THE SUPREME COURT'S THEORY OF PRIVATE LAW

Nathan B. Oman and Jason M. Solomon[·]

Abstract

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

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

Part I is a brief overview of how that jurisprudential view came to be, as well as a sketch of a competing view of private law as individual justice. In Part II, we briefly trace the development of the doctrine surrounding the tension between the First Amendment and private law, particularly tort law, and how it helps lead to the view of private law as government regulation displayed in *Snyder*. We also point out how the intentional infliction of emotional distress tort, the main claim at issue in *Snyder,* is a particularly poor vehicle for the Court's theory of private law. A relatively recent tort, it was developed by scholars and judges as a means of redress for plaintiffs who had clearly been wronged, but were left without a remedy.

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

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Introduction

Snyder v. Phelps was *the* blockbuster case of the last term of the Supreme Court, and for good reason.[1] It had vivid facts. The father of a slain Marine suing protesters from a Baptist church that had made it their mission to disrupt funerals of soldiers around the country in order to spread their message of the dangers of homosexuality.

It had interesting law: featuring the sexiest Amendment in the Bill of Rights — the First — and perhaps *the* central principle to American political culture: freedom of speech.

But with all the First Amendment hype, less noticed was the underlying nature of the lawsuit itself – having nothing to do with freedom of speech. It was the kind of lawsuit brought every day in courts around the country – an individual files a complaint, demands an answer, and alleges that someone has wronged him.

When the case went to trial, the particular claims of wronging that went to the jury were claims for intentional infliction of distress and invasion of privacy: common-law torts.[2] *Snyder v. Phelps* was, fundamentally, about *private* law. And it wasn't just media coverage and commentators that missed this: the Supreme Court itself failed to appreciate the private-law nature of the case.

In this paper, we approach the tension in *Snyder* between private law and the First Amendment with a private-law lens. We are scholars who write about private law as individual justice, a perspective that has been lost in recent years but is currently enjoying something of a revival.

Our argument is that the Supreme Court's theory of private law – one that follows the dominant view of private law as a species of government regulation -- has led it down a path which has hurt its decision-making in several areas, including the First Amendment-tort clash in *Snyder*.

Much of the court's approach to "speech torts" like defamation, privacy and the intentional infliction of emotional distress tort at issue in *Snyder* can be explained by the particular circumstances in which it has elaborated the First Amendment in modern cases. Before *New York Times v. Sullivan*

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[1] 131 S.Ct. 1207 (2011).

[2] Snyder v. Phelps, 533 F.Supp.2d 567, 570 (D. Md. 2008). A claim of civil conspiracy – based on the two tort claims -- also went to the jury. *Id*.

in 1964, the Supreme Court had not applied the First Amendment to state common-law actions.[3] But *Sullivan* was a uniquely appropriate vehicle for doing so.

After all, cases in which government officials seek to suppress critical speech lie at the core of virtually any theory of free speech.[4] And in *New York Times Co. v. Sullivan*,[5] as we discuss below, this is clearly what the ostensibly private lawsuit was intended to do.

From the inception of the tort v. First Amendment doctrine, therefore, the Court was inclined to treat private law as a tool to suppress and punish speech by public officials.[6] The fact that the cases decided immediately after *Sullivan* involved public figures surely contributed to this trend.[7] By the time the court decided *Snyder*, nearly fifty years later, the assumption that tort law served to suppress speech had become so pervasive that it scarcely needed to be articulated, and even an action by a private individual was conceptualized as an attempt to suppress offensive speech rather than an action seeking private redress.[8]

Snyder is more than just a First Amendment case, though. It provides a window into the way the Supreme Court views private law more broadly. In areas that range from punitive damages to preemption, the Supreme Court has adopted a particular and dominant, but highly contested, theory of

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[3] *See* New York Times v. Sullivan, 376 U.S. 254, 299-300 & n.3 (1964) (Goldberg, J., concurring) (pointing out that the Court was "writing on a clean slate"). *But see* Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249, 250 (arguing that "constitutional constraints on speech-based civil liability have deep roots").

[4] *See* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 918 (2010) (pointing out that the First Amendment was designed to serve a "quite limited purpose in preventing government suppression" of speech).

[5] New York Times v. Sullivan, 376 U.S. 254 (1964).

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

[7] *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), Rosenblatt v. Baer, 383 U.S. 75 (1966).

[8] *See* Snyder v. Phelps, 131 S.Ct. 1207, 1219 (2011) (arguing that the "outrageousness" standard for speech in the intentional infliction of emotional distress tort carries a high risk that the jury will become an instrument for "suppression of… expression") (quoting Bose Corporation v. Consumers Union of United States, Inc., 466 U.S. 485, 510 (1984)).

private law.[9] It is the theory that private law is not private at all; it is part and parcel of government regulation, or "public law in disguise."[10]

To understand why the Supreme Court currently holds this view of private law as a form of state regulation, it is necessary to look beyond the development of First Amendment doctrine. Because the Supreme Court's view is deeply influenced by a widely held view of private law that has taken hold during the course of the 20th century. What follows in Part I is a brief overview of how that view came to be, as well as a sketch of a competing view.

In Part II, we briefly trace the development of the doctrine surrounding the tension between the First Amendment and private law, particularly tort law, and how it helps lead to the view of private law as government regulation displayed in *Snyder*. We also point out how the intentional infliction of emotional distress tort, the main claim at issue in *Snyder,* is a particularly poor vehicle for the Court's theory of private law. A relatively recent tort, it was developed by scholars and judges as a means of redress for plaintiffs who had clearly been wronged, but were left without a remedy.

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

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[9] *See, e.g.*, PLIVA, Inc. v. Messing, slip op. at 10 (2011) (asserting in a preemption case that "[s]tate tort law places a duty directly on all drug manufacturers to adequately and safely label their products"); Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008) ("[T]he consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct." (footnote omitted)). This Article will focus on the First Amendment context, but many of the observations are applicable more broadly. For an analysis of related ideas in the context of punitive damages and preemption, see Benjamin C. Zipursky, *Palsgraf*, Punitive Damages, and Preemption, 125 Harvard L. Rev. ___ (forthcoming 2012) (symposium on new private law).

[10] The quoted phrase comes from Leon Green, *Tort Law: Public Law in Disguise* (pts. 1 & 2), 38 TEX. L. REV. 1, 257 (1959-60) For one of many examples of this view in contemporary Supreme Court doctrine, *see, e.g.*, Minneci v. Pollard, 132 S.Ct. 617, 620 (2012) (denying a federal constitutional tort because state tort law already provides "both significant deterrence and compensation").

I. Competing Theories of Private Law

A. Private Law as Government Regulation

Modern thinking about private law began on January 8, 1897. Picking such dates is always arbitrary, of course, but this day's claim is as good as any other. On that date, Oliver Wendell Holmes, Jr. delivered his lecture, later published in the nascent *Harvard Law Review*, "The Path of the Law" at Boston University Law School.[11]

Holmes's lecture came at a moment of tremendous creativity in private law. The decades after the Civil War saw private law transformed by two pressures, one internal and one external. The internal pressure was the final collapse of the common law writ system.[12] As the old writs lost their grip on procedure and with it legal thought, it became necessary for judges and commentators to construct, for the first time, general bodies of doctrine governing tort and contract. The result was a huge burst of legal creativity as whole areas of the law were re-imagined for the post-writ universe.[13]

The external pressure came from the massive economic and industrial expansion witnessed in the United States in the years after the Civil War.[14] In part this was technological. Improvements in the efficiency of steam engines dropped freight costs by sea and by rail.[15] Instant, long-distance communication became widely available via telegraph and then telephone. Industrialization, especially increased mechanization, dramatically dropped production costs, which helped create the first truly national and international markets for manufactured goods, especially consumer goods.[16]

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

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

[13] *See* JOHN H. LANGBEIN, RENEE LETTOW LERNER, AND BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS xx-xx (2009).

[14] *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 11 (2000) (alluding to the "rapid and tumultuous changes" during the late 19th century that resulted in the transformation of the United States from a "rural, agricultural, and decentralized society into an urbanized and industrialized nation in the process of centralizing").

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

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

All of these economic developments, in turn required private law to grapple with whole new categories of disputes such as industrial accidents and complex corporate contracts.[17]

Holmes thus wrote at a moment when private law in the United States was in profound doctrinal and intellectual upheaval, adapting itself to a radically new environment. In this context, Holmes provided a bracing new vision of the law, one based on a hard-headed functionalism and a strong distaste for moralizing the law.[18] Rather than understanding the law in terms of some internal logic or in terms of some underlying structure of moral obligations, Holmes insists on viewing the law purely in terms of a system of incentives.[19]

This emphasis on law's functional reality in turn requires that one think of law in terms of social aggregates and public policies. Having banished the language of morality from the law as so much sentimentality, Holmes offered a vision in which legal outcomes were to be justified purely in terms of social utility.[20] On this point it is striking that Holmes, surely one of the most sophisticated legal thinkers of his time, turned away from the most complex body of interdisciplinary work on law at the close of the nineteenth century, namely history. "It is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV."[21] History, Holmes insisted, is necessary to expose the reality of law. However, he went on:

> When you get the dragon out of his cave on to the plain and in daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either

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involving such products at the beginning of the 20th century) (*citing* F. ALLEN ET AL., TECHNOLOGY AND SOCIAL CHANGE (1957); S. ROSEN & L. ROSEN, TECHNOLOGY AND SOCIETY: THE INFLUENCE OF MACHINES IN THE UNITED STATES 243-306 (1941)).

[17] See generally MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 (1994).

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

[19] See Holmes, *supra* note ___, at 459 "(If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict…").

[20] *See* Holmes, supra note ___, at 467, 469 ("I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage… For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.").

[21] *See* Holmes, supra note ___, at 469.

> to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future I the man of statistics and economics.[22]

In short, private law should be divorced from moral philosophy, studied as a mechanism for social control through incentives, and organized to advance particular social goods.[23]

The century of private law thinking since "The Path of the Law" can be usefully understood as an attempt to tame the dragon – the unruly historical accident that is the common law – exposed by Holmes and render him useful. Above all else, usefulness has been understood in terms of enlightened regulation.[24]

Writing a generation after Holmes' essay, for example, Felix Cohen, a leading Legal Realist, dismissed traditional legal reasoning as so much "transcendental nonsense."[25] Legal Realists like Cohen were profoundly skeptical of the reasons traditionally given by common law judges in support of their decisions and, like Holmes, longed for a legal discourse that would focus on the public policies at stake rather than obfuscating itself in the language of legal doctrine or individual moral responsibility.[26]

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[22] *See* Holmes, supra note ___, at 469.

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

[24] *See* Lawrence B. Solum, *The Supreme Court In Bondage: Constitutional Stare Decisis, Legal Formalism, And The Future Of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 167 (defining the "instrumentalist thesis" as "the proposition that the outputs of legal decision-making processes (paradigmatically, appellate adjudication) are, and should be, determined by extralegal considerations--that is, by (extralegal) considerations of policy or principle.")

[25] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935). The attempt to understand legal arguments in terms of the structure of legal concepts and their underlying normative logic, he insisted, was the equivalent of engaging in a meaningless scholastic debate over how many angels can dance on the head of a pin.[25] The panacea to our jurisprudential ills, Cohen insisted, was "the functional approach." Legal doctrine should be specified in terms of social aggregates and the effect of legal rules on social outcomes.

[26] The work of the prominent Realist torts scholar Leon Green is a good example of this. Green's Torts casebook took a functional approach to consider the implications of various doctrinal choices for public policy. See G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 77 (1980) (discussing LEON GREEN, THE JUDICIAL PROCESS IN TORTS CASES (1931)).

While private law scholarship has fractured in many directions since the Legal Realists, by and large it has accepted the basic rules of discussion set down by them. Rather than looking to the structure of legal doctrine for normative inspiration, the theorist should treat judicial rhetoric with suspicion.[27] The virtuous judge is one that refuses to hide behind legal rules and forthrightly takes policy choices and consequences into account.[28] Private law in particular should not be understood as resolving private disputes but rather as a mechanism for public regulation.[29] To be sure, there has been a range of opinions as to what constitutes desirable public regulation, but all sides have agreed that this is what private law categories such as tort and contract are doing.

On this view, for example, tort law should be seen in terms of safety regulation and social insurance. A primary purpose of making tortfeasors liable is to police their conduct by imposing fines on certain undesirable activities.[30] The modern law and economics movement has pursued this basic approach with the greatest tenacity and rigor. Money damages, on this view, force actors to fully internalize the cost of their own decisions, pushing them toward optimal levels of investment in precautions and the like.[31] Even those that have not adopted the law and economics framework, continue to see tort law in terms of shifting losses from plaintiffs to defendants in order to achieve distributionally desirable outcomes by – for example – transforming corporate actors into insurers for those that they harm.[32] In either case, the law is a way of regulating conduct so as to achieve particular social outcomes. The same trend can be seen in the conceptualization of contract law.[33]

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[27] *See, e.g.,* Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 450 (1930) (suggesting that "one lift an eye canny and skeptical as to whether judicial behavior is in fact what the… rule purports (implicitly) state"). *See also* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 476 (2003).

[28] *See* Tamanaha, supra note xx, at 231 (associating this view of judging with both "pragmatists" like Posner and "purposivists" like Breyer).

[29] *See* RICHARD POSNER, OVERCOMING LAW 391 (1995)

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

[31] *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970) for the leading account of this view.

[32] Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 219 (2000) (making this argument)

[33] Though primarily associated with the law and economics movement today, an early and well-known proponent of this view – though conceived of in very different terms than

In short, despite the diversity of modern thinking on torts and contracts, virtually all assume that private law is a form of public regulation.[34] Writing more than 1000 years ago, Trebonian opened the Institutes of Justinian by writing, "The study of law consists of two branches, law public, and law private. The former relates to the welfare of the Roman State; the latter to the advantage of the individual citizen."[35] For much of western legal history this distinction was taken as basic.

The century of legal thought since Holmes, however, has made the distinction invisible if not incomprehensible.[36] From Holmes's "bad man" to the complex theories of incentives promulgated by the economically inspired theories that dominate thinking about tort and contract, private law is something that the state does to its citizens. It is ultimately regulatory in precisely the same way that OSHA regulations or FTC rules are regulatory.[37]

B. Private Law as Individual Justice

Even as the instrumentalist view of private law has remained dominant, there has been an alternative view that has arisen in the past few decades. It is a view that might be described as old-fashioned, though prevalent before Holmesian thinking took over: that private law is about individual justice.

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the economists - was the doctrinal scholar Grant Gilmore. See GRANT GILMORE, THE DEATH OF CONTRACT (1974). With this provocative title, he meant the intellectual and doctrinal collapse of a vision of contract that saw it primarily as a mechanism for enforcing self-imposed obligations. For Gilmore, like those in law and economics, the purpose of the law of contracts is not to enforce self-imposed obligation, but rather to create incentives for people to behave in efficient ways.

[34] See Tamanaha, supra note xx, at 132 ("All [legal academics] construe law in fundamentally instrumental terms.").

[35] Book I, Title I, 4.

[36] *See* Gary Peller and Mark Tushnet, State Action and a New Birth of Freedom, 92 Geo. L.J. 779, 789 (2004) (stating the Realist view that the public-private distinction was conceptually impossible, given the fact that "private" rights inevitably depend on the existence of state power to enforce them) (citing Hale and Hohfeld).

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

The rise in this view of private law appears to be the result of a few trends -- first, a reaction to the dominance of instrumentalism in legal reasoning and legal theory, particularly utilitarianism and its main variant, law-and-economics;[38] second and related, the revival of formalism or neoformalism as a legitimate and desirable way of thinking about legal reasoning;[39] and third, a revival of what some have called "rights talk" in the legal academy and practice.[40] We briefly review each of these developments in turn.

The rise of instrumentalism occurred over time, but by the 1960s and 70s, its dominance in legal thinking was complete.[41] It is not just that it was unfashionable to think about law in any other way. It simply was near impossible to be taken as a serious practitioner or academic when articulating a different view.[42] Such complete paradigm shifts, as Thomas Kuhn and others have explained, inevitably lead to reactions and swings in the other direction.[43]

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[38] *See* BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 1 (2006) (("An instrumental view of law – the idea that law is a means to an end – is taken for granted in the United States, almost a part of the air we breathe."). *See also* WILLIAM J NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 23 (1996) (describing instrumentalist perspective as emphasizing "private law's reflexive qualities as a mirror and facilitator of basic social processes, most importantly capitalist development").

[39] For a good overview of the "new formalism" or "neoformalism," see *Symposium: Formalism Revisited*, 66 U. CHI. L. REV. 527-942 (1999).

[40] For a critique from the academy, *see* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 1-17 (1993) (taking stock of and critiquing this development). For an exposition and defense from leading judges, see Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986). These judicial accounts are cited in Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 480 n.24 (2003).

[41] *See* BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 116 (2006) (concluding that by the 1970s, "[t]he view that law is in essence an instrument had won over the legal academy"). *See also* Jason M. Solomon, *Judging Plaintiffs*, 60 Vand. L. Rev. 1749, 1754-1755 (2007) ("Since the publication of Oliver Wendell Holmes' *The Common Law* in 1881, the dominant perspective among scholars is that tort law can be justified on instrumental grounds." (footnotes omitted)).

[42] *See* Lawrence B. Solum, *The Supreme Court In Bondage: Constitutional Stare Decisis, Legal Formalism, And The Future Of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 167 ("Contemporary American legal thought accepted as an almost dogmatic truth that legal decisions are (and should be) made on instrumental grounds--shaping outcomes to serve normative concerns.")

[43] *See* Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 680-681 (1990) (outlining four indicia that law is in a state of "Kuhnian crisis," the fourth

And so legal scholars from different vantage points came together to strike blows against instrumentalist thinking.[44] Some of this movement came from those trained in philosophy, where a similar reaction to utilitarianism was taking place, along with a belief the conceptual reasoning was both possible and desirable.[45] Legal thinkers on the left thought instrumentalist thinking, particularly in the hands of economists, failed to consider important factors like fairness and solidarity in assessing the impact of law. [46] Still others worried that if law simply collapsed into public policy, then law would lose its essential character.[47] Scholars and judges on the right thought that instrumentalist approaches to law allowed "activist" judges to sneak in their own policy preferences in deciding cases.[48]

It was this final critique that gave rise to the neoformalists. For the neoformalists, deploying concepts and using deductive reasoning was not an empty exercise; indeed, it was an ineliminable part of legal reasoning.[49]

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being "the proliferation of 'schools' or 'movements' within the academy that increasingly talk past one another" such as law and economics and civil recourse theory.).

[44] For an example of this in torts scholarship, *see* John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1735-1745 (1998) (arguing for a reintroduction in legal thinking of duty concepts, alongside instrumentalist concerns).

[45] *See id.* at 1804 ("Although it continues to enjoy considerable popularity, utilitarianism was the subject of severe philosophical critique in the 1950s, '60s, and '70s."); Ronald Dworkin, TAKING RIGHTS SERIOUSLY 232-38 (1978) (arguing utilitarianism fails to provide equality); John Rawls, A THEORY OF JUSTICE 14, 26-27, 286-89 (1971) (arguing utilitarianism cannot give voice to concerns of fairness and individuality); Bernard Williams, *A Critique of Utilitarianism*, *in* J.J.C. Smart & Bernard Williams, UTILITARIANISM: FOR AND AGAINST 75, 93-118 (1973) (arguing utilitarianism renders moral values unintelligible); *see generally* UTILITARIANISM AND BEYOND (Amartya Sen & Bernard Williams eds., 1982) (critiquing various forms of utilitarian thought).

[46] *See* Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103, 103-130 (2002) (criticizing law and economics scholars Louis Kaplow and Steven Shavell for failing to account for fairness and justice while pursuing promoting of human welfare).

[47] *See* Goldberg & Zipursky, *supra* note ___, at 1741-42 (arguing the "Holmes-Prosser model" of judicial inquiry is undisciplined, leading to unhelpful, "arbitrary, inderterminate, and doctrinally unstable" decisions.); *see also id.* ("In addition, as every torts professor knows, the reduction of negligence to policy analysis threatens to drain the analytic structure from torts."). *See also* Solomon, *supra* note __, at 1758 (noting concerns that instrumentalism threatens to collapse law into public policy).

[48] It was this concern that led judges and scholars like Antonin Scalia to call for a return to formalism. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (Amy Gutmann ed., 1997) ("Long live formalism. It is what makes a government a government of laws and not of men.").

[49] *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2 (2007) ("According to the formalists, judges apply the governing law to the facts of a case in a logical, mechanical, and deliberative way." (footnote omitted)); Ernest J. Weinrib, *Legal Formalism: On the*

If the law was to have any predictability, and limits on the discretion of judges and other legal decision-makers was to be in any way meaningful, there had to be some kind of check on judges simply implementing their own policy preferences.[50] Perhaps the formal mode of reasoning had some merit after all.

For neoformalists, one could accept the Legal Realist view that policy choices were an inevitable part of legal reasoning in hard cases[51], and the Critical Legal Studies point that legal concepts and rules were always indeterminate and infinitely malleable.[52] But one could still take the position that legal reasoning should not simply collapse into an ad hoc balancing of factors, all things considered.[53]

Third, in the 1980s and 90s, there was a revival in the use of and thinking about rights in the face of prior critiques that rights were simply convenient labels to be used to mask whatever policy preferences a litigant, scholar, or judge was asserting.[54] Legal theorists like Ronald Dworkin and others posited a meaningful role for rights in the context of judicial

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Immanent Rationality of Law, 97 YALE L.J. 949, 953-957 (1988) (In the formalist conception, law has a content that is not imported from without but elaborated from within."); *see generally* Martin Stone, *Formalism, in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 166-205 (Jules Coleman & Scott Shapiro eds., 2002).

[50] *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 13 (1997) (arguing that judges deciding cases must "understand themselves to be enjoined to enforce these restraints independently of the views of the executive and the legislature, and of political parties . . .").

[51] *See* Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1979-1980 (2004) (arguing that Jerome Frank and other legal realists held the position "that adjudication is always a moral decision" because "[a] judge cannot escape morally assessing whether the law should be followed at all . . ."). Judge Richard Posner combines formalism and realism succinctly: "'Realism' can be used simply to mean the use of policy analysis in legal reasoning. We get the premises on which to perform the logical operations of formalism from notions of sound public policy." Richard Posner, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 326, 326 (1988).

[52] *See* Allan C. Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI L. REV. 541, 543 (1989) (arguing "the law is irredeemably indeterminate.").

[53] See, e.g., Lawrence B. Solum, *The Supreme Court In Bondage: Constitutional Stare Decisis, Legal Formalism, And The Future Of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 176-84 (making "the case for neoformalism").

[54] *See* Goldberg & Zipursky, *supra* note 80, at 1793-1797 (highlighting a resurgence of rights-based reasoning in order to further "highlight the oddity of the continued rejection of duty analysis in legal scholarship.").

review.[55] After the right to substantive due process became much discredited after *Roe v. Wade*[56], it enjoyed a revival, striking down state action in areas as diverse as anti-sodomy laws[57] and punitive damage awards.[58] And while "rights talk" enjoyed its most significant revival in the area of public law or constitutional rights, the idea of private-law rights emerged again as well.

In the last few decades, private law has enjoyed a resurgence in legal scholarship. There has been a renewed interest in the importance of private-law rights -- indeed, the very idea that there is a coherent set of concepts called private law – led by the work of philosophers like Jules Coleman and Ernest Weinrib in tort theory,[59] and scholars like Charles Fried in contract theory.[60] In both tort and contract theory, the philosophers have pushed back against the economists and demonstrated that deploying ideas like rights, duties, fairness and justice constitute a more accurate and better way to think about these areas of law.[61]

Much of this writing has been under the umbrella of "corrective justice." For corrective-justice theorists, private law's unification of the victim and the wrongdoer has normative significance. The wrongdoer has breached a duty owed to the victim, and so the wrongdoer now owes amends to the victim. The practice of corrective justice, for many such theorists, helps restore the normative equilibrium among individuals in a society.

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[55] *See, e.g.,* Dworkin, *supra*, note 81, at xi, 142-143; Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625, 629 (1988) (arguing for a view of individual rights "as a position of fall-back and security in case other constituent elements of social relations ever come apart.").

[56] 410 U.S. 113 (1973)

[57] Lawrence v. Texas, 539 U.S. 558 (2003).

[58] *See* BMW of North America, Inc. *v*. Gore*,* 517 U.S. 559 (1996).

[59] *See generally* JULES L. COLEMAN, RISKS AND WRONGS (1992); ERNEST JOSEPH WEINRIB, THE IDEA OF PRIVATE LAW (1995).

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

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

We are also attracted to, and have written about, a relatively new theory of individual justice called civil recourse.[62] Civil recourse takes as the central components of private law that the plaintiff both decides whether to brings the case, and prosecutes the case herself (both unlike criminal law).[63] Like corrective justice, civil recourse sees normative significance in the plaintiff bringing her claim directly against the defendant, as opposed to bringing a demand to the attention of the state, for example. And civil recourse sees torts specifically as a law of private wrongs, not as a vehicle for loss allocation or deterrence of risky activity.[64]

Despite this revival of interest in private law in the academy, though, it appears that this has not translated to the bench.[65] There might be a few reasons for this (other than judges not reading law review articles). The idea of private law rights is so closely associated with the *Lochner* doctrine that it bears a heavy burden.[66] *Lochner*, of course, was a case where the right of freedom of contract was used to strike down New York

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[62] Civil recourse theory was first introduced by Zipursky in *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 6 (1998) Shortly afterwards, Goldberg and Zipursky published John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998), which largely focused on the relationality of duty but also asserted that a relational duty approach should go hand in hand with a civil recourse theory of tort law. Goldberg and Zipursky have extended this joint relationality-and-recourse approach in several joint articles since and have also developed civil recourse theory separately in, especially: John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) [hereinafter Goldberg, *Constitutional Status of Tort Law*]; Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 718–21 (2003) [hereinafter Zipursky, *Civil Recourse*]; and Benjamin C. Zipursky, *Philosophy of Private Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW (Jules Coleman & Scott Shapiro eds., 2002).

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

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

[65] RICHARD A. POSNER, HOW JUDGES THINK 45 (2008) ("Often, 'following' precedent really means making a policy-based choice among competing precedents or a policy-influenced interpretation of a precedent's scope.")

[66] *See* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 476 (2003) ("Starting with Holmes in the 1890s, reformist American legal thinkers yoked the private law conceptualism of Langdell and his followers to the activist classical-liberal judicial review of the Lochner era."). For a more positive view of *Lochner*, *see generally* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

State regulation of bakery workers' hours.[67] Cass Sunstein and others critiqued the doctrine as enshrining a notion of common law baselines that were somehow pre-political and natural.[68] This view was taken as gospel among legal elites, at least until recently.[69] Indeed, even in the *Kelo v. City of New London* case, a case with very good facts for proponents of private-law rights, a 5-4 decision from the court upheld the state interest in economic development against the right to private use of one's property.[70]

Moreover, in an age of statutes[71], judges may think that legitimate state interests in individual rights are to be found in legislative codes, when they cannot be inferred from constitutional text. Looking for such rights in the common law might seem like praying to the "brooding omnipresence in the sky."[72] Finally, private law may have a discredited pedigree in the court simply because of its association with litigation.[73]

Against this backdrop, the Supreme Court considered the clash between private law and the First Amendment in perhaps the most closely watched case of last term, *Snyder v. Phelps*.

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[67] Lochner v. New York, 198 U.S. 45 (1905).

[68] *See* Cass R. Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987); HOWARD GILMAN, THE CONSTITUTION BESIEGED: THE FOUNDING VISION OF A FACTION-FREE REPUBLIC, THE INTENSIFICATION OF CLASS CONFLICT AND CONSTITUTIONAL IDEOLOGY DURING THE LOCHNER ERA (1988).

[69] *See, e.g.*, Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L.J. 1063, 1086 (1981) ("Whether or not the Court's record can be evaluated, however, Lochner remains an embarrassment for proponents of fundamental rights adjudication and cause for skepticism about the practice."); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 Duke L.J. 243, 244 (1998) ("Although it has never been formally overruled, it is well understood among constitutional lawyers that relying on Lochner would be a pointless, if not a self-destructive, endeavor.").

[70] *See* Kelo v. City of New London, Conn., 545 U.S. 1158; Richard A. Epstein, *Supreme Folly*, Wall St. J., June 27, 2005.

[71] *See generally* Guido Calabresi, A Common Law for the Age of Statutes (1982).

[72] Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

[73] *See* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence,* 84 TEX. L. REV. 1097 (2006); Jamal Greene, *Heller High Water? The Future of Originalism,* 3 HARV. L. & POL'Y REV. 325, 342 (2009) ("If any other theme has emerged from the votes of Chief Justice Roberts and Justice Alito, it is an apparent hostility to litigation -- continuing the views of their predecessors*"); Kenneth W. Starr, The Roberts Court at Age Three: A Response, 54 Wayne L. Rev. 1015, 1025 (2008)* ("[T]he Roberts Court, more than any Court in recent memory, is skeptical of the efficacy of large-scale civil litigation.").

II. *Snyder* and the Speech Torts: A Window Into the Supreme Court's Theory of Private Law

A. Snyder v. Phelps

On Friday, March 3, 2006, Lance Corporal Matthew A. Snyder of the Combat Service Support Group-1, 1st Marine Logistics Group, 1st Marine Expeditionary Force died in Iraq's Anbar province when the Humvee in which he was riding overturned.[74] He had been in Iraq for one month and had been a Marine for 3 years.[75] He was twenty years old.[76] Corporal Snyder had grown up in the small Maryland town of Westminster and had only recently graduated from the local high school.[77] Indeed, prior to shipping out to Iraq, the Marine Corps had sent Corporal Snyder back as a recruiter to his high school.[78] His death was a major event in the small town. They announced it to the students and teachers at the high school, where David Brown, the assistant principal, had coached Corporal Snyder as a six-year-old basketball player.[79] His mother was too grief stricken to speak with the media, deputizing her sister – Corporal Snyder's godmother – to act as her spokesperson.[80] Al Snyder, his father, said only, "He was a hero and he was the love of my life."[81] A week later, the family held a funeral for Corporal Snyder at their Catholic church.[82]

In 1955, Fred Phelps founded the Westboro Baptist Church in Topeka, Kansas.[83] The church describes itself as an "Old School (or Primitive) Baptist Church" but is not associated with the Southern Baptist Convention or any other mainstream Baptist denomination.[84] Firm believers in the Calvinist doctrines of total human depravity and limited atonement, the Westboro Baptist Church insists that there are many people that God despises and will refuse to save.[85] The URLs of the websites run

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[74] *See* Nicole Fuller & Gina Davis, *Carroll Co. Marine, 20, Killed in Iraq*, Balt. Sun. March 7, 2006 at 1B (reporting Corporal Snyder's death); *News at Five*, ABC 2 WMAR (Baltimore) transcript of March 10, 2006 broadcast (same).
[75] *See id.*
[76] *See id.*
[77] *See id.*
[78] *See id.*
[79] *See id.*
[80] *See id.*
[81] *See id.*
[82] *See id.*
[83] *See* About Us, http://www.godhatesfags.com/wbcinfo/aboutwbc.html (the official website of the Westboro Baptist Church) last visited Jan. 18, 2012.
[84] *See id.*
[85] *See id.*

by the church provides a litany of those to whom God's grace will not extend and whom he accordingly hates: www.GodHatesFags.com, www.GodHatesIslam.com, www.GodHatesTheMedia.com, www.GodHatesTheWorld.com, www.JewsKilledJesus.com, www.BeastObama.com, www.PriestsRapBoys.com, www.blogs.SpareNot.com, and www.AmericaisDoomed.com.[86] Much of the Church's preaching focuses on homosexuality and the punishments that God has been raining down on America because of its tolerance toward homosexuals, including homosexuals in the military.[87] Since 1991, the church has conducted over 47,000 "sidewalk protests" in which they have held aloft signs declaring "God Hates Fags," "AIDS Cures Fags," "Thank God for Dead Soldiers," "Fag Troops" and the like.[88]

On March 10, 2006, members of the Westboro Baptist Church arrived in Westminster, Maryland to protest Corporal Snyder's funeral.[89] They had previously contacted the county sheriff, who informed them that they would have to conduct their protest 1,000 feet from the church.[90] Protests by the church had previously attracted the attention of veterans who formed the Patriot Guard Riders, a motorcycle gang that converges on funerals targeted by the Westboro Baptist Church and forms a cordon of leather clad, flag waving, bikers to shield family members from the protesters.[91] Bikers from up and down the east coast converged on Corporal Snyder's funeral and ringed the edge of the parish church where the funeral was held. Not surprisingly, the event attracted media attention, leading the local 5 o'clock television news and making the front page of the *Baltimore Sun*.[92] The Westboro Baptist Church subsequently published an extensive manifesto on their website defending their protests at the funeral and accusing the Snyders of raising their child to support child molestation in the Catholic Church and earn divine retribution for American sinfulness.[93]

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[86] *See Frequently Asked Questions*, http://www.godhatesfags.com/faq.html last visited Jan. 18, 2012.
[87] It should be noted that the church's opposition to t
[88] *See* About Us, http://www.godhatesfags.com/wbcinfo/aboutwbc.html (the official website of the Westboro Baptist Church) last visited Jan. 18, 2012.
[89] *News at Five*, ABC 2 WMAR (Baltimore) transcript of March 10, 2006 broadcast (discussing the protests); Gina Davis, *At Carroll funeral, a national protest*, Balt. Sun. March 11, 2006 at 1A.
[90] *See id.*
[91] *See id.*
[92] *See id.*
[93] Find and cite "the epic."

The church's protests had also attracted the attention of Maryland state legislators, who introduced a law designed to protect mourning families from protestors by making it a crime to protest in close proximity to funerals.[94] This law, however, was aimed at controlling the behavior of future protestors. It gave Corporal Phelps's parents no means of redress against those that had turned their son's funeral into a national media event.

Maryland's common law of torts, however, provided such an avenue. In 1977, the Maryland Supreme Court recognized the tort of intentional infliction of emotional distress in the case of *Harris v. Jones*.[95] Building on case law from other jurisdictions, the *Restatement (Second) of Torts*, and academic commentary, the court crafted a tort designed to provide redress against "one who by extreme and outrageous conduct intentionally or recklessly cause severe emotional distress."[96] As examples of severe emotional distress, the court cited cases involving false allegations of child molestation and misconduct surrounding the death of a loved one. On June 6, 2006, Al Snyder availed himself of this law and sued the Westboro Baptist Church protesters in federal district court in Maryland.[97]

The jury eventually awarded Al Snyder $2.9 million in compensatory damages and $8 million in punitive damages, which the district court reduced to $2.1 million.[98] Phelps appealed to the 4th Circuit Court of Appeals, arguing that Maryland's tort of intentional infliction of emotional distress violated the free speech clause of the first amendment.[99] The court agreed, and Snyder appealed to the U.S. Supreme Court, which granted certiorari on the case.[100] The Court upheld the Fourth Circuit's decision.[101]

B. Doctrinal Background – First Amendment v. State Tort Law

The majority opinion by Chief Justice Roberts represents the culmination of a long series of cases in which the Court has considered the relationship between the first amendment and state tort law. The Court's jurisprudence in this area begins with the case of *New York Times Co. v.*

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[94] *See id.*
[95] 380 A.2d 611 (1977).
[96] *Id.* at 613 (quoting Restatement (Second) of Torts §46).
[97] *See* Snyder v. Phelps, 533 F.Supp.2d 567 (D.Md. 2008).
[98] *Id.*
[99] See Snyder v. Phelps, 580 F.3d 206 (2009).
[100] 130 S.Ct. 1737 (2010).
[101] 131 S.Ct. 1207 (2011).

Sullivan.[102] The case grew out of the Civil Rights movement and the struggle against segregation in Alabama.[103] On March 29, 1960, the *New York Times* ran a paid advertisement in the form of an editorial entitled "Heed Their Rising Voices."[104] The editorial proceeded to describe events in Montgomery, Alabama related to the student protests against the continuing unwillingness of the state to comply with various desegregation orders.[105] It was undisputed that the advertisement as published contained various false statements about the Montgomery police department.[106] For example, it stated that police had "ringed" the university campus when in fact that had only been stationed nearby and claimed that Dr. Martin Luther King, Jr. had been arrested seven times when in fact he had only been arrested four times.[107] Sullivan, one of Montgomery's elected police commissioners, sued the *Times* for libel and was awarded $500,000 in compensatory damages by an Alabama jury, although neither Sullivan nor the police commission were mentioned in the advertisement.[108]

The *Times* appealed to the Supreme Court, which ruled that in order for a public official to prevail in a tort action based on critical speech he must show that the statement is false, was made with "actual malice" and bears the burden of proving these elements with "convincing clarity."[109] Strikingly, the court's opinion, authored by Justice Brennan, reveals a view of private law that sees it as essentially indistinguishable from other forms of government regulation. This can be seen, for example, in the Court's rejection of Sullivan's state action argument. The court wrote:

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[102] 376 U.S. 254 (1964).

[103] *See Sullivan,* 376 U.S. at 256. (Mr. Sullivan, one of three Commissioners of the City of Montgomery, Alabama, brought this civil libel action against the four petitioners, made up of Negros and Alabama clergyman , and against the New York Times Company.)

[104] *See Sullivan,* 376 U.S. at 256.

[105] *See Sullivan,* 376 U.S. at 256-258 ("[I]n their [the Southern Negro's] efforts to uphold these guarantees [in the Constitution and Bill of Rights], they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. Suceeding paragrpahs purported to illustrate the 'wave of terror' by describing certain alleged events.").

[106] *See Sullivan,* 376 U.S. at 258 ("It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of the events which occurred in Montgomery."____.

[107] *See Sullivan,* 376 U.S. at 259. ____.

[108] *See Sullivan,* 376 U.S. at 256, 258.

[109] *See Sullivan,* 376 U.S. at 285-286 ("[W]e consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands....Finally....[t]he mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false.").

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that the law as applied is a civil action and that it is a common law only, though supplemented by statute.[110]

Elsewhere, the court wrote disparagingly of attempts to draw distinctions between libel law and other forms of restrictions on speech as "mere labels of state law."[111] Hammering away at the equivalence between private law and other forms of government regulation, it wrote, "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[112]

This prohibited state of affairs is the suppression of political speech. The court's key argument was that like the other attempts to suppress speech it listed, the effect of libel damages was to penalize speech critical of public officials. As even critics of its decision have acknowledged, the court was surely correct that "whether or not a newspaper can survive a succession of [civil judgments], the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."[113] Hence, the court focused on "a State's power to award damages for libel,"[114] seeing the purpose – or at any rate the effect – of libel law in terms of the suppression of libelous speech by the government.[115]

Given the context of *New York Times Co. v. Sullivan*, it is unsurprising that the court saw the libel action at issue in the case primarily in terms of the state's effort to suppress critical speech.[116] First, the case arose out of the largely unsuccessful attempt by the federal courts to force Southern states to desegregate.[117] Second and related, given that the

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[110] *See Sullivan,* 376 U.S. at 265.

[111] *See Sullivan,* 376 U.S. at 269 ("[W]e are compelled by neither precedent nor policy to give any weight to the epithet 'libel' than we have to other 'mere labels' of state law.").

[112] *See Sullivan,* 376 U.S. at 277.

[113] *See Sullivan,* 376 U.S. at 278.

[114] *See Sullivan,* 376 U.S. at 283.

[115] *But see Sullivan,* 376 U.S. at 281.____ (quoting a decision by the Kansas Supreme Court weighing the importance of public discussion against the "occasional injury to the reputations of individuals").

[116] *See* Constitutional Law Stories ___-___ (Michael Dorf ed.) (discussing the historical background to *New York Times Co. v. Sullivan*).

[117] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE XX (discussing the relative ineffectiveness of judicially mandated desegregation). Effective desegregation in the south

connection between the ad and Sullivan was tenuous at best and that criticism by outside agitators (such as those who purchased the *New York Times* ad) likely enhanced – rather than libeled – his political reputation, it is unsurprising that the court saw the lawsuit mainly as an effort to muffle criticism of segregationist policies. There is every indication that this is exactly what the suit was intended to do. Indeed, while the majority opinion was coy on this point, the dissenting opinion by Justice Douglas and Justice Black was more forthright. Justice Douglas wrote:

> One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called "outside agitators," a term which can be made to fit papers like the Times, which is published in New York.[118]

Given this background, it is easy to understand why one might conclude that "state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials."[119] Even the majority displayed a distinct lack of trust in the Alabama courts, resolving the case on the merits rather than remanding it to the local court to apply the new standard.[120] While the majority justified this action in the name of "effective judicial administration," the procedural ploy makes it clear that the majority shared the concurrence's belief that libel law was being used as a weapon to suppress critical speech.[121] Indeed, one of the striking things about the Alabama law at issue in the case is that it was not the common law of libel but rather a statutory creation that, through a series of shifted presumptions, made it very easy for public officials to obtain libel

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ultimately required congressional intervention in the form of expanded powers for the Justice Department and various fiscal sticks and carrots.

[118] *See Sullivan,* 376 U.S. at 294.

[119] *See id*.

[120] *See Sullivan,* 376 U.S. at 292 ("The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceeding not inconsistent with this opinion."). ____.

[121] *See Sullivan,* 376 U.S. at 284.

judgments for any factually inaccurate statement, even one where the errors were relatively trivial.[122]

Nearly twenty-five years later, in *Hustler Magazine v. Falwell*,[123] the Court extended its approach in *New York Times Co. v. Sullivan* to cases involving the intentional infliction of emotional distress, holding that a public figure could not recover damages against the publisher of a parody that had otherwise satisfied the common law requirements for IIED.[124] The case involved a parody published by Larry Flint's *Hustler Magazine* featuring a drunken and incestuous sexual encounter in an outhouse between conservative televangelist Jerry Falwell and his mother.[125] In overturning Falwell's damage award, the Court once again conceptualized damages as a form of "governmentally imposed sanctions."[126] According to the opinion by Chief Justice Rehnquist, the purpose of the tort of intentional infliction of emotional distress is to impose "a sanction in the form of damages"[127] and "prevent[] emotional harm."[128] Hence, the state interest to be balanced against first amendment values was its ability to control its citizens' behavior by suppressing a particular activity – offensive speech – through a system of monetary punishments.

This does not mean, of course, that the Court's modern First Amendment jurisprudence has always conceptualized state tort law in terms of government regulation and the suppression of speech. In *Rosenblatt v. Baer*,[129] the Court considered who should be treated as a "public official" for purposes of *New York Times Co. v. Sullivan's* "actual malice"

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[122] *See Sullivan,* 376 U.S. at 265 ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which the petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press.") (citing ALABAMA CODE, TIT. 7, ss 908-917).

[123] 485 U.S. 46 (1988).

[124] *Hustler*, 485 U.S. at 46. ("In order to protect the free flow of ideas and opinions on matters of public interest and concern, the First and Fourteenth Amendments prohibit public figures and public officials from recovering on damages for the tort of intentional infliction of emotional distress by reason of the publication of a caricature such as the ad parody at issue without showing in addition that the publication contains a false statement of fact which was made with actual malice.").

[125] *Hustler,* 485 U.S. at 46.

[126] *Hustler*, 485 U.S. at 49 ("The freedom to speak one's mind is not only an aspect of individual liberty- and this a good unto itself-but also is essential to the common quest for truth and vitality of society as a whole. We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.").

[127] *Hustler*, 485 U.S. at 52..___.

[128] *Hustler*, 485 U.S. at 53. .

[129] 383 U.S. 75 (1966).

requirements. The Court ruled that the manager of a ski resort owned by a New Hampshire county was a "public official" and therefore faced the heighted requirements of *New York Times*. Writing for the Court, however, Justice Brennan emphasized, "This conclusion does not ignore the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing *and redressing* attacks upon reputation."[130] In his concurring opinion, Justice Stewart was even more forceful:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself is left primarily to the States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system . . . . The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted by careless liars.[131]

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

By 2010 and *Snyder v. Phelps*, however, the image of tort law as a mechanism for the regulation of speech was firmly entrenched in the Court's jurisprudence. Strikingly, Chief Justice Roberts's majority opinion in *Snyder* does not even attempt to articulate a justification for state tort law, focusing the bulk of its discussion on the nature of Westboro's speech.[132] It acknowledged the plaintiff's deep emotional distress, but, if

[130] *Rosenblatt*, 383 U.S. at 86 (emphasis added).
[131] *Rosenblatt*, 383 U.S. at 92 (Stewart J. concurring).
[132] *See Snyder*, 131 S.Ct. at 1211,1217 ("The context of the speech-its connection with Matthew Snyder's funeral-cannot by itself transform the nature of Westboro's speech.");

anything, this acknowledgment served to strengthen Phelps's first amendment claim. It did this by bolstering the majority opinion's conceptualization of tort law as doing little more than seeking to punish and suppress distressing speech.[133]

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

> To uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harms.[134]

Justice Breyer's defense of the state interest remains couched in the regulatory vision of tort law that has dominated the Court's jurisprudence since *New York Times v. Sullivan*.

Only Justice Alito expressed concern, writing a dissent in which he insisted that the first amendment does not mean that the Westboro Baptist Church "may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate."[135] The bulk of his opinion focused on the Church's tactic of using funerals to garner public attention, the limited public interest of the attacks directed specifically at Snyder and his family, and the wide availability of other fora in which to share their public message.[136] Even the dissenting opinion, however, conceded the majority's assumption that tort law was a form of regulation, with liability designed to deter unwanted speech. Hence, he wrote, "[t]o protect against such injury, most if not all jurisdictions permit recovery in tort for intentional infliction of emotional distress (IIED)."[137]

Id. at 1217 ("The fact that Westboro spoke in connection with a funeral, however, cannot transform the nature of Westboro's speech.").

[133] *See Snyder*, 131 S.Ct. at 1212 ("The "special protection" afforded to what Westboro said, in the whole context of how and where he chose to say it, cannot be overcome by a jury finding that the picketing was "outrageous" for the purposes of applying the state law tort of intentional infliction of emotional distress. That would pose too great a danger that the jury would punish Westboro for it's views on matters of public concern.

[134] *See Snyder*, 131 S.Ct. at 1222.

[135] *Id.* at 1222 (Alito, J. dissenting).

[136] *See id.* at ___ (Alito, J. dissenting).

[137] *Id.* at 1222 (Alito, J. dissenting) (internal quotation marks omitted).

C.Intentional Infliction of Emotional Distress

As it turns out, this assumption that tort law is a form of government regulation is particularly strange in light of the particular tort at issue in *Snyder* – intentional infliction of emotional distress. Although the Snyder verdict was based on an invasion of privacy claim as well, the conflict between intentional infliction of emotional distress and the First Amendment was the main issue on appeal.[138]

And the intentional infliction of emotional distress tort provides a clear example of a tort that was created by judges to provide redress for victims of wrongs, and in doing so, to reinforce social equality.[139] Even the most committed economists would have a hard time making the descriptive claim that intentional infliction of emotional distress arose as a means of government putting a price on certain kinds of harmful activity so as to discourage it.

The tort arose in the early part of the twentieth century when women were being injured in various ways, but frequently without physical manifestation, from railroads.[140] These cases, analyzed in depth by Barbara Welke, and Martha Chamallas and Jennifer Wriggins in recent books, were known as "fright" cases.[141] The word "fright" refers to the kind of injury that people thought women had suffered when railroads passed too close to their homes, stopped suddenly in front of them, and the like. But it wasn't even considered an injury at the time, simply a condition. And it was a condition unique to women, not represented among judges and juries.[142]

Lawsuits against the railroads in these circumstances were generally

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[138] *See Snyder*, 131 S.Ct. at 1214.

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

[140] *See* Barbara Young Welke, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW AND THE RAILROAD REVOLUTION, 229-231 (2001).

[141] *See* BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW AND THE RAILROAD REVOLUTION, 203-231 (2001); MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW, 39-46 (2010).

[142] *See* Barbara Young Welke, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW AND THE RAILROAD REVOLUTION, 229-231 (2001); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 Mich. L. Rev. 814, 819-821.

brought under assault or battery theories, and generally failed.[143] In not recognizing these injuries as cognizable, the courts were saying (one might argue) that whoever suffers these kinds of injuries – here, women – doesn't count.

When courts moved later to recognize emotional distress as legitimate, they were validating the very real injuries that women suffered, and validating women's equal claim to personhood.[144] This is an example of how the intentional infliction of emotional distress tort has operated over time to help mediate between the law and social norms on what kinds of injuries are particularly outrageous.

Intentional infliction of emotional distress also served as a precursor to sexual harassment as a cognizable claim under title VII of the Civil Rights Act and as a unacceptable kind of behavior in the workplace.[145] It was in part through the bringing of these claims under intentional infliction of emotional distress theories that courts began to recognize unwanted sexual advances in the workplace as a kind of legal harm.[146] To be sure, the precise story on how norms in law interact in such circumstances is not well understood, and we do not claim to have any particular insight into that mechanism.

But it seems quite plausible that a state interest in providing redress to individuals who have suffered from intentionally inflicted severe emotional harm is to have a social mechanism for defining behavior as simply out of bounds in a "decent" society, what things are simply "outrageous." In doing so, a state can help reinforce a mode of interaction where people treat one another with dignity, regardless of station. All of these things can be

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[143] MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW, 40 (2010) ("As with so many other legal disputes, the choice of classification was crucial: if the claim was for mental disturbance, there would be no recovery."); BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW AND THE RAILROAD REVOLUTION, 212 (2001) ("In New York, Pennsylvania, Massachusetts, and the few states that followed their lead, gender and class combined with other factors to shape a rule of no liability for nervous ills.").

[144] BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW AND THE RAILROAD REVOLUTION, 234 (2001) ("In the law of nervous shock, courts not only acknowledged the extent of the dependence and vulnerability which defined modern life, they as well extended the sphere of the law's protection to the intangible space of the mind. In so doing, they contributed to a redefinition of the scope of liberty in modern life.").

[145] *See* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW, 76-86 (2010).

[146] *See* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW, 86 (2010).

plausibly described as a legitimate state interest – one that the Court ought to take into consideration – even if the net effect on behavior is zero.

Even today, scholars and lawyers use the intentional infliction of emotional distress tort to argue that new kinds of injuries ought be recognized as severe, and the underlying conduct causing them, outrageous.[147] Chamallas and Wriggins make a case for recognizing domestic violence as something that can be brought under an intentional infliction of emotional distress claim, and explain how insurance policy exclusions work to counter the recognition – indeed, the bringing of such a claim.[148] In holding up the ideal behind the intentional infliction of emotional distress tort – one shall not treat other people this way – and demonstrating how our legal system falls short of achieving that ideal, Chamallas and Wriggins are engaging in classic legal reform that if successful, could have a feedback effect on social norms as well.

How does this translate to *Snyder*? It was unacceptable for Phelps to treat Snyder, a father grieving his son's loss, as simply a pawn in his larger plan to alert the country to the moral rot that was taking place. And providing redress for intentional infliction of emotional distress is a way that the state can underscore Snyder's equal moral worth, and reinforce what the state believes to be the appropriate form of social interaction within Maryland's borders: "treat people with respect, the way you would want be treated."

Snyder's claim is a chapter that fits easily in the story of a tort that has been significantly involved in the evolution of social norms on how to treat different kinds of people over the last century. But it is a poor fit for a story about government's attempt to regulate harmful activity. Which brings us to the puzzle: why did all three opinions in *Snyder* assume that the underlying private law was simply a species of government regulation? It is this question that we attempt to unpack in Part III.

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[147] *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 59 (1982) ("[T]he tort grew out of cases representing very different types of social problems.").

[148] MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW, 66-67, 75-76 (2010).

III. Unpacking The Supreme Court's Theory of Private Law

In this section, we unpack the Supreme Court's theory of private law by looking at what is missing in a case like *Snyder*. In our view, the conception of private law as government regulation comes from a combination of (1) the doctrinal tools judges use in First Amendment cases, (2) the unitary nature of the state-action doctrine, and (3) the influence of instrumentalism, specifically in obscuring the plaintiff's agency and the state interest in redress, and in privileging a particular view of compensation. We explain what we mean by this below, and then in Part IV, we offer some preliminary thoughts on the normative implications if the Court took a more nuanced view of private law.

A. First Amendment Doctrine

Generalizing about First Amendment doctrine is a dangerous task. The Supreme Court and First Amendment scholars generally agree, though, that most First Amendment cases involve assessing the First Amendment values at stake in light of the state interest in the underlying law being challenged.[149]

This analysis, though, does not amount to a simple weighing of the scales. Our argument is that the Supreme Court's theory of private law is doing a lot of work on both sides of the equation in how this balance comes out.[150] Though we do not explore in depth other areas of doctrine, like punitive damages or preemption, we suspect it is doing significant work there as well.

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

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

Specifically, we believe the Supreme Court's theory of private law operates on the state interest side to bolster the suspicion that an illicit purpose or motive is at work.[151] If the state is *regulating*, then it must be *suppressing*. This is, after all, what "deterrence" is all about – preventing the wrongful conduct (here, speech) from happening in the first place.

And then, related to the state's purpose, the theory of private law as regulation is providing a presumption of "effects" on the First Amendment side of the equation: that speech will indeed be suppressed.[152] In this section, we explain a bit more what we mean on both these points.

Recall that First Amendment doctrine strives to strike a balance between the constitutional interests on the one hand, and state or individual interests on the other. In doing this, the doctrine uses the basic categories of "content-based" and "content-neutral" regulation to serve as a rough divide between suspicious and less suspicious government action – one worthy of First Amendment protection, the other less so.[153] This division has been criticized as a crude one, but has been explained by scholars like Jed Rubenfeld and now-Justice Elena Kagan as a proxy for or means of "flushing out" suspect or illegitimate government motives – motives for suppressing certain kinds of speech.[154]

This kind of doctrine – deploying tools for flushing out "motive" – is common in constitutional adjudication.[155] To be sure, the Supreme Court has denied, in the seminal case *U.S. v. O'Brien*,[156] that governmental purpose is what it is after, but scholars have pointed out persuasively that

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

[152] *See* Fallon, supra note ___, at 69-70.

[153] *But see* Herzog, supra note, at 12-13 (observing that the "alleged black-letter rule" that the state may not regulate speech on the basis of its content is "blatantly false"). *Cf.* Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 159 (arguing that the use of strict scrutiny in Equal Protection cases reflects an empirical assumption about the "perceived likelihood of legitimate versus illegitimate motives").

[154] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 UNIVERSITY OF CHICAGO L. REV. 413 (1996); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STANFORD L. REV. 767 (2001).

[155] *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997); Lawrence A. Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925 (1978) (citing Ely and Brest).

[156] 391 U.S. 367 (1968).

the Court's actions in subsequent cases have demonstrated otherwise.[157] In *O'Brien*, the Court claimed that the concern was the "effects" on speech, another common test in constitutional adjudication.[158] But lots of perfectly permissible "content-neutral" regulation has the effect of lessening the amount of speech – it is when the government *seeks to* (again, purpose or motive at work) suppress speech because of its content that the First Amendment gets worried.[159]

One can argue, of course, that in a case like *Snyder*, this is precisely what "the government" is doing through its agent, the jury – regulating Phelps' speech because it is "outrageous" – a judgment about content, and a key element in the intentional infliction of emotional distress tort that is primarily at issue in *Snyder*.[160] But suppressing or putting a high price on speech because of its offensiveness to the majority of people in the community is exactly what the First Amendment is designed to protect.[161] So the argument goes.

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[157] See Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 NYU L. REV. 1784, 1787-88 (2008) (despite the Court's protestation in *O'Brien*, courts had "long been willing to consider some objective indicia of legislative purpose" in assessing the constitutionality of a statute, even if it had been unwilling to scrutinize the "legislature's inner workings").
Indeed, the Supreme Court has recently acknowledged as much. *Sorrell v. IMS Health*, 564 U.S. __ (2011), slip op. at 9 ("Just as the 'inevitable effect of a statute on its face may render it unconstitutional," a statute's stated purposes may also be considered.") (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

[158] 391 U.S. at 383, 385. See Richard H. Fallon, Jr,, *Foreword, Implementing the Constitution*, 111 HARV. L. REV. 56, 62-63 (1997) (discussing these kinds of "effects tests").

[159] *See* Alan K Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HVD C.R-C.L. REV. 31, 82 (characterizing the framework of First Amendment law as "being as concerned with illicit government purposes as it is with effects."); Richard H. Fallon, Jr, *Foreword, Implementing the Constitution*, 111 HARV. L. REV. 56, 90-102 (1997) (arguing that purpose-based tests and their surrogates play a more central role in constitutional doctrine than has been appreciated, including in First Amendment doctrine)..

[160] See Faigman, supra note ___, at 1531 (pointing out that the "legitimacy of government power depends also on the purpose behind its exercise" and that the purpose gets greater scrutiny "the more deeply revered the right").

[161] See *Snyder v. Phelps*, 131 S.Ct. 1207, 1219 (2011) (arguing that the "outrageousness" standard for speech in the intentional infliction of emotional distress tort carries a high risk that the jury will become an instrument for "suppression of… expression") (quoting *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510 (1984)). *But see* Benjamin C Zipursky, Snyder v. Phelps*, Outrageousness, and the Open Texture of Tort Law* [hereinafter Snyder, Outrageousness, and Open Texture], 60 DEPAUL L. REV. 473 (2011) (arguing that the "outrageousness" standard is a high threshold to meet, and the intentional infliction of emotional distress tort is far more cabined than the Court seems to think).

What this argument misses, though, is the nature of the intentional infliction of emotional distress tort. It is a tort limited to situations where people deliberately use speech as a weapon for inflicting severe emotional harm.[162] The "outrageousness" element is not an indicator that the tort is designed or used to go after unpopular views. The outrageousness requirement is to make sure that the speech is sufficiently egregious that it *is not* simply something that the majority doesn't like.[163]

Assume, though, that the Court is right about this danger of juries. If it was *only* juries the Court was worried about, then the First Amendment interests *still* might not have enough bite. After all, juries are historically designed to serve as a bulwark against government power, and though this function has been greatly diminished in the civil context, the mythology around this role of the jury remains.[164] The jury is not the agent of government oppression; it is the counterweight to it.[165]

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

But the attribution is problematic in many respects. In a case like *Snyder*, involving a common-law action, "the state" is at once everywhere and nowhere. It empowers plaintiffs to bring lawsuits.[166] It provides its authority to juries to decide what is okay, and what ought receive a measure

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[162] *See* Restatement of Torts Second §46(1) (1965). In fact, some commentators have proposed new torts because intentional infliction is so limited. *See, e.g.,* Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, HVD. C.R.-C.L. REV. 133, 151-57 (1982) (walking through cases and concluding that courts generally "have not recognized the gravity of racial insults" in denying many apparently strong IIED claims).

[163] *See* Zipursky, *supra* note __, Snyder, *Outrageousness, and Open Texture*, at 500-04 (explaining how the outrageousness requirement serves as a judicial screening device to limit liability).

[164] See Jason M. Solomon, *The Civil Jury as a Political Institution*, 61 EMORY L.J. (forthcoming 2012) (discussing the lack of contemporary justification for the civil jury on this ground).

[165] *See* AKHIL REED AMAR, THE BILL OF RIGHTS 81-110 (1998). Amar refers to the "populist and local" institution of the jury as "the dominant strategy to keep agents of the central government under control." *Id*. at 83.

[166] Arguably, this context is an example of what Don Herzog has called the "Kerr principle," a principle in constitutional adjudication that "bars the state from serving as a conduit for private parties' illegitimate preferences." See Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 1-2 (2006).

of justice. And it of course provides a forum for the highly staged dance of demands for accountability and explanations of conduct to take place.[167]

The state's alleged motive or purpose in deterring speech plays an important role, standing alone, in elevating the First Amendment concerns.[168] But what the Supreme Court is *also* doing here is using governmental motive as a way to prove, demonstrate, or extrapolate to, governmental effect. That is to say, it is our sense that this attribution of governmental motive helps drive the analysis and assumption that the state law serves to have a regulatory effect.[169]

The Supreme Court's "effects" concern in a case like *Snyder*, involving a multi-million dollar jury verdict, is with the next speaker. If someone were to voice concerns on public issues in a way that could be construed as hurtful, even if meant simply to be provocative by the speaker, would the speaker be chilled from undertaking such speech?

That depends on an empirical question about the degree to which tort law - specifically "speech torts" like defamation, privacy, and intentional infliction of emotional distress - perhaps even just intentional infliction of emotional distress, the primary claim at issue in *Snyder* - have on people's behavior.[170] We have very little empirical evidence on this question.[171] But

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[167] *See* MILNER BALL, THE PROMISE OF AMERICAN LAW 42-63 (describing trials as a type of theater); ROBERT BURNS, THE THEORY OF THE TRIAL 34-72 (explicating trials as a set of highly structured linguistic practices where a person 'actually performs his interpretation of events in a public forum") (internal quotations omitted).

[168] *See* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 NYU L. REV. 1784, 1856-57 (2008) (positing that the outcome of judicial review in constitutional challenges can frequently "hinge" on the court's assessment of legislative purpose: "Was the legislature trying to produce the adverse effects in question, or were those effects simply incidental to the legislature's pursuit of some legitimate objective?").

[169] In the course of disagreeing with Jed Rubenfeld's argument for focusing on legislative purpose in First Amendment adjudication, Richard Posner acknowledges this role for governmental purpose. "The purpose, even the motives, behind a regulation of expressive activity may indeed be relevant – to assessing its consequences. We often and rationally infer the probable consequences of an action from evidence of a desire by the actor to produce them. People generally don't undertake a course of action without reason to believe that it will accomplish their purpose in undertaking it." Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 745 (2002).

[170] Richard Fallon points to *New York Times v. Sullivan* and *Gertz v. Robert Welch, Inc.* as examples of cases that rely on "empirical, predictive calculations" in making constitutional judgments. See Richard H. Fallon, Jr, *Foreword, Implementing the Constitution*, 111 HARV. L. REV. 56, 62-63 (1997).

the relatively small number of such claims – and lack of widespread awareness of claims brought, verdicts achieved, and the like -- indicates the effect is likely to be minimal.

So why are we concerned about such an effect? Because we have already posited that the state is trying to suppress speech. By enabling an intentional infliction of emotional distress tort, the state's motive - so the conventional story goes, repeated in all three opinions in *Snyder* - was to limit (or *deter*) such speech.[172] And if it is setting up and maintaining an expensive apparatus – the tort system – for deterring such conduct, we must assume that it is worth the candle.

As we explain below, the identification of the state interest as deterrence or speech-suppression stems in part from the particular (and contingent) way that First Amendment law developed, but it also comes from the nature of the state action doctrine.

B. State Action

The Court's focus on tort law as a form of state regulation may also be driven by the nature of the state-action doctrine. In this section, we briefly explain why we think this is the case.

The state-action doctrine is the mechanism by which courts determine whether a particular action ought receive constitutional scrutiny, and has

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[171] *See* David L Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles v. Supreme Court Practice*, 78 VA. L. REV. 1521, 1524-25 (arguing that the Supreme Court's questionable practice of incorporating consideration of government interests into the definition of whether a constitutional right is implicated permits the Court to "avoid answering difficult empirical questions inherent in government interest analysis").

[172] See *Snyder v. Phelps*, 131 S.Ct. 1207, 1219 (2011) (arguing that the "outrageousness" standard for speech in the intentional infliction of emotional distress tort carries a high risk that the jury will become an instrument for "suppression of… expression") (quoting *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510 (1984)); *Snyder v. Phelps*, 131 S.Ct. at 1222 (Breyer, J., concurring) (defining the State's interest as "protecting its citizens against severe emotional harm"); id. at 1222 (Alito, J., dissenting) (noting that "most if not all" jurisdictions allow the intentional infliction of emotional distress tort "[t]o protect against such injury") (quoting *Hustler v. Falwell*, 485 U.S. 46, 53 (1988)).

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

been the site of much contentiousness among courts and scholars since the beginning of the 20th century.[173] Constitutional rights, of course, only can be invoked against action fairly attributable to the state, and so the state action doctrine seeks to answer this question of proper attribution.[174]

Since *Shelley v. Kraemer*, common-law actions brought by private parties could be the basis for "state action."[175] The context in which this arose was attempts by private parties to use litigation to uphold racial segregation, and applying the state-action doctrine to this litigation and finding it to be "state action" allowed federal courts to use constitutional rights to police racial mischief.[176]

Indeed, this was the very context in which the First Amendment was first applied to suits among private parties.[177] In *New York Times v. Sullivan*, Sullivan was an individual suing the New York Times for libel.[178] This was the first time that the First Amendment had been held to apply to such action, though it was a logical extension of *Shelley,* decided 16 years earlier.

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[173] For a sampling of the vast literature, see sources cited in Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1446 & nn. 273-74 (2003). For a recent critique, *see* Gary Peller and Mark Tushnet, State Action and a New Birth of Freedom, 92 Geo. L.J. 779, 789 (2004) (arguing that the false public-private distinction that grounds the state action doctrine makes the doctrine "analytically incoherent").

[174] Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (describing the question as one of "fair attribution").

[175] Shelley v. Kraemer, 334 U.S. 1, 19-20 (1948) (holding that court enforcement of racial covenant on property was state action). How far *Shelley* extends beyond its facts, though, has been much debated. See e.g., Kevin L. Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 348-53 (1990) (pointing out that the state's involvement in Shelley was so minimal that "it is difficult to imagine any case in which state action is not present"); Ronald J. Krotoszynski, Jr., *Back To The Briarpatch: An Argument In Favor Of Constitutional Meta-Analysis In State Action Determinations*, 94 MICH. L. REV. 302, 316-17 (1995) (noting that *Shelley* "has proven controversial because it could be read to mean that any court involvement in an essentially private dispute satisfies the state action requirement" but it can be construed more narrowly).

[176] See Charles Black, *The Supreme Court, 1966 Term--Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

[177] 376 U.S. 254 (1964). The Court explained: "Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." Id. at 265.

[178] 376 U.S. 254, 256 (1964).

Since *Sullivan*, though, the scope of what is considered "state action" for First Amendment purposes has continued to grow,[179] and it is worth pausing on just how much the factual circumstances of *Sullivan* differ from *Snyder*. Snyder was an individual citizen whose son died at war, and who only entered the public spotlight when Westboro Baptist Church showed up at his son's funeral. His entanglement with the "state" was simply availing himself of the right of any citizen to bring a civil suit.

In contrast, Sullivan basically *was* the state; he was an elected City Commissioner in Montgomery, Alabama.[180] The lawsuit was a part of a strategy that was later well-documented by Anthony Lewis and others to be a quite conscious effort to bankrupt Northern newspapers like the *Times* that reported on the civil rights movement, in an effort to discourage them from doing so.[181] That is to say, it was an effort by elected officials to use the legal system to suppress future speech.

In contrast to the factual circumstances of *Snyder*, where a private citizen brought an individual lawsuit, consider another First Amendment case, *Sorrell v. IMS Health*, also decided in 2011.[182] Vermont had passed a law barring the sale (or give away) of doctors' prescription records by pharmacies and data-miners, unless the doctors gave permission.[183] The prescription records were valuable to companies marketing pharmaceuticals to doctors and their patients.[184] So here we have the State of Vermont, speaking through its legislature, telling companies not to do certain activities within its borders, at least without consent. Now *this* is state action. And the companies brought a lawsuit based on the First Amendment to challenge the restriction on their commercial speech.

The problem with state-action doctrine, though, is that it does not take into account the differences between the type and extent of state involvement in the *Snyder* and *Sorrell* cases. State action doctrine is unitary: either something is state action, or it is not.[185] If it is, then full

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[179] *See Development in the Law, State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1255-66 (2010) (providing an analytic summary of the evolution of the state action doctrine).
[180] 376 U.S. 254, 256 (1964).
[181] *See generally* Anthony Lewis, MAKE NO LAW.: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1992).
[182] 131 S. Ct. 2653 (2011).
[183] VT. STAT. ANN., TIT. 18, §4631(d).
[184] 131 S. Ct. 2653, 2659-60 (2011) (describing how the companies use the information).
[185] *See* John Fee, *The Formal State Action Doctrine and Free Speech Analysis,* 83 N.C. L. REV. 569, 578 (2005)"[The] state action issue presents an all-or-nothing question. Either

blown constitutional scrutiny applies; if it is not, then no such scrutiny applies. But the concerns underlying the First Amendment are not necessarily as salient in cases where a private party brings a lawsuit, as opposed to a state legislature passing a statute, as in *Sorrell*, or a public official either using his authority or the courts, as in *Sullivan*.

And the effect of this unitary aspect of state action doctrine is (we suspect) to exacerbate the tendency to view the common-law as an arm of state regulation. After all, regulation is *what the state does* in the 21st-century.[186] So if it is indeed the *state acting*, then that is what it *must* be doing - regulating conduct. Surely the 21st-century state does not provide fora for slightly more civilized duels.[187]

Moreover, the acceptance of the "everything is state action" status quo has led the doctrine to bleed over far beyond the specific question it is designed to answer: whether the government is sufficiently involved in the challenged action such that constitutional protections apply at all.[188] One can agree that common-law actions and enforcement implicate "the state" such that they are subject to challenge under the Constitution on the one hand (the purpose of the state action doctrine), without committing to the view that the animating purpose or function of the common law is state regulation.[189]

Now a defender of the Court can respond that it is true that the common-law can be characterized, perhaps is even best characterized, as serving an interest in redress. Perhaps that is the underlying purpose of private law, at least tort law. But that does not mean that the effect (or alternatively, another function) of tort law cannot also be described as putting a price on certain activity so as (whether intentionally or otherwise)

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there is state action, in which case the ultimate act is attributed to the government, or there is no state action, and the case is dismissed. No middle ground is available.").

[186] *See* EDWARD L. RUBIN, BEYOND CAMELOT 204 (2005) (suggesting that "policy and implementation" – the basic tools of regulation – "constitute the full range of governmental action in a modern state").

[187] *But see* Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31, 45-49 (2011) (exploring the historical relationship between litigation and dueling).

[188] Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (describing the question as one of "fair attribution").

[189] *See* Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 22-23 (2006). In this sense, state action doctrine is less about "attribution" or causation, and more about responsibility – the state cannot be *responsible* for the suppression of speech, even if it is not doing the suppressing itself, or making the tort available for the purpose of suppression.

to discourage said activity.[190] State-provided fora where lawsuits can result in the payment of money damages can do that.

If it has the effect of discouraging speech by putting a price on it (and in this case, it turned out to be a pretty big one, $11 million), then courts have to obey the stricture of the Bill of Rights, according to this view. The federal interest simply trumps. In our view, consistent with Justice Breyer's concurrence in *Snyder*, this is both inconsistent with the thrust of First Amendment doctrine, and accords the federal interest too much weight.

C. Instrumentalism's Influence

Besides the unitary state action requirement, the instrumentalist view of private law also gives the state a greater role than it actually has in this case. According to the instrumentalist view, particularly the law-and-economics variant, the plaintiff is a private attorney general, acting on behalf of the government to deter undesirable behavior.[191] But this imposes a particular theoretical construct on facts that are unlikely to fit. The public record contains little on Snyder's motives for bringing the lawsuit, but it seems quite likely that he was acting on behalf of himself and his slain son, not the state of Maryland.[192]

Indeed, it is quite important doctrinally in the cases on the conflict between the First Amendment and speech torts whether plaintiffs like Snyder are "public figures" or not.[193] But Justice Roberts' opinion ignores entirely this issue: the first on which the Court granted cert, and the ground on which the District Court ruled that the verdict should stand – that Snyder

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[190] New York Times v. Sullivan, 376 U.S. at 277 ("The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.").

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

[192] *See* Zipursky, Snyder, *Outrageousness, and Open Texture, supra*, at 505 (2011) ("[T]he plaintiff Snyder is not acting as a private attorney general of Maryland demanding that some criminal or regulatory fine be handed out; Snyder is suing for a wrong to him.").

[193] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (first articulating this distinction). *See also* Mark Strasser, *Funeral Protests, Privacy, and the Constitution: What is Meant After Phelps?* 61 AM. U. L. REV. 279, 293-96 (2011) (arguing that *Snyder*'s ignoring of this issue does not reflect the current state of First Amendment law).

and his son were private figures, quite unlike Jerry Falwell, the plaintiff in the Supreme Court's only intentional infliction of emotional distress/First Amendment case, *Hustler v. Falwell*.

Under an instrumentalist view of private law, how public a figure the plaintiff is ought not matter a bit. In bringing the lawsuit, he becomes an agent of the state. But the reason Snyder's private or public-ness *does* matter in First Amendment doctrine, *contra* instrumentalism, is that it affects his entitlement to recourse. That is to say, even if Richard Jewell, the Atlanta security guard suspected of bombing the Olympics in 1996, had been defamed, as he claimed in a well-known First Amendment/defamation case, he was not entitled to complain because he had "thrust himself into the vortex" of public life.[194] This is consistent with a kind of "consensual waiver" approach to First Amendment doctrine.[195]

But the Supreme Court had never ruled whether the balance of First Amendment and state interests ought be different in the intentional infliction of emotional distress context --- as it is in defamation and privacy cases -- when the plaintiff is a private citizen, as opposed to the very public Jerry Falwell.[196] And dodging the issue in *Snyder* no doubt hurt the Court's ability to appreciate that private law is really something other than government regulation.

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

1. Ignoring Plaintiff's Agency

One of the results of the Court's emphasis on state tort law as a form of public regulation is to render the agency of the plaintiff in bringing the lawsuit largely invisible. One of the core features of the law of private wrongs is that nothing happens unless a wronged plaintiff chooses to sue.[197]

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[194] *See* Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175, 182-85 (Ga. Ct. App. 2001).

[195] *See* Jason Solomon, *Judging Plaintiffs,* 60 Vand. L. Rev. 1749, 1767-68 (2007) (explaining the public-figure doctrine as a variant of assumption of risk) .

[196] *See* Zipursky, *Snyder, Outrageousness, and Open Texture,* supra note xx, at 517 (noting that it is "striking, to put it gently" that the decision to not give the status of the plaintiff any weight "would be made silently").

[197] *See* Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31, 40 (2011) ("[T]he private law empowers plaintiffs to act against defendants. Plaintiffs may choose to

The machinery of the law will remain inert unless a private party brings an action.[198] Furthermore, the private party bringing the lawsuit must in some sense be a victim of the defendant's action. He must have suffered a wrong of some sort. He is thus in a different position than a public prosecutor or someone such as a qui tam relator under federal whistleblower statutes who need not be a victim of the defendant's wrongdoing to sue.[199] Rather, the law of torts empowers victims to act against those that have harmed them.

When tort law is seen purely as a matter of safety regulation or loss spreading, the way in which tort law empowers plaintiffs becomes at best an idiosyncratic system of private enforcement.[200] On this view, the regulatory ideal would be for an omniscient and omni-competent state to monitor the behavior of all citizens and impose sanctions on those who frustrate the supposed regulatory goals of tort law.[201] Given the limitations in terms of resources and information that the state faces, however, this ideal is not possible. The second best solution is to create private rights of action and then give plaintiffs an incentive to sue. Private suits thus serve to vindicate public policy.[202] This argument seems plausible, and no doubt there is some truth to it, but it doesn't quite fit the law of torts.

If tort actions are second-best means of controlling behavior, it makes little sense to confine the right of action to victims. Remember, according to the second-best argument, private litigation is a response to

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bring suit against tortfeasors and contract breachers, but the law does not require that they do so, Rather, it waits entirely on the plaintiff's decision to sue. Until she brings an action, nothing happens.").

[198] See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 738-39 (2003).

[199] *See* Oman, *Honor of Private Law*, supra note ___, at 39 (explaining that under "disaggregated enforcement mechanisms" like qui tam actions, "plaintiff need not be a victim of the defendant's wrongdoing but may sue as a way of enforcing public policy merely on the basis of information.").

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

[201] *See* John C.P. Goldberg, *Tort In Three Dimensions,* 38 PEPP. L. REV. 321, 325-26 (2011) (ascribing such a view to mid-20th century scholars like Leon Green and William Prosser – that tort would be "a branch of the emergent administrative state in which regulations directed toward certain kinds of influential actors…would be crafted primarily by jurors and judges on a case-by-case basis").

[202] *See* Kaplow and Shavell, *supra* note ___, at 136 (arguing that a norm encouraging victims to seek redress is valuable because "deterrence is undermined when victims fail to respond").

finite government resources and limited government information.[203] This, however, would imply that anyone with resources and information should be allowed to bring a suit to vindicate the government's regulatory interests.[204] Tort law, by confining the right of action to victims, would seem to undermine the very regulatory goals that it is supposedly pursuing.

The alternative view is that the empowering of victims is not a second- or even third-best solution to problems of enforcement. Rather, empowering victims by giving them the agency to act against their wrongdoers is itself a primary value of private law.[205] On this view, tort law may be a poor system of risk regulation, but that it is not its purpose. Rather there is an independent normative value in giving victims recourse against tortfeasors.[206]

One way of thinking about this value is suggested by the writing of John Rawls. In *A Theory of Justice*, Rawls argues that there are certain preconditions for a good life that hold true regardless of one's ultimate beliefs about the shape of that life.[207] Because they do not hinge on controversial beliefs about the good or moral life but are necessary for virtually every conception of such a life, they become a legitimate object for a liberal state.[208] Among these preconditions, Rawls names self-respect, the notion that the life one is pursuing is valuable and worth pursuing.[209] Thus far the claim strikes us as plausible. Rawls, however, tends to view self-respect as a good distributed by a beneficent social planner. It becomes a right that the individual claims, like the right to vote or perhaps the right to

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[203] *Id*. at 136 (pointing out that "victims are often in the best position to know when and how much they have been injured as well as the identity of injurers").

[204] Indeed, some scholars have proposed exactly this in the context of tort law. *See, e.g.,* Dan Markel, *Retributive Damages: A Theory Of Punitive Damages As Intermediate Sanction*, 94 CORNELL L. REV. 239, 279-286 (2009) (explicating the appeal of this "private attorney general" model in cases where retributive justice against wrongdoers is warranted, but victims decline to sue).

[205] *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts As Wrongs*, 88 TEX. L. REV. 917, 972 (2010) (arguing that it is "legitimate and useful" for the state to "afford the victims of certain wrongs an avenue of recourse against those who have wronged them," and referring to civil recourse as "what the state delivers" by having tort law).

[206] See Oman, supra note ___ at 40 ("Recourse theorists insist there is some distinctive normative goal that is vindicated by giving citizens the ability to proceed in court against those that have wrong them.").

[207] *See* JOHN RAWLS, A THEORY OF JUSTICE 155 (rev. ed. 1999). One of us first used Rawls in this context in Oman, Honor of Private Law, supra note ___, at 55-56.

[208] *See* Rawls, *supra* note ___ at 155-60 (discussing the role of self-respect in the deliberations of agents in the original position).

[209] *See* Rawls, *supra* note ___ at 155 ("Self-respect is not so much a part of any rational plan of life, as the sense that one's plan is worth carrying out.").

a welfare benefit.[210] What this formulation misses is the role of agency in generating self-respect.[211]

The idea of honor provides a way of thinking about the role of agency. Think of a tort as an act of humiliation, a way in which the tortfeasor fails to show due concern to the victim. How does one recover one's honor? If the person who humiliates you is punished, one might believe that justice has been done, that the person has received his due reward. Yet just punishment is not quite the same thing as the restoration of lost honor – of lost self-respect.[212]

Here it would seem that epic poetry provides a more insightful account of self-respect than John Rawls. In the Iliad, the Aeneid, or Beowulf, a beneficent king does not dispense honor. To be sure, all of these stories are set within hierarchical societies in which differing levels of honor are attached to certain kinds of statuses – king, knight, hero, slave, and so on. This status-based honor, however, is not the honor that drives the plot.[213] Rather the self-respect gained by Achilles, Aneas, and Beowulf comes from their actions. In the face of humiliation, taking action against those that have humiliated them restores their self-respect.[214]

For the heroes of the epic poems, agency against wrongdoers took the form of violent self-help. Fortunately, the modern state has been relatively successful at suppressing private violence and other forms of serious private aggression. We can call those that wrong us names, but we cannot act directly against their persons or their property. This leaves the modern victim with relatively few options for acting against his wrongdoer. Even an act of forgiveness or magnanimity loses much of its meaning in a world in which the forbearance of the victim has little impact on the wrongdoer. In short, there is a sense in which the success of Leviathan in suppressing the Hobbesian war of "all against all" is too successful, leaving wrongdoers more or less invulnerable to attack by their victim.[215]

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[210] *See* SHARON KRAUSE, LIBERALISM WITH HONOR 18 (2002) ("Thus self-esteem is a good to be distributed, according to Rawls, and in a just society it will be distributed equally.").
[211] *See* Oman, *Honor of Private Law*, *supra* note ___, at 56.
[212] *Id.* at 62-63.
[213] *Id.* at 56 ("In The Iliad, honor is not ultimately dispensed by the gods, but is gained by heroic actions.").
[214] *See, e.g.*, HOMER, THE ILIAD 421 (Robert Fagles trans., Viking Penguin 1990) ("Fight like men, my friends," urges Patroclus, "Now we must win high honor for Peleus' royal son. . . .) .
[215] *See* THOMAS HOBBES, LEVIATHAN (1968).

Private law responds to this problem by creating "liability." While the word is ubiquitous, its original meaning is seldom fully remembered. To be liable is to be vulnerable.[216] To be liable to attack means that one is vulnerable to attack. It does not mean that the attack will actually occur. That is left to the choice of the attacker. Tort law defines wrongs, but it does not suppress those wrongs.[217] Rather, it makes the wrongdoer vulnerable to recourse by the victim.[218]

This recourse, however, is sharply limited. It is *civil* recourse. Nevertheless it avoids the problem of the humiliated and powerless victim that is created by the complete suppression of self-help.[219] In effect we solve the problem of Leviathan's over-effectiveness by reintroducing the war of all against all into society, albeit with a very stylized form that sharply limits the scope of conflict.[220] Nevertheless, litigation is a form of conflict, a way in which a victim chooses – or not – to act against her victimizer.[221]

Another way of thinking about this is in terms of moral address. The regulatory vision of the law sees its obligations primarily in the third person.[222] The impersonal demands of the law are ideally enforced by the impersonal force of the state. The law does not involve the victim

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[216] *See* Jason M. Solomon, *Civil Recourse as Social Equality*, xx FSU L. Rev. xxx (2012) (relating this meaning of "vulnerable" to the vulnerability that accompanies physical embodiment and is often taken advantage of in a situation resulting in tortiously caused harm)

[217] *See* Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 90 (1998) ("The tort law defines the ways in which we wrong one another....").

[218] *Id*. ("A person who has been wronged in these ways has a right to civil recourse against the one who has wronged her.").

[219] *See* Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts,* 51 VAND. L. REV. 1, 85 (1998) (referring to the law of civil recourse as allowing society to "avoid[] the mayhem and crudeness of vengeful private retribution, but without the unfairness of leaving indidivudals powerless against invasions of their rights.").

[220] *See* THOMAS HOBBES, LEVIATHAN (1968).

[221] *See* Oman, Honor of Private Law, *supra* note ___ at 63-64 ("Suing someone is more than simply a petition for redress. It is an act of aggression by the plaintiff against the wrongdoer. Likewise the process of litigation is a battle and a struggle.").

