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A Tale of Two Ironies: In Defense of Tort

David F. Partlett* and William W. Gill**

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I. INTRODUCTION

Charles Dickens likely never imagined that he would be quoted so often in legal discourse. Yet it is not surprising that he resonates in the world of legal theory, rich as his work is with ironies that operate on personal as well as political levels. Take, for example, A TALE OF TWO CITIES, in which a revolution fought in the name of liberty turns to tyranny, and stable, tradition-bound Burkean ideals provide the means to freedom for those terrorized in the name of liberty. The seeds of such ironies have also taken root in the law of our two “cities,” the United States and the rest of the common law world; therein we find a study in contrast regarding the question of how to deal with the inherently contentious relationship between free speech rights and the rights traditionally protected by tort law, many of which pertain to speech-based harm. We argue that the overwhelming dominance of constitutional free speech doctrine over common law tort principles that has taken hold in the United States has resulted in significant inconsistencies that are unlikely to crop up in legal systems that have opted to deal with the same conflict from within the common law.

Part II of this Article outlines the constitutional solution that has emerged as prevalent in the United States, paying particular attention to the manner in which

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1. This is not to suggest, of course, that the English law of the day escaped Dickens’s critical eye, ever focused on social injustice; particularly memorable in this regard is his sarcastic description of the practice of the use of whipping-posts for criminal punishment as a “dear old institution, very humanising and softening to behold in action.” CHARLES DICKENS, A TALE OF TWO CITIES 82 (Oxford University Press 1987) (1868). The paradigm for “justice delayed is justice denied” is the Chancery case of Jarndyce v. Jarndyce in BLEAK HOUSE, Dickens’s ninth novel that spurred reform of the late 19th Century justice system. CHARLES DICKENS, BLEAK HOUSE (Bantam Books, 1992) (1868). The debtors’ prison central to Dickens’s LITTLE DORRITT focused again on the operation of law in society and its shortcomings. CHARLES DICKENS, CHILDREN STORIES (Henry Altemus Co. 1900).

2. Dickens drew inspiration for his book from Carlyle’s THE FRENCH REVOLUTION (1837). See MICHAEL SLATER, CHARLES DICKENS 472-73 (2009). He had earlier written of a massacre carried out at Avignon in the name of Liberty during the revolution. Id. at 247. We thank John Sims of the University of the Pacific, McGeorge School of Law for his suggestions on the genesis of the “Tale of Two Cities.”
the American approach represents an expression of societal values through law. In Part III, we review the Supreme Court’s most recent prominent decision in this area, Snyder v. Phelps, and we challenge the judicial critique of tort law as impermissibly vague and unpredictable. Particularly ironic and problematic, we argue, is the fact that this critique occurs within a constitutional analytical framework that is itself marked by imprecision—a phenomenon exemplified by the majority opinion in Snyder. In Part IV, we argue that the United States’ First Amendment jurisprudence—ostensibly grounded in important part in protecting values such as self-determination and freedom from oppression—has resulted in the sacrifice of common law tort principles rooted in comparable, if not identical, values. At the heart of this second irony is the fact that the protection of civil liberties through tort law has traditionally been entrusted in great part to courts and juries, whereas the constitutional approach is characterized by mistrust of these institutions. Moreover, the common law should be accorded a privileged—even a constitutionally protected—place in the scheme of recognized rights, and it ought not to be conflated with other types of government action. In Part V, we analyze the extent to which the approaches taken by other nations’ courts guard against the problems identified in Parts III and IV.

II. THE AMERICAN CONSTITUTIONAL APPROACH: THE BEST OF NEW YORK TIMES, THE WORST OF NEW YORK TIMES

With its decision in New York Times Co. v. Sullivan, the U.S. Supreme Court unleashed a First Amendment juggernaut that, in the name of protecting robust public debate, obliterated a common law balance centuries in the making. The case involved defamation claims arising from an advertisement printed in the Times that described civil rights protests and a “wave of terror” facing the protestors, illustrated by actions of local government officials. The advertisement solicited funds for the civil rights movement and the legal defense of its leader, Dr. Martin Luther King, Jr., who stood charged with perjury. Ostensibly addressing “the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct,” the Court concluded that the First Amendment would not tolerate the plaintiff’s common law-based civil libel judgment. The Court then proceeded to modify the common law defamation framework such that it comport with the First Amendment

6. Id. at 256.
7. Id. at 256-57.
8. Id. at 256, 283.
requirements newly formulated by the Court. These “modifications” included imposing the “actual malice” standard; shifting the burden of showing the falsity of the speech in question to the plaintiff; and heightening the level of proof from a preponderance of the evidence to “clear and convincing” evidence.

These seemingly mechanical modifications of common law defamation doctrine effected profound changes. The jury—so touted as the guardian of freedoms and republican governance—was pushed aside, replaced by a structure of constitutional trumping in which rules thwart conflicting rights. The notion that good men would be reluctant to enter a vicious realm of invective was cast aside in favor of a faith that, through a robust marketplace of ideas, the truth would emerge. In the Court’s view, the public good resulting from this regime justified the un-remedied harm that would inevitably be suffered by individuals. By elevating First Amendment values and diminishing competing values, the Sullivan decision expressed a specific ethos through constitutional doctrine.

The hard-line constitutional approach conceived in New York Times stiffened into standard methodology in subsequent decisions. While we will barely touch the Supreme Court’s case law in this area, we point to a few major cases that show the development of this trend.

Justice Powell’s majority decision in Gertz v. Robert Welch, Inc. “reconsider[ed] the extent of a publisher’s constitutional privilege against

9. Id. at 278-83.
11. One is reminded of Thomas Jefferson’s lofty reflection on the role of the jury: “I consider trial by jury as the only anchor yet devised by man, by which a government can be held to the principles of its constitution.” Letter from Thomas Jefferson to Thomas Paine (1789), reprinted in 8 PHILIP WILKINSON, AMERICA SPEAKS: LAWMEN AND LAWBREAKERS 43 (2005). Sullivan and its progeny turn this proclamation on its head, suggesting that elimination of the jury is the only way to ensure that state governments (and their courts) can be held to First Amendment principles.
12. Norman L. Rosenberg traces the colonial roots of this idea in NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL (1986). He notes that in 1974, President Richard Nixon was concerned that libel laws weakened by Sullivan would discourage “good people” from running for “public office.” Id. at 251.
14. This movement has not gone unnoticed by the Supreme Court justices. See, e.g., Dun & Bradstreet Inc., 472 U.S. at 766 (White, J., concurring) (quoting Sullivan, 376 U.S. at 270) (“New York Times Co. v. Sullivan was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander. . . . This judgment overturning 200 years of libel law was deemed necessary to implement the First Amendment interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”). In the academic realm, see Richard A. Epstein, Was New York Times v. Sullivan Wrong?, 53 U. CHI. L. REV. 782 (1986). But see also Eugene Volokh, Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition, 96 IOWA L. REV. 249, 250 (2010) (arguing that “constitutional constraints on speech-based civil liability have deep roots, stretching back to the Framing era.”).
liability for defamation of a private citizen.\(^\text{15}\) At issue in \textit{Gertz} was a judgment in favor of a publisher on a defamation claim for statements regarding the political affiliations of the plaintiff—an attorney involved in a high profile wrongful death action.\(^\text{16}\) The lower courts in \textit{Gertz} had reasoned that, because the speech at issue concerned a matter of public interest, the \textit{Sullivan} standard had to apply irrespective of whether the plaintiff was a public figure—a determination that unsurprisingly had precluded liability.\(^\text{17}\) The Court reversed, showing greater deference to the state’s decision to allow relief for the speech-driven harm because the plaintiff was a private figure.\(^\text{18}\) Notably, however, the Court did not retreat from its constitutionally premised modification of the common law framework. Far from allowing the common law tort regime to stand, the Court specified that the First Amendment would only allow defamation liability in cases involving private plaintiffs for “actual injuries,” without the possibility of presumed or punitive damages.\(^\text{19}\) That is, the Court prescribed a lower dosage of constitutional medicine than it had deemed necessary in \textit{Sullivan}, but it nevertheless solidified the practice of tinkering with common law tort frameworks on constitutional grounds.\(^\text{20}\)

The Court revisited the import of the plaintiff’s status as a public figure in \textit{Hustler Magazine, Inc. v. Falwell}.\(^\text{21}\) The Court reversed a judgment in favor of Reverend Jerry Falwell on a claim of intentional infliction of emotional distress (“\textit{IIED}”) based on a parody of a well-known advertisement that included a mock interview with Reverend Falwell describing his first sexual experience as “a drunken incestuous rendezvous with his mother in an outhouse.”\(^\text{22}\) Because the speech qualified as public debate, and because of Reverend Falwell’s status as a public figure, the Court concluded that ordinary common law tort liability for

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  \item Gertz, 418 U.S. at 325.
  \item Id. at 325-27.
  \item Id. at 328-30.
  \item Id. at 345-46 (“For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.”). The Court reasoned that public figures assume the risk of dignitary harm arising from speech by thrusting themselves into the spotlight and that such figures enjoy a greater ability than private figures to fight back using their own presumptive access to the media. See id. at 344-46.
  \item Id. at 349-50.
  \item Again, the Court justified the modifications imposed in \textit{Gertz} by espousing mistrust of civil juries, which the Court found to be insufficiently restricted in defamation cases. In particular, the Court reasoned that juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.
  \item Id. at 349.
  \item Id. at 48.
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IIED could not lie.\textsuperscript{23} Again, the Court modified the framework of the tort in an effort to harmonize it with the First Amendment.\textsuperscript{24} The Court augmented the tort’s traditional elements through extension of the rule enunciated in \textit{New York Times}; in particular, it held that a public figure seeking relief for IIED must show “that the publication contains a false statement of fact which was made with ‘actual malice.'”\textsuperscript{25}

