

QUEER OUTRAGE:
Why the Legal Vindication of LGBTQ Feelings
Can Transform Dignitary Tort Law

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ABSTRACT

This Note unearths the history of how LGBTQ people used the tort of intentional infliction of emotional distress (IIED) to vindicate their rights and protect their basic dignity, from the height of the AIDS epidemic until today. In so doing, the Note challenges the common view that IIED is a purely majoritarian tort that enforces prevailing communal norms of right and wrong. Instead, the history of LGBTQ IIED shows that the tort can serve as a tool for responding to majoritarian domination and protecting those most vulnerable to hatred and abuse. The Note provides a path forward to reconcile the recent clash between IIED and the First Amendment, showing that—in light of IIED’s ability to bring more people to the expressive table—the two can be friends rather than foes. In this respect, LGBTQ law and experience can provide insight for the future of dignitary tort law more broadly.

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INTRODUCTION

On June 28, 1987, Rod Miller entered Beebe Medical Center in Lewes, Delaware with a lacerated tendon in his foot.¹ The emergency doctor told him he needed immediate surgery, or else he might never be able to walk again.² However, when the surgeon, Dr. Spicer, entered the room, he insisted that Miller be airlifted to a different hospital by helicopter.³ Spicer had gotten word from hospital staff that Miller was gay, and thus assumed Miller had HIV.⁴ The surgeon refused to operate on him based on a medically unfounded fear of exposure to the virus.⁵ Miller waited for the helicopter for two hours and was mistakenly transferred to the wrong hospital.⁶ By the time he arrived

1. Miller v. Spicer, 822 F. Supp. 158, 160 (D. Del. 1993); *About Us*, BEEBE HEALTHCARE, <https://www.beebehealthcare.org/about-us> [<https://perma.cc/DPU2-NLSB>] (noting that Beebe Medical Center is located in Lewes, Delaware).

2. *Id.*

3. *Id.* at 160–61.

4. *Id.*

5. *Id.* at 161; see *Statement on the Surgeon and HIV Infection*, AM. COLLEGE OF SURGEONS (May 1, 2004), <https://www.facs.org/about-ac/s/statements/surgeon-and-hiv-infection> [<https://perma.cc/68F6-U6Q6>] (explaining the lack of evidence about the frequency of HIV transmission between surgeons and patients, and warning that action should only be taken “based solely on documented scientific data and not on unfounded hysteria” because “[s]urgeons have the same ethical obligations to render care to HIV-infected patients as they have to care for other patients”).

6. *Miller*, 822 F. Supp. at 161.

at the proper facility, his foot was too swollen to examine, let alone operate on.⁷ Miller ultimately received his surgery eight days later.⁸

Miller sued Spicer and the hospital for intentional infliction of emotