short, the perception that the "outrageousness" criterion invites judicial subjectivity is really quite backwards, at least in the context of the facts of *Snyder*; behind the circumstances of the case itself lies a very rich common law history and cultural history in the context of which the plaintiff's claim easily passed the judicial threshold for IIED. *In addition*, of course, the jury had to find not only that the facts were as the plaintiff alleged, but that the defendants' conduct within this particular scenario were indeed *outrageous*, and there is no reason to doubt that the jury found exactly so. While the District Court of Maryland could and probably should have been more ample in its discussion about why such a

⁸⁵ *Id.* at 167.

⁸⁶ *Id.* at 168.

jury finding was defensible, there is no reason to doubt that they had an ample evidentiary basis for doing so.

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

As explained in Part V, courts evaluating IIED claims require that the plaintiff establishes *severe* emotional distress and typically demand a substantial evidentiary record to support such a claim. Maryland courts are no exception. In *Harris v. Jones*,⁸⁷ the case in which the Court of Appeals of Maryland’s recognized IIED as actionable within the state, that court not only held that there must be sufficient evidence of severe emotional distress, but actually reversed the intermediate appellate court because it deemed the evidence before it to be insufficient.⁸⁸ District Judge Bennett took seriously Maryland’s requirement that there be evidence of severe emotional distress, and, in his opinion upholding the verdict in *Snyder*, noted that “[p]laintiff’s experts testified at trial that his depression and diabetes were exacerbated after the events of March 10, 2006.”⁸⁹ “While the doctors concluded that it would be nearly impossible for Plaintiff to separate the emotional impact of Defendants’ actions from preexisting conditions and from general grief over the loss of his son, they agreed that Defendants actions had a

⁸⁷ 380 A.2d 611 (Md. 1977).

⁸⁸ *Snyder I*, 533 F. Supp. 2d 567, 580 (citing *Harris* at 380 A.2d at 616).

⁸⁹ *Snyder I*, 533 F. Supp. 2d 567, 580 (emphasis in original).

significant impact.”⁹⁰ The expert testimony by physicians fortified Snyder’s own testimony regarding the severity of his response to defendants’ actions, including vomiting and crying for hours.⁹¹

Snyder v. Phelps thus possessed many of the attributes that permit IIED to be consistent with constitutional values of due process notwithstanding its utilization of an open-textured concept like that of “outrageousness”; indeed, outrageousness is in some ways utilized to strengthen the process protections of the tort. It must be said, however, that the District Court’s treatment of the case falls short in at least one important respect (apart from questions regarding its treatment of punitive damages⁹²). District Judge Bennett did not exercise his power to engage in any sort of muscular review of the claim that the conduct was outrageous. He did not appear to have made a preliminary finding (or post-verdict finding) on the question of whether this counted as outrageous. Such a review would have included a survey of relevant IIED case law as well as a review of the jury’s finding on this after the fact. As to the doctrinal issue, the court’s failure was relatively trivial, since (as our analysis revealed) the doctrinal case for an IIED action for intentional interference with a family’s grieving is extremely strong. As to scrutiny of the evidence put forward to the jury on whether defendants in this case were acting outrageously, the District Court’s failure was more questionable. Its review of the jury’s finding more generally, and on outrageousness in particular, was very light. To the contrary, Judge Bennett bent over toward the jury, permitting the members of the jury to weigh the value of the defendant’s First Amendment rights and override the First Amendment values if they so chose.

While there were flaws in the District Court’s handling of the case, and flaws that bear on concerns about the constitutionality of IIED torts in this setting, that would not be a sufficient reason to warrant judgment as a matter of law for the defendants. For recall that the flaw just indicated was essentially the same problem for which the Fourth Circuit vacated the jury verdict; instructions that gave the jury too much of the First Amendment question and circumvented the court’s own responsibility to engage in substantial oversight of the protection due, as applied to the facts of the case. The District

⁹⁰ *Id.*

⁹¹ *Id.* at 572.

⁹² See note 67, *supra*.

Court's over-empowerment of the jury warranted the Fourth Circuit's vacating of the jury verdict. But this is a reason for the Fourth Circuit to remand, not to reverse.

Conclusion

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

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

sense, the outrageousness requirement is part and parcel of what tort law does with intentionality; we are only willing to impose liability for a variety of non-physical injuries (fraud, intentional interference with economic interest, invasion of privacy) when the scienter level is high enough to rule out the possibility that defendants are innocently or inadvertently engaging in conduct which is categorized as wrongful or tortious.

When *Snyder v. Phelps* is revisited from within a point of view that takes the state tort law of IIED seriously, it becomes quite an easy case. Interfering with a person's grieving of a family member is – after the tort of assault -- perhaps the oldest pure emotional harm tort there is: the right of family members to be protected from such intrusions is extremely well entrenched in the common law, as a unanimous Supreme Court expressly recognized in a different context only seven years ago.⁹³ It is no surprise that the jury found the Phelps' conduct to be "outrageous"; the defendants themselves have explained that they choose upsetting conduct for the very reason of attracting as much attention as possible. In essence, the Phelps were emotionally injuring Snyder because doing so was provocative, and this provocativeness was the best way to make a point. In this context, to suppose that there is an inherent vagueness or subjectivity at the core of Albert Snyder's personal injury claim is to miss what the defendants themselves saw as plain as day.

⁹³ *Favish*, 541 U.S. 157, 167-68 (2003).