In support of its extension of the \textit{Sullivan} rule to adjust the common law formulation of the IIED tort, the Court took issue with the fact that liability was premised on the “outrageousness” of the defendant’s conduct.\textsuperscript{26} The Court readily acknowledged that the speech at issue was “at best a distant cousin of” the type of political caricature most deserving of First Amendment protection, yet found that the “outrageousness” inquiry involved in determining IIED liability was a “pejorative description” that did not supply “a principled standard” for determining whether speech will give rise to liability.\textsuperscript{27} Furthermore, the Court explicitly tied its criticism of the IIED tort to a mistrust of the jury, stating that “[o]utrageousness’ in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.”\textsuperscript{28} The Court found these aspects of the IIED tort fatally at odds with the “central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”\textsuperscript{29} In short, the states’ tort-based right to redress individual harm gave way to the relentless force of constitutional doctrine in an expression of preference for First Amendment values—such as the public good that flows from open uninhibited discourse—over competing interests.

This application of constitutional principles to limit the bounds of tort law has not been limited to the realm of speech-based torts. In a line of cases including \textit{BMW of North America, Inc. v. Gore}\textsuperscript{30} and \textit{State Farm Mutual Automobile Insurance Co. v. Campbell},\textsuperscript{31} the Supreme Court has thrust the judiciary into the business of subjecting punitive damages awards by juries to a “reasonableness” review under the due process clause of the Fourteenth Amendment. These cases, like the speech-tort cases discussed above, express an

\textsuperscript{23} Id. at 50-53.
\textsuperscript{24} Id. at 53.
\textsuperscript{25} Id. at 56.
\textsuperscript{26} Id. at 55 (rejecting the contention “that the caricature in question . . . was so ‘outrageous’ as to distinguish it from more traditional political cartoons.”).
\textsuperscript{27} Id. Indeed, the Court expressed doubt that any satisfactory standard could ever be formulated. See id.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 56 (quoting FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978)).
ethos characterized by mistrust of state governments (state courts in particular) and civil juries. Later, in Exxon Shipping Co. v. Baker, the Court revised its criticism of civil juries, citing empirical literature which revealed that juries’ “discretion to award punitive damages has not mass-produced runaway awards.” However, equipped with more empirical data, along with a helping of anecdotal evidence, the Court rechanneled its criticism toward “the stark unpredictability of punitive awards” —i.e., the “spread between high and low individual awards” in cases with comparable facts. Notably, awards by juries factored significantly into this unpredictability-based criticism, though decisions rendered solely by judges were also factored in. In other words, the Court did not renege on its critique of the jury, but rather broadened the critique to encompass other actors that contribute to punitive damage awards.

In sum, under the Supreme Court’s methodology, tort law has consistently yielded to constitutional principles when the two have come into conflict. The Court’s method of reconciling these opposing forces has been to impose constitutional doctrine to change the elemental makeup of tort principles traditionally governed by common law. This approach is not limited to formulating rules and modifying frameworks, but rather constitutes an expression of preference for certain values over others. The predominant themes in this regard have been the exaltation of the First Amendment tenet of uninhibited, robust, and wide-open public debate; devaluation of states’ rights to address wrongs through judicial application of tort law principles; and mistrust of state courts and civil juries.

We find that two basic but interrelated reasons motivate this attitude. In the first place, the task of the Supreme Court is, to an important extent, to provide a rhetoric for value formation in American law and society. As a result, the prosaic function of law to order relationships must compete with the role of expressing the law’s and the polity’s highest aspirations. Hence, we find, as we point out later, an avoidance of reference to the real impact of new First Amendment doctrine: the Court may talk of “chilling speech,” but it is an assertion without

32. See Gore, 517 U.S. at 598 (Scalia, J., dissenting) (expressing the view that “the Constitution does not make [the concern over excessive punitive damages] any of [the Court’s] business,” and that “Court’s activities in this area are an unjustified incursion into the province of state governments.”).
33. See Catherine M. Sharkey, The Vicissitudes of Tort: A Response to Professors Rabin, Sebok & Zipursky, 60 DePaul L. Rev. 695, 707 (2011) (“Deep skepticism of the role of the jury and its capacity to transform its expression of moral outrage into dollar values pervades most criticisms of punitive damages.”).
34. Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008). Like Gore and Campbell, Exxon Shipping involved a review of an award of punitive damages; however, the review in Exxon Shipping occurred under the Court’s common law authority in the area of federal maritime law rather that the due process clause. Id. at 501-02.
35. Id. at 498 (citing The Paths of Civil Litigation, 113 Harv. L. Rev. 1783, 1787-88 (2000)).
37. Id. at 500.
38. Id. at 499-501.
empirical foundation. 39 Second, in this blizzard of high rhetoric, categorical rules, and elevated endeavor, the subtlety of the common law is lost. 40 For its tradition and substance depend upon a judiciary that is steeped in the practice of the common law operating within a field of rules honed by long use. In this regard, it is problematic that in the American federal system, a small but powerful portion of the judiciary remains charged with the formidable task of making constitutional rules from whole cloth that profoundly affect delicately crafted common law doctrine. In contrast, for example, England’s and Australia’s top courts often feature specialized divisions populated by barristers from the upper echelons of particular areas of the practicing bar, 41 as opposed to generalists whose decisions must cover the full legal spectrum. 42

III. SNYDER AND THE IRONY OF THE SUPREME COURT’S VAGUENESS CRITIQUE OF TORT LAW

One of us suggested in a recent article that the market-relation principle motivating the American approach may have lost its shine, and that the law within the United States could witness a move towards an accommodation of other values, drawing on other nations’ frameworks for reconciling the interests at stake. 43 Then the Supreme Court decided Snyder v. Phelps, 44 a decision which rather severely called into question the likelihood of such a change in perspective.