[222] In moral philosophy, such obligations are also referred to as "state-of-the-world-regarding." That is, the obligation exists because the world would be a better place if it were so, not because of any reason you have for might have for having such an obligation (first-person), or because of anything owed to another (second-person). *See* Darwall, supra note __ , at 5-6 (citing and quoting G.E.MOORE, PRINCIPIA ETHICA (1993)).

addressing the tortfeasor and demanding redress.[223] At best, on the regulatory view, the state addresses itself to the tortfeasor through the person of the victim, who is reduced to an instrument of the state's policy.[224]

What the regulatory vision of the law denies is the idea that the victim himself has a right to address the tortfeasor and make demands on him as a result of his wrongdoing.[225] It is the difference between saying, "One should not step on the feet of others" and saying, "Hey you! Get off my foot."[226] The second form of address acknowledges the moral authority that a victim acquires over a wrongdoer, an authority that gives the victim the right to make demands on the person that has victimized him.

Bringing a lawsuit, then, is a way for an individual to demand answers or accountability from one who has wronged him. In providing a forum for such practices, the state reinforces a particular kind of social equality that is relational.[227] It underscores that no individual's interests is above another, simply because of status or wealth.[228] It underscores that we all have obligations to one another, and are answerable for these obligations.[229] And by empowering the victim herself to demand accountability, the state underscores each individual's moral authority and personal agency.

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[223] An alternative view of the law, consistent with what we describe here and also based in significant part on Stephen Darwall's work, is presented in Robin Kar, *The Second Person Standpoint and the Law*, LEGAL THEORY 1, 14-19 (forthcoming 2012) (using Darwall's work to argue that legal obligations "purport to have a special form of authority, which is best understood as involving either implicit or explicit interpersonal demands").

[224] See infra text accompanying notes xxx-xx.

[225] *See* Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1810 (2009) ("From the state's perspective, by establishing a system whereby indidivudals can hold those who have wronged them legally accountable , the state underscores the moral accountability we have toward one another as well. The state does this simply by establishing the system and making it available.").

[226] This example is drawn from STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT 5-6.

[227] *See* Jason M. Solomon, *Civil Recourse as Social Equality*, FSU L. REV. (forthcoming 2012)

[228] See Goldberg, *Constitutional Status*, *supra* note __, at 607-08 (articulating tort law's role in promoting and maintaining a "nonhierarchical conception of social ordering").

[229] *See* Solomon, *Equal Accountability*, *supra* note ___, at 1807-11 (describing this as a "moral community of equals who are mutually accountable").

2. The Missing State Interest In Redress

Acknowledging the importance of empowering victims and providing a legal mechanism for them to exercise agency against their victimizers has implications for how one conceptualizes the state interest in private-law cases. When private law is seen as a regulatory enterprise, the state interest centers on controlling the behavior of the defendant.[230] Hence, for example, the purpose of libel law becomes the suppression of libelous speech. The purpose of state products liability law becomes to eliminate defective products. And so on.

Placing the agency of the plaintiff in the foreground of the discussion of tort law, however, recasts the state interest. While the state may be interested in suppressing certain kinds of wrongs that give rise to torts, this is not the primary purpose of tort law itself.[231] Rather, tort law, with its plaintiff- and victim-centered structure, advances the state's interest in providing its citizens with recourse against those that have harmed them.[232] What is important is not insuring that wrongs don't happen but insuring that if wrongs do happen the victim is not left powerless to act against the wrongdoer.[233] There is ample evidence that providing civil recourse is an interest that is deeply embedded in state laws.

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

One can imagine, for example, the Maryland state legislature holding hearings on the amount of emotional distress that individuals are suffering

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[230] *See* LOUIS KAPLOW AND STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 86 (2002) (pointing first to the "incentives it creates for potential injurers" as a way to evaluate tort law, and acknowledging in a footnote that the influence on potential victims' behavior is another "important effect").

[231] See Benjamin C. Zipursky, Snyder v. Phelps*, Outrageousness, and the Open Texture of Tort Law* [hereinafter Snyder, Outrageousness, and Open Texture], 60 DEPAUL L. REV. 473, 478, 496-98 (2011) ("Tort law, unlike criminal law or regulation, is not a series of general prohibitions or restrictions promulgated and enforced by the state.").

[232] *Id*. at 519.

[233] Almost in passing, at the end of his Snyder dissent, Justice Alito acknowledges this value of a tort claim: "Respondents' outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a *judgment that acknowledges the wrong he suffered*.) (emphasis added). 131 S.Ct. at 1229.

within its borders. One can imagine a blue-ribbon report documenting this phenomenon, labeling it as a problem, and making recommendations as to what to do. One of those recommendations might be the passage of a law providing for a private right of action for individuals to bring tort claims for emotional distress inflicted on them, and one can even imagine a "purpose" or "preamble" section of the statute that specifically says that this is the state's motive in passing the law and including the private right of action: to reduce or deter or suppress this kind of conduct, including speech. Indeed, statutes providing individuals with private rights of action for wrongs done to them are quite common in state and federal law.[234]

But Maryland's law at issue here - the common-law tort of intentional infliction of emotional distress -- arose quite differently. It arose in a context in which certain individuals came into court seeking redress for wrongs done to them.[235]

Indeed, Maryland has a quite deeply rooted interest in proving its citizens with the power to act against those that wrongfully harm them. Hence, the Maryland constitution's Declaration of Rights states "[t]hat every man, for any injury done to him is his person or property, ought to have remedy by course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land."[236] Elsewhere the Declaration states "[t]hat the Inhabitants of Maryland are entitled to the Common Law of England, and trial by Jury, according to the course of that Law . . . ."[237]

What is striking about these constitutional provisions is that rather than entitling the citizens of Maryland to some absolute protection in their persons and property, they confer upon them rights of redress, "a remedy by course of law." Far from being an anomaly, Maryland's constitution's emphasis on the right to a law of redress for private wrongs represents a powerful strand running through American law.

Most states have "open courts" provisions in their state constitutions guaranteeing to citizens access to the courts for the redress of private

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[234] In state law, a wave of recent consumer fraud statutes are perhaps the best example. *See* Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1521-25 (2009) (reviewing these developments).
[235] *See* Harris v. Jones, 380 A.2d 611 (1977).
[236] MD. CONST. Dec. of Rights, Art. 19.
[237] Id. at Art. 5(a). This provision of the state constitution acts as Maryland's reception statute for the common law.

wrongs.[238] While the way in which these provisions are phrases varies from state to state, they all represent a state interest in providing private recourse of sufficient importance to be enshrined in the state's fundamental law. The notion that members of the community have a basic right to access to civil justice against those that have wronged them is deeply embedded in the common law tradition from which our legal system emerged.[239]

Beginning in the seventeenth century, classical common law theorists such as Coke, Hale, and Selden began articulating a theory of "the ancient constitution" that placed significant limitations on royal prerogatives.[240] While the ancient constitution was little more than a historical myth, it did mark an important set of arguments about the legal institutions to which subjects were entitled.

A key element in this theory was the right to redress of private grievances. Hence, for example, while the king had considerable power to grant special exemptions from the law, the classical common law theorists insisted that he could not do so in a way that deprived a wronged subject of recourse against those who committed private wrongs against them.[241] These ideas were then transmitted via Blackstone and social contract theorists to America, where they formed the basis for the tradition of open courts provisions in state constitutions guaranteeing access to civil justice.[242]

Based on these sources, leading private-law scholar John Goldberg has gone so far as to argue that there is a right to a law for the redress of wrongs that emerges from the due process clause of the fourteenth amendment and the structure of the federal constitution.[243] According to Goldberg, such a

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[238] *See* Goldberg, supra note xx, at 560-62 (describing the insertion of such rights into early state constitutions).

[239] *See* Goldberg, supra note xx, at 539-41 (locating these ideas in Blackstone's Commentaries, itself a synthesis of common law and social contract theory).

[240] *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524, 532-37 (2005) (describing the components of the "Ancient Constitution").

[241] *See* Goldberg, supra note ___, at 539-41 (discussing limits on the "dispensing power" of the King)

[242] *See* David Schuman, *The Right to a Remedy*, 65TEMP. L. REV. 1197, 1201 n.25 (1992) (listing the thirty-nine state constitutional provisions). Most of these provisions assert that the courts must be open "freely and without purchase." E.g., Ind. Const. art. 1, § 12. Others state that courts must be available to redress harms to "property or character." E.g., Minn. Const. art. 1, § 8.

[243] *See* Goldberg, supra note xx, at 583-96 (referring to this as a "structural due process" right).

right is justified by the historical link between due process and redress for wrongs and is consistent with the structure of many of the Court's decisions construing the due process clause.[244] Without taking a position on the ultimate merits of Goldberg's constitutional claim, however, we note that it is not necessary to go so far to appreciate the importance of redress.

Even if the Constitution does not require a law for the redress of wrongs, providing such a law surely counts as an important state interest, one that is likely "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and goes to the "very essence of a scheme of ordered liberty," as well as contained within the written constitutions of many states.[245] It is this interest in a law that empowers victims to seek redress against those that have wronged them – rather than suppressing some particular form of behavior – that is largely missing from the way in which the Supreme Court conceptualizes the states' interest in tort law.[246]

3. Compensation as Social Insurance or Pricing Mechanism

The instrumentalist view of private law sees "compensation" or damages as a mechanism either of social insurance for accidental harm, or as a pricing mechanism for risky activity.[247] And this view is reflected in the contemporary Court's discussion of compensation like the $5 million jury verdict at issue in *Snyder*. But there is an alternative view with deeper historical and cultural roots: that compensation is a means of making amends or paying back debt.

As William Miller has emphasized, money has always, across cultures and eras, been a substitute for literally taking the other person's eye when he harms yours.[248] If you bring a civil lawsuit against one you think has wronged you, you are not seeking vengeance - that is, seeking to inflict pain

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[244] *See* Goldberg, supra note xx, at 564-80 (analyzing Supreme Court doctrine that consider due process limits on remedies).

[245] To quote a well-known passage from Justice Cardozo. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105).

[246] *See* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 735-37 (2003) ; Ronen Perry, *Empowerment and Tort Law*, 76 TENN. L. REV. 959, 979-80 (2009) ("Civil litigation may serve to empower victims in several ways.").

[247] *See* Gerald F. Gaus, *Does Compensation Restore Equality?*, *in* COMPENSATORY JUSTICE, 60-62 (John W. Chapman ed., 1991).

[248] William Ian Miller, EYE FOR AN EYE 25 (2006) ("The fact is that revenge in blood invariably coexisted with means of paying off the avenger by transfers of property or money-like substances in lieu of blood. …Revenge was compensation using blood, not instead of money, but as a kind of money")

on another like that inflicted on you - the way you would be if you sought to draw blood. But instead, you are making a demand to settle a moral accounting that stems from the wrong done to you.[249] And money happens to be the vehicle for settling such accounts.

Though the compensation involved in tort cases can be seen as the equivalent of a payment from a "no-fault" government-provided fund for accidental injury, such as that from the 9/11 fund for victims' families or the system governing accidental injury in New Zealand,[250] it is of a different character. There is normative significance in the fact that the demand for compensation is made to the wrongdoer, not the government, and that the demand for justice is made by the victim herself, unlike in criminal law.[251] These characteristics of tort law highlight the normative connection between the "doer and the sufferer,"[252] as Aristotle put it, and put this particular kind of cash payment on a different plane than a Social Security check, for example.

Moreover, though the social insurance mechanism is certainly one function that tort compensation serves,[253] it is not clear how much tort compensation serves this function. Though economic damages for wage

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

[250] *See* Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CALIF. L. REV. 976, 982-83 (1985)

[251] *See* Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 699 (2003) ("The state provides the plaintiff with a right of action against the defendant for damages or other relief only if the defendant has wronged the plaintiff in a manner specified by tort law. In permitting and empowering plaintiffs to act against those who have wronged them, the state is not relying upon the idea that a defendant has a pre-existing duty of repair. Instead, it is relying on the principle that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor who wronged them.")

[252] *See* Aristotle, NICOMACHEAN ETHICS, 1132a5-1132a6 (Terrence Irwin trans. 1985).

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

loss and medical bills is certainly a significant part of tort compensation, it is not all. Noneconomic, or pain and suffering, damages also make up a significant segment of tort damages, although caps on such damages may be changing that. In Snyder's lawsuit, for example, the amount of "economic" damages, primarily for psychological counseling, was a miniscule percentage of the overall verdict.[254]

The point is this: there is a form of justice involved in tort law. We can call it individual justice, corrective justice, or, perhaps, equal accountability. We can even see it as a way of redeeming honor or underscoring dignity -- when the wrongdoer has to pay money to the victim, that shows that the victim is someone who must be dealt with, who cannot be ignored with a flick of the hand. This is the kind of justice instantiated in the state constitutions that mention a "right to redress," and discussed by tort scholars as civil recourse theory - the right to confront one who has wronged you. And the payment of damages can be seen as settling a moral debt, or making amends.[255]

This is a different kind of justice than the distributive justice implicated by social insurance. Social insurance is at root a way of achieving greater equality of misfortune or, put differently, a way of evening out, or cushioning people from, the burden of risk.[256] For example, when Congress created a vaccine compensation program, it achieved this kind of justice by ensuring a "cushion" of sorts for individuals who happen to have the misfortune of taking particular vaccines at a particular point in time.[257]

But the Court too often seems to assume that it is this kind of distributive justice at issue, rather than individual or corrective justice (or the state interest in redress). When a state provides a forum for someone like Snyder to demonstrate that Phelps has harmed him in a particular way - by knowingly acting and, yes, speaking in such a way as to cause him severe emotional harm - he has, in a sense, treated him as less than human. As simply, to use the familiar Kantian terms, a means to another's end. Snyder's ceremonial grieving was simply a backdrop for Phelps's main event, speaking to the world about the moral rot of the United States. And so for a court to order the payment of damages, or compensation, is to

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[254] Snyder v. Phelps, 533 F. Supp. 2d 567, 586-589 (D. Md. 2008).
[255] *See* Benjamin Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 6 (1998).
[256] *See* Robert E. Goodin, *Compensation and Redistribution*, *in* COMPENSATORY JUSTICE 143-177 (John W. Chapman ed., 1991).
[257] 42 U.S.C. § 300aa-10 (2012).

"restore equality," to use Aristotle's term, between the two men, both of equal dignity and moral worth.

Compensation has always been about justice.[258] Indeed, the duty to pay damages -- compensation -- is the fundamental act of "repair" in corrective justice theory.[259] And though compensation as social insurance may implicate distributive justice -- that the victims not bear an undue burden of the costs of particular kinds of accidents -- it does not further the kind of accountability or interpersonal justice that private law allows.[260]

By viewing compensation as social insurance or a pricing mechanism, the Court furthers the notion of private law as regulation, keeping concepts like justice and redress out of the picture.