In Snyder, the Court addressed the question of whether the First Amendment would allow liability on an IIED claim brought by the father of a deceased American soldier against members of the Westboro Baptist Church—a

40. For the background on the constitutional method, see Frederick Schauer, Principles, Institutions, and the First Amendment, 112 HARV. L. REV. 84, 112 (1998).
42. Some of the missteps in substantive law in the areas of defamation and privacy are explained by the judges’ and counsels’ relative lack of experience in those areas; take Milkovich and the place of “opinion” in the law, where an appreciation of the common law of fair comment would have aided analysis. See Richard H. Weisberg, The First Amendment Degraded: Milkovich v. Lorain and a Continuing Sense of Loss on its 20th Birthday, 62 S.C. L. REV. 157, 166-67 (2010); see also Richard Weisberg, Two Wrongs Almost Make a “Right”: The 4th Circuit’s Bizarre Use of the Already Bizarre “Milkovich” Case in Snyder v. Phelps, 2010 CARDOZO L. REV. DE NOVO 345, 350-51 (2010) (criticizing the use made of Milkovich by the Fourth Circuit Court of Appeals in Snyder v. Phelps).
43. See David F. parteau, The Libel Tourist and the Ugly American: Free Speech in an Era of Modern Global Communications, 47 U. LOUISVILLE L. REV. 629 (2009). The recent Supreme Court decision in Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011), eclipses the state legislature’s power to protect the privacy of clients from the data collection of pharmaceutical companies. The decision confirms the inclusion of commercial speech as central to the First Amendment.
fundamentalist congregation comprised primarily of the Phelps family, which staged one of its infamous protests at the soldier’s funeral. The speech at issue consisted of a mix of political, religious, and personal messages on signs carried by the protesters. The Court found that the messages in question constituted speech on a matter of public concern, highlighting the messages’ focus on morality and their references to issues such as homosexuality in the military and scandals involving Catholic clergy. The Court also emphasized that the protest took place on a public street and that the speech was not a disguised attack motivated by animosity toward the plaintiff and his family. Furthermore, the Court reiterated the sentiment from Hustler that IIED liability is based on the impermissibly vague “outrageousness” standard. Likewise, the Court provided the familiar refrain that juries in speech-driven tort cases are “unlikely to be neutral with respect to the content of the speech, posing a real danger of becoming an instrument for the suppression of vehement, caustic, and sometimes unpleasant expression.” Accordingly, the Court found that the First Amendment precluded liability.

In short, the majority opinion in Snyder operated to further propel a constitution-over-common law approach that rejects any convergence of tort principles and free speech doctrine. In upholding an absolutist approach to applying the First Amendment, the majority opinion in Snyder signaled a vehement rejection of tort law as a protector of rights. Simply put, Chief Justice Roberts concluded that to allow a tort action to be maintained in this context would be an unacceptable risk. In particular, the majority opinion found the IIED tort too vague to give rise to liability for tortious conduct that implicates the protections of the First Amendment. This position is rooted in the more familiar vagueness analysis often applied with regard to criminal statutes, and the rationale is analogous—an impermissibly vague tort gives insufficient notice to

45. Id. at 1213-14.
46. The messages quoted in the majority opinion included: “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You’re Going to Hell,” and “God Hates You.” Id. at 1213. The damages awarded at trial were also premised on tortious speech set forth in an online “epic” posted by a member of the Westboro congregation following the funeral. Id. at 1226. The Court declined—for procedural reasons—to consider the content of the epic, which directly targeted the plaintiff and his family. Id. (Alito, J., dissenting) (quoting portions of the epic).
47. Id. at 1217.
48. See id. at 1217-18.
49. Id. at 1219.
51. Id.
52. Id. (“[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.” (quoting Boos v. Barry, 485 U.S. 312, 322 (1988))).
determine when liability will obtain, thereby chilling a wide range of speech.\textsuperscript{53} This brings us to the internal irony of Snyder: the primary reason for permitting Snyder’s tort-protected right to be encroached upon—that the conduct at issue relates to a matter of public concern—suffers from a greater degree of vagueness than the tort.

As Professor Zipursky persuasively argues, and as Justice Alito expresses in his dissenting opinion, Chief Justice Roberts’ characterization of the IIED tort as overly vague is not accurate.\textsuperscript{54} Instead of acknowledging the limiting aspects of the tort, the Court focuses entirely on one element of the tort: that the conduct must be “outrageous” for liability to attach.\textsuperscript{55} A deeper analysis of the tort would have shown it to be well defined in protecting persons in their most vulnerable moments, such as when they are grieving for their lost loved ones. Indeed, the requirement that the tortfeasor’s intentional actions must be so outrageous as to breach the norms of civilized behavior has limited the tort’s reach rather than extended it; likewise, courts have been vigilant in safeguarding limits on the factual circumstances in which the tort will lie, including the circumscription of a well-established boundary relating to funerals.\textsuperscript{56} The flexibility of the tort—its open-textured quality—is responsive to the individual’s need to live with dignity even in the face of a changing society. Yet the courts, recognizing the need for boundaries, have insisted upon the presumption of a robust psyche unless the defendant should take advantage of a known weakness.\textsuperscript{57} It is not surprising that there are many cases concerning the protection of persons at their most vulnerable, such as those involving intrusions on individuals in times of

\textsuperscript{53} As advanced by Professor Benjamin C. Zipursky, the application of this type of vagueness reasoning is problematic in the area of torts, where, unlike in statute-driven criminal law, much of the law is “open-textured” and is governed by standards as opposed to hard-edged rules—an aspect of tort law identified as positive, perhaps even necessary. See Benjamin C. Zipursky, Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law, 60 DEPAUL L. REV. 473, 495-99 (2011).

\textsuperscript{54} See id. at 519-20; Snyder, 131 S. Ct. at 1222-23 (“[IIEED] is a very narrow tort with requirements that are rigorous, and difficult to satisfy.” (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 61 (5th ed. 1984))).

\textsuperscript{55} See Snyder, 131 S. Ct. at 1219.

\textsuperscript{56} See Zipursky, supra note 53, at 519-20 (“[T]he ‘outrageousness’ and the other requirements within the IIED tort itself are not there as wild cards to allow unpopular speakers to be sanctioned. On the contrary, these requirements exist to ensure that there will not be liability unless there is a deliberate or reckless injuring; unless the context is one in which it is understood that conduct of this sort is unbearably intrusive and individuals are highly emotionally vulnerable; and unless not only jurors, but judges, courts, and paradigms of precedent indicate that the conduct goes well beyond a socially tolerable way to interact with others.”); see also id. at 508-10 (collecting IIED cases premised on harm caused to mourners in connection with the funerals of loved ones).

mourning or the mishandling of the corpses of loved-ones.\textsuperscript{58} In a nation as complex, large, and dynamic as the United States, the tort is perfectly tailored to reflect diversity, vulnerability, changing social norms, and different regional traditions. Common law institutions in fact function—in the way so lauded by First Amendment stalwarts—as a vigorous and democratic marketplace that evolves responsive rules over time.\textsuperscript{59}

If vagueness is identified as the fatal weakness of the IIED tort, the majority in \textit{Snyder} must be described as having given the tort short shrift, and the vagueness vice is even more present in the Court’s rationale. Indeed, the vagueness of the rationale relied upon by the majority is striking. The \textit{Snyder} majority concedes that the line distinguishing matters of public and private concern is blurry, stating that “the boundaries of the public concern test are not well defined.”\textsuperscript{60} Yet, the Court concludes that, despite the uncertainties of the public concern category, the Phelps’ speech readily fits because, notwithstanding a few messages directed at the Snyder family, the majority of its content related “to broad issues of interest to society at large,” and its context—a private funeral—“cannot by itself transform the nature of [the] speech.”\textsuperscript{61} The vagueness of the public concern test is compounded by the fact that the Court has given varying degrees of weight to a number of other factors throughout its First Amendment decisions. For instance, the Court has given much credence to the plaintiff’s status as a public/private figure and the nature of the harm inflicted in past decisions.\textsuperscript{62} In \textit{Snyder}, however, the Court remained conspicuously silent on the question whether the plaintiff was a public or private figure.\textsuperscript{63}

This state of affairs is problematic for several reasons. For one, the concerns raised by the majority with regard to the vagueness of the IIED tort take on reduced significance when that issue is analyzed in a manner similar to that in which the public concern issue is analyzed in \textit{Snyder}. Whatever the ambiguities of the “outrageousness” standard, the Phelps’ conduct certainly fits; indeed, they quickly gave up any attempt to argue otherwise.\textsuperscript{64} More importantly, the uncertainty in determining when speech may give rise to liability is equally

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\textsuperscript{58} VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS 470-71 (12th ed. 2010) (collecting cases).
\textsuperscript{59} FRIEDRICH A. HAYEK, LAW LEGISLATION & LIBERTY, VOLUME 1: RULES AND ORDER 85-88 (1973) (distinguishing the common law from laws created by the legislature. The process and tradition of common law decision-making produces laws different in kind from those promulgated by legislatures.) In this vein, Hayek sees the common law as applying norms within a spontaneous order that protects fundamental rights of property and liberty. \textit{See id.} at 94-110.
\textsuperscript{60} \textit{Snyder}, 131 S. Ct. at 1216 (quoting San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam)).
\textsuperscript{61} \textit{Id.} at 1216-17.
\textsuperscript{62} \textit{See supra} Part II (discussing cases in which the Court stressed these factors to varying degrees).
\textsuperscript{63} \textit{See Snyder,} 131 S. Ct. at 1207.
\textsuperscript{64} \textit{See id.} at 1223 (Alito, J., dissenting) (“Although the elements of the IIED tort are difficult to meet, respondents long ago abandoned any effort to show that those tough standards were not satisfied here.”).
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attributable to the vagueness of the Court’s First Amendment framework as to the vagueness of the IIED tort.