IV. Normative Implications of Recapturing Private Law

We have now seen how the evolution of First Amendment doctrine, the unitary nature of state-action doctrine, and the influence of instrumentalist thinking have combined to shape the Court's view of the role of private law. Having unpacked these factors, the question then becomes how this ought to affect doctrine.

Here, we are cautious. Our observations in Part III on the factors that have shaped the Court's theory of private law are not the kind to lead to wholesale doctrinal revamping. For the most part, our prescription is for greater caution in determining the interests at stake when private law is at issue.

Nonetheless, we present some prescriptive or normative ideas here in Part IV. These come from thinking about these issues in the First Amendment context, but some may apply more broadly to how the

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[258] *See* WILLIAM IAN MILLER, EYE FOR AN EYE 4 (2006) ("[J]ustice is a matter of restoring balance, achieving equity, determining equivalence, making reparations, paying debts, taking revenge – all matters of getting back to zero, to even.").

[259] *See generally* JULES L. COLEMAN, RISKS AND WRONGS (1992) (explaining tort law as concerned with identifying whether there are instances of "wrongful loss" where a wrongdoer ought to compensate the victim for the harm caused); ERNEST J. WEINRIB, The Idea of Private Law (1995) (describing corrective justice as a self-contained practice where those who behave wrongfully discharge their duty of repair by compensating those they have harmed).

[260] *See* Solomon, *supra* note 19, at 329 ("[C]ivil justice is a legal regime that responds to wrongdoing by vindicating the right of the victim to hold the wrongdoer accountable.").

Supreme Court ought to treat private law, and the state interest in providing redress or access to courts for individuals in a variety of contexts.

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

(1) *Tinker With Speech Torts, But Don't Shut Off Entirely*

In *New York Times v. Sullivan*, the Court dealt with the conflict with First Amendment values by creating a fault requirement for the state of mind of the defendant – "actual malice" – in order for plaintiff to recover.[261] But there were several other roads not taken that could be explored anew.

Justice Roberts' opinion in *Snyder* seems to indicate that if the First Amendment applies, then it automatically trumps.[262] There would be no liability at all. But Justice Breyer's approach in his concurring opinion that called for a more nuanced assessment of the First Amendment interests in light of the state interest is perfectly plausible.[263]

Moreover, in a case like *Snyder*'s, it might be that only actual damages are warranted.[264] If the concern is that verdicts like this would put too high a price on speech, then this could serve to lower the price considerably. In this way, an individual like Snyder could still get redress by being able to confront in court the individual who had wronged them.[265]

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[261] New York Times v. Sullivan, 376 U.S. 254, 283 (1964).

[262] 131 S.Ct. at 1215 ("Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.").

[263] 131 S.Ct. at 1221-22 (Breyer, J. concurring).

[264] See Epstein, supra note __, at 793-94 (suggesting that this was a road that the *Sullivan* court could have taken).

[265] *See* Timothy Zick, *"Duty-Defining Power" and the First Amendment's Civil Domain*, 109 COLUM. L. REV. SIDEBAR 116, 120 (pointing out that *Sullivan*'s constitutionalizing of the common law was an "anomaly"); Richard Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 791 (1986) (arguing that the presumption "should be in favor of the constitutional permissibility of the common law rules").

Perhaps, though, one could say that no lawyer would take such a case if there were only actual damages available. And therefore, the ability to get into court at all is illusory. One might also ask: if not a serious damages award, what would the remedy be? Here, though, it may well be that the ability to demand answers and confront another is a value in itself,[266] and also alternative remedies such as a court-ordered apologies or some form of restorative justice might also serve that state interest in redress just as well or better.[267]

One thing, though, is clear: as a mechanism for providing redress, private law is not something that is easily replicated by other avenues, particularly in the case of private-figure plaintiffs like Snyder. This inquiry about available redress, though, has been entirely absent due to the Court's imputing regulatory motive to the state.[268] Closer attention to the state interest in redress, we believe, would lead to greater efforts to allow *some* measure of redress, while still protecting First Amendment values.

(2) *Take a Considered Look at State Interests and Level of Involvement*

Second, the court ought to take a considered look at state interests, and not automatically assume that the regulation of primary activity is what the state is after.[269] In order to do this, the court will have to understand the common law as one embodying rights of various kinds, including the right to redress.[270] And the Court will have to be comfortable with the fact that the common law contains no "purpose" section as a statute passed by state legislatures frequently do.[271] Nonetheless, the history of the common law,

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[266] *See* Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 135-37 (2010).

[267] *See* Jason Solomon, *Civil Recourse as Social Equality*, FSU L. REV. (forthcoming 2012).

[268] *See* Zipursky, *supra* note xx, Snyder, *Outrageousness, and Open Texture*, at 519 ("The question is not whether the state may regulate or prohibit this type of speech. It is whether the state may prevent accountability and individual recovery when one person has emotionally harmed another under such circumstances.").

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

[270] *See* Goldberg, *Constitutional Status, supra* note ___, at 606-611 (making the case for such a right, in conjunction with historical and doctrinal evidence).

[271] *See* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 NYU L. REV. 1784, 1855 (2008) (noting that modern courts "rarely hesitate" in considering legislative history and other information about the internal deliberations of legislatures when inquiring into governmental purpose).

the practice in states, and the presence of rights of redress and State constitutions are all indicia that this interest is something that matters to states.

There is also the question of how exactly to determine what the state interest is and who to listen to on the question. In Snyder's case, he sued Phelps and the Westboro Baptist Church.[272] All parties were private individuals and entities. The state of Maryland was nowhere in the picture. So when a court was determining what the state interest is in the underlying law, there is no one representing the state to ask.

By the time the case got to the Supreme Court, Maryland along with several other states, had entered as amici. Their brief emphasized the importance of "protecting the sanctity and privacy of funerals," as well as their interest in protecting "the emotional well-being of grieving families through the.[273] The state, then, appeared to also buy into the idea of tort law as regulation. But it is not clear how much weight ought be given the state's assertions in litigation.[274] Among the unusual dimensions of placing "state interests" at the center of the analysis are that is not at all clear who gets to define them and how.[275]

In determining the state interest, though, a distinct doctrinal question – the threshold one of whether the state is sufficiently involved to trigger constitutional scrutiny at all (state action) – has the potential to mislead.

As explained above, state action doctrine has become overly unitary. Either there is state action, or there isn't. But there is no in between. So when there is state action, the state involvement is assumed to be regulatory. After all, that's what modern governments do.

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[272] *See* Snyder v. Phelps, 533 F.Supp.2d 567, 569 (D. Md. 2008).

[273] Brief for the State of Kansas, 47 Other States, and the District of Columbia as *Amici Curiae* In Support of Petitioner, at 2 (No. 09-751).

[274] *See* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 NYU L. REV. 1784, 1789 (2008) (pointing out that judicial inquiries into legislators' "true goals" are now "widely accepted" in American constitutional doctrine).

[275] *See* Stephen E. Gottlieb, *Compelling Governmental Interests: And Essential but Unanalyzed Determined Constitutional Adjudication*, 68 B.U. L. REV. 917, 917-18 (1988) (pointing out that the literature has ignored the "validity of the process of inferring interests" and "the validity of the interests inferred").

Many scholars have criticized the state action doctrine, saying it is outmoded and should be retired.[276] Our view is somewhat different. To a certain extent, we think the public-private distinction that the state action doctrine helps police should be stronger, not weaker. That is, we think more attention ought be paid to the genuinely *private* aspect of private-law actions.

The implication, though, would not be whether or not the Constitution is implicated at all, as under the current unitary state action doctrine. In our view, the extent to which the state is involved in the action has implications for how much constitutional rights are protected.[277] If the state involvement consists of making available a common-law action, and enforcing a jury verdict, then the constitutional protections should be less than a state statute, agency action, or direct action by government officials.[278] In short, the degree of state involvement ought weigh in the balance in determining the interests and values that prevail in a particular case.

For example, at least seventeen states have statutes that forbid some kinds of false campaign speech, and the lower courts are split about whether such laws are constitutional.[279] Of course, the kind of speech – on political campaigns – is at the heart of First Amendment concerns, and the fact that it is a state statute means that the level of state involvement is relatively high compared to a private-law action brought by a private citizen like Snyder. Because the state directive comes from legislators who have to face voters every few years, we ought to be suspicious of the governmental motive or purpose as well, more so than the twice-removed-from-the-sovereign (plaintiff brings action, jury enforces) posture of *Snyder*. Here, the legislative motive may well be to suppress speech that is critical of incumbents like them – much closer to the facts and posture of *Sullivan* than

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[276] *See* sources cited in Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1446 & n. 275 (2003).

[277] For a similar argument in the context of how to deal with privatization, *see* Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1431-32 (criticizing the "all-or-nothing" approach to state action as a "very blunt instrument").

[278] *Cf.* Epstein, supra note __, at 788 & n. 14 (pointing out that if one reads Blackstone, "one could easily conclude that freedom of press meant only that prior restraint by administrative officials was unconstitutional"). *See also* Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931) (extending this principle to judicial injunctions against speech in a 5-4 decision in part based on availability of private-law remedies like defamation ex post) (discussed in Epstein, supra).

[279] *See* Adam Liptak, Was That Twitter Blast False, or Just Honest Hyperbole?, *The New York Times*, March 5, 2012 (mentioning a pending cert petition challenging a Minnesota law of this kind).

Snyder. And so a court ought to give more First Amendment protection to the defendant in such a case, relative to the defendants in *Snyder*.

(3) *Identity of Plaintiff, and Point of Litigation Matter*

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

First, the public or private status of the plaintiff ought to remain a central part of First Amendment doctrine when evaluating the viability of speech torts. In *Snyder*, the Court ignored this central issue – whether the identity of the plaintiff ought to matter to the level of First Amendment protection accorded the speech.[280] Using this doctrinal divide in intentional infliction of emotional distress cases, as well as privacy and defamation cases where it is well-established, is truer to the real interests at stake. The entitlement to redress for a public figure ought be less because of the decision to be in the public eye.[281]

In *Snyder v. Phelps,* the Court confronted a situation similar to that in *Hustler* with one important difference: neither Al Snyder nor his dead son were public figures. Unlike Jerry Falwell, they had not placed themselves before the public as participants in public affairs who can expect bare-knuckled political debate. Al Snyder didn't ask for the Westboro Baptist Church to show up at his son's funeral simply because his son was a Marine.[282] And so the state interest is stronger in providing redress against

[280] 131 S.Ct. at 1221 (Breyer, J. concurring) ("The Court holds that the First Amendment protects picketing that occurred here, primarily because the picketing addressed matters of 'public concern.' While I agree... I do not believe that our First Amendment analysis can stop at that point.") ; Jeffrey Shulman, *Free Speech at What Cost?: Snyder v. Phelps and Speech-Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO 313, 325-26, 333-34)(criticizing the 4th Circuit opinion and the Westboro Baptist Church lawyers for ignoring the status of the plaintiff).

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

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

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

To be sure, this distinction has been difficult to navigate in the defamation context, but in cases like Snyder's where he is clearly a private figure, not a public one, there ought be less First Amendment protection for the speaker. The majority opinion in *Snyder* looked exclusively at the content of the speech in deciding the amount of First Amendment protection it was given: since it was a matter of public concern (itself debatable) it got full First Amendment protection.[283] But the other side of the equation is what the state's interest is in providing redress for this plaintiff.

Put differently, the question is whether the plaintiff has the moral authority to complain about certain speech. When the plaintiff is a public figure of his or her own choosing, then courts in the defamation context will frequently deny liability on the ground that the plaintiff does not have a right to complain, having sought the spotlight.[284] But if the plaintiff is a private citizen like Snyder, then he does have grounds to complain.

In addition, a reason the plaintiff's identity matters is that it helps give us a clue as to what the purpose of this particular lawsuit is – a key issue in First Amendment doctrine.[285] Snyder's interest was certainly not in speech suppression. It was in demanding accountability from someone who had harmed him a critical time in his life. If the Supreme Court took a closer look at what was actually going on in the underlying litigation, instead of assuming that the plaintiff and jury were acting as agents of state regulation, then the degree of First Amendment protection might not have been so absolute.

This lesson might apply in other areas of law as well. In *Wyeth v. Levine*, a major preemption case in recent years, Diana Levine's interest was not in regulating the safety of prescription medicines generally, it was in holding to account the drug company who had contributed to the loss of her arm -- a loss significant for anyone, but particularly a professional musician.[286] In *BMW v. Gore*, a major punitive damages case, the interest that Gore had in bringing the lawsuit, and getting extra-compensatory

[283] 131 S.Ct. at 1216.
[284] See Solomon, Judging Plaintiffs, supra note __, at 1767.
[285] See infra text accompanying notes ___.
[286] Wyeth v. Levine, 555 U.S. 555 (2009).

damages against BMW, was to, in a sense, "get even" for the deception that BMW had used to sell him a used car that was worth less than advertised.[287] And the state's interest was in providing these plaintiffs with a forum for obtaining this kind of redress. But in both cases, the Court assumed that the state's interest was regulatory.[288]

Conclusion

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

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

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

We hope that the silver lining of *Snyder* is that it will become clear that the pendulum has swung too far. Then we can revisit ways to protect First Amendment values while protecting the state interest in individuals being able to redress wrongs that were done to them.

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[287] *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 Tex. L. Rev. 105, 124 (2005) (arguing the Court was "caught off guard" by the prospect of Dr. Gore receiving an enormous punitive damage award for "an invisible flaw in the paint of his BMW" and so they "struck down the award as 'unconstitutional,' despite the absence of any sound basis for doing so.").

[288] See Wyeth, 555 U.S. at xx; BMW, 517 U.S. at xx.

Words can wound. And when attacked, the Al Snyders of the future ought to be able to use a civilized means for redeeming their honor, and holding accountable those who have wronged them. Far from being a relic of the past, the right to civil recourse is a fundamental part of a modern society that aspires to social equality. It is a right worthy of state interest, and a right worthy of being preserved.