As a result, a state’s right to protect individuals from tortious conduct is infringed upon not because of any failure to articulate clear standards for determining tort liability, but rather because of the lack of First Amendment standards that can be applied in a principled and predictable fashion. Tort law therefore suffers because of the shortcomings of constitutional standards. Furthermore, in light of these considerations, it is fair to question whether the Court’s approach of trumping tort law with First Amendment doctrine can achieve its stated purpose; that is, irrespective of whether individuals can predict whether their conduct will subject them to tort liability, how are they to know when the First Amendment will shield them from such liability?

These problems arising from the vague First Amendment standards are akin to the critique of using constitutional doctrine to strike down punitive damages, offered by the dissenting justices in the punitive damages cases discussed above, including Gore\(^\text{65}\) and Campbell.\(^\text{66}\) A central aspect of Justice Scalia’s dissent in Gore, for example, is his determination that the constitutional doctrine surrounding the due process clause is “insusceptible of principled application.”\(^\text{67}\) After discussing the various factors meant to provide guidance in reviewing punitive damage awards by state courts, Justice Scalia concludes that they amount to nothing more than “crisscrossing platitudes [that] yield no real answers in no real cases.”\(^\text{68}\) The same might be said of the manner in which the constitutional doctrine surrounding free speech rights is employed in reviewing state court tort judgments. The Supreme Court has unleashed an array of loose factors—\textit{i.e.}, public concern, the public or private status of the plaintiff, and the nature of the injury; yet the relative importance of these factors, as well as the manner in which they relate to one another, continues to shift in the attempt to achieve a cohesive approach to applying free speech doctrine.

Of course, it is possible to argue that the vague standard will crystallize over a reasonable period of time into rules that can be applied with more certainty. Yet, the long evolution over nearly fifty years of the standards first set forth in \textit{Sullivan} must give pause that crystallization will be sure or short. Indeed, the public concern standard appears to look back to \textit{Rosenbloom v. Metromedia},\(^\text{69}\) which is widely understood to have been repudiated by \textit{Gertz}.\(^\text{70}\) Thus, we have reason to doubt the stream of doctrine from \textit{Gertz} that utilized the public status of

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\item 67. \textit{Gore}, 517 U.S. at 599 (Scalia, J., dissenting).
\item 68. \textit{Id.} at 606.
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the plaintiff as the departure point for determining whether defamatory speech is actionable.

IV. THE IRONY OF SACRIFICING TORT-PROTECTED RIGHTS IN FAVOR OF FIRST AMENDMENT RIGHTS ROOTED IN COMPARABLE PRINCIPLES

Another paradoxical aspect of the absolutist First Amendment approach is that many of its motivating principles are akin to those at the heart of the tort law rights that it diminishes. Tort students learn early on that tort law has a non-reducible foundation in the protection of civil liberties. In American law, for example, tort law has a venerable tradition of protecting rights related to privacy, individual autonomy, self-determination, and freedom from fear of maltreatment and emotional harm.71 Alas, the pull of the Constitution is so great that we often find this foundational aspect of tort law forgotten.

Moreover, many of these same principles—or highly analogous ones—underpin the First Amendment right to free speech. Indeed, such principles have been invoked in support of the forceful application of First Amendment doctrine to protect free speech rights.72 The most often cited First Amendment justification—the need for uninhibited, robust, and wide-open public debate—is not immediately identifiable as congruous to the aforementioned tort principles. Yet, unless society is to be reduced to a debate club, robust public discourse is not an end unto itself. Rather, its worth depends on the other values that it is meant to advance—values such as self-actualization through participation in a secure exchange of ideas, the prevention of injustice that results from promoting honest democratic processes, and the avoidance of fear and repressio.73

There are various troublesome aspects to the harsh application of free speech doctrine at the expense of tort law, despite it being rooted in many similar values. First, free speech rights often prevail simply because of their constitutional status, without any evaluation of whether First Amendment law furthers these values more effectively than tort law. The conclusion that free speech rights

71. See THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 192-93 (2d ed. 1888) (championing the importance of the “right to be let alone”); Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890) (introducing the right to privacy and explaining its nature and importance).


override common law tort rights because of their constitutional character is unsound from a policy perspective because it eschews any attempt to formulate an approach that maximizes the common interests of free speech and tort law. For example, as the facts of Snyder illustrate, there are instances in which arguably protected speech undermines the values that freedom of speech is meant to protect. In the same instances, tort law’s focus on protecting people at times and places when they are most vulnerable may better serve these values. Likewise, the absolutist constitutional view provides no room for consideration of whether tort law’s flexible, open-textured standards may be better suited to protecting these common values than the First Amendment’s categorical, rule-focused methodology and its insistence on uninhibited debate. Another advantage that may be lost in the absolutist constitutional approach is the drive in modern tort law to devise rules around which settlements may be achieved with efficiency.

Furthermore, while many of the values underpinning tort law rights and free speech rights are comparable, there are significant implications resulting from reliance on constitutional doctrine to further these goals rather than a common law-based tort regime. One such difference arises from the law’s inevitable role as an expressive medium. Whether explicitly stated or not, the choice to rely upon constitutional doctrine to protect free speech rights at the expense of common law tort rights is an expression in favor of the notion that juries and local governments—particularly their courts—are more properly seen in terms of their potential for infringing upon the salient values rather than their potential for upholding them. As discussed previously, this runs counter to tort law’s advantage in a complex, varied, and changing society.

Compounding this issue is the fact that the institutions on the wrong end of this regime have independent constitutional foundations that necessarily suffer under the absolutist First Amendment approach. For example, the role of the jury is constitutionally protected under the Seventh Amendment, and interference with state governments’ ability to redress individual harm as they see fit

74. Even strong free speech advocates like Professor Schauer admit to this: I do not mean to be taken as intimating that offence to individuals is not a harm that could in some circumstances outweigh freedom of speech, or that offence may not be a valid justification to respect in setting the boundaries of the Free Speech Principle. But if we do so it should be because we have identified offensiveness as a significant countervailing interest, not because the concept of free speech itself incorporates a set of rules for the ‘proper’ exercise of that freedom.

SCHAUER, supra note 73, at 148. Surely we argue a fortiori where the interest is ensconced in a common law rule.

75. See Zipursky, supra note 53, at 495-99 (discussing the open-textured nature of tort law); David A. Anderson, First Amendment Limitations on Tort Law, 69 BROOK. L. REV. 755, 759-60 (2004) (“The culture of First Amendment jurisprudence seeks precision and predictability (even though it often fails to achieve these), insists on narrow remedies, and distrusts juries. Tort law embraces broad, flexible principles that aim not so much to prescribe outcomes as to provide structures by which outcomes can be decided . . .”).

355
implicates issues of federalism—a concept that is embedded into the structure of the federal Constitution.

One last matter that we will be able to touch on but lightly in the context of this essay is the vice of the courts and many commentators of conflating government action with common law rules. A principle of the First Amendment is fear of government. For good reason, we must doubt the government’s capacity for goodwill in telling its citizens the truth. Thus, the citizenry must have adequate channels to information free of government interference. Yet this says nothing about the rules that have evolved and that are administered by courts and juries. Indeed, as John Goldberg has forcefully argued, the common law may itself be constitutionally protected.\(^6\) To be sure, the Court has made heavy inroads for better or for worse into defamation—quintessentially common law. But the American approach, which began in the civil rights movement in the South of the 1960s, has set up a presumption of First Amendment preemption that surely is an inadequate fit for every tort that touches communications. Common law institutions are part of the least dangerous branch of government, and even if not given constitutional standing, they ought to be given deference where coordination of citizens’ lives and their basic rights are accommodated through rules that have evolved over many centuries.

V. EXTENT TO WHICH OTHER NATIONS’ APPROACHES PREVENT THE INCONSISTENCIES IN THE AMERICAN SYSTEM

The reputational interests protected by tort law have traditionally received greater consideration than conflicting free speech rights in other common law legal systems.\(^7\) However, while the American approach remains unique in its constitutional absolutism, other countries have recently launched concerted efforts to elevate free speech rights. For example, with its 1997 decision in *Lange v. Australian Broadcasting Corp.*, the Australian High Court addressed the conflict between tort rights and free speech rights through a common law rule, expanding the protection of qualified privilege to reach conduct related to government affairs.\(^8\) While the rule announced in *Australian Broadcasting Corp.* provided a potent defense against tort liability, it did not result in dramatic elemental changes to the common law structure of tort law in the manner of *Sullivan*: the burden of proof remained on the defendant, and the Court maintained the traditional “reasonableness” standard rather than requiring a more onerous showing.\(^9\) New Zealand adopted a similar approach with the Court of

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9. See id.; see also Russell L. Weaver & David F. Partlett, *Defamation, the Media, and Free Speech*: 356
Appeal’s decision in *Lange v. Atkinson*, wherein qualified privilege was held applicable to a tort action involving speech about government officials and political candidates.\(^{80}\)

Despite its reputation as a favorable forum for defamation plaintiffs, Britain has also utilized an expanded common law qualified privilege to protect speech that might otherwise give rise to tort liability.\(^{81}\) In *Reynolds v. Times Newspapers Ltd.*, the House of Lords established that entitlement to the protections offered by the privilege depended on a variety of factors, including the speech’s “public importance, seriousness, overall tone and whether it included the claimant’s position—as well as matters about the information’s source, such as what steps had been taken to verify it.”\(^{82}\) In a subsequent decision, *Jameel v. Wall Street Journal Europe SPRL*,\(^{83}\) the House of Lords again took up the issue of the proper application of the newly-expanded qualified privilege. Unlike *Reynolds*, where the privilege had failed on the facts, the House of Lords found the privilege applicable in *Jameel*, stressing the flexibility that the privilege is meant to provide with regard to eligible speech.\(^{84}\)

While these qualified privilege approaches are not governed by identical standards, they share a common trait that distinguishes them from their American counterpart: each of them works from within the common law rather than using external constitutional rules to negate the common law. Notably, this aspect of these countries’ methodologies was not inevitable. The Australian High Court has acknowledged the existence of an implied constitutionally based right to freedom of political speech, and even sought to enforce that right through a *Sullivan*-type rule before abandoning the constitutional approach in favor of expanding qualified privilege.\(^{85}\) And while Britain does not have a constitutionally premised right to freedom of expression, it has passed legislation that requires courts to give effect to the provisions of the European Convention on Human Rights,\(^{86}\) which gives freedom of speech the status of a primary value.\(^{87}\) Thus, it is apparent that viable alternatives exist to working within the

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\(^{81}\) See Partlett, *supra* note 43, at 640-44.


\(^{84}\) *See id.*


\(^{86}\) Human Rights Act, 1998, c. 42 (Eng.).

\(^{87}\) *Convention for the Protection of Human Rights and Fundamental Freedoms* art. 10, Nov. 4, 1950, 213 U.N.T.S. 221. In contrast to Britain, Canada has entrenched the right to free speech by incorporating it into its Charter of Rights and Freedoms and requiring courts to consider it when interpreting statutory and common
2012 / A Tale of Two Ironies: In Defense of Tort

common law to reconcile conflicting free speech and tort rights, and adoption of the qualified privilege approach has not been chosen simply due to a lack of alternative options.

In certain respects, giving effect to free speech rights through common law qualified privilege has practical effects that are similar to those of the American constitutional approach. As Professor Anderson has observed, "[b]ecause the High Court’s decisions on common law matters are binding on the Australian state courts, its decision to protect political speech with an expanded common law privilege was almost as effective as a constitutional rule would have been."\(^8\)

Also, the novelty of these qualified privilege approaches makes it difficult to evaluate the extent of their impact.

Nevertheless, the fundamental distinction of the qualified privilege approach—\(i.e.,\) the expansion of a common law defense as opposed to the imposition of constitutional rules—suggests that it may avoid the inconsistencies of the American constitutional approach identified above in Parts II and III. First, because the use of qualified privilege does not pit constitutional rules against tort frameworks, it sidesteps the problem of evaluating common law torts for vagueness under constitutional standards that are marred by the uncertainty and unpredictability of their own governing standards. While the chilling of protected speech will still be an issue, a legal system that evaluates the issue within the context of a common law defense rather than enforcing it as a constitutional rule will likely avoid the hypocrisy of targeting torts for their vagueness under a vague constitutional framework that nevertheless always prevails because it pertains to constitutional rights.

Furthermore, the qualified privilege approach—by expanding the reach of an established defense rather than razing torts through extreme and sudden modification of their elements—will likely not result in sacrificing torts in favor of constitutional rules rooted in comparable values. Consequently, the election of qualified privilege is expressive of a greater degree of trust in lower courts: rather than casting courts, along with juries, as a threat to be guarded against, they are assigned the role of balancing competing interests in order to determine when a particular party is entitled to be shielded from liability. And by granting defendants a shield that is proportional to the sword of the tort it protects against, the use of qualified privilege endorses a more flexible approach—a contrast to the First Amendment trump card that prevails as a matter of its constitutional status rather than the merit of its ability to protect the values it is meant to protect. In short, fixing the free speech tort conflict from within the common law may serve to put courts in the role of reconciling conflicting rights on a case-by-

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\(^8\) Anderson, supra note 75, at 782 (footnote omitted).
case basis—as only they can do—rather than focusing on courts’ role as agents that threaten free speech rights.

VI. CONCLUSION

The Supreme Court’s decision in Snyder confirms its devotion to a regime in which constitutional free speech rights override conflicting tort-protected rights and courts as well as juries are seen as a threat. This absolutist constitutional approach suffers from notable inconsistencies arising from its vagueness-related critique of tort law and its obliteration of common law torts that have a well-established foundation in protecting civil liberties and other prominent values. Other countries have opted to address the same conflict of rights by working within the common law. While this alternate approach may suffer from its own deficiencies, it is unlikely to produce the ironies and inconsistencies that plague the absolutist constitutional approach.

Our hope in this Article is to stimulate a more open jurisprudence that gives some regard to the power of the common law and to comparative regimes. In a world of global communications, not even the vast power of American law can nor should be a wall against different conceptions of protecting freedom. Conversation, if not convergence, has its own force for a more productive and nuanced protection of free speech.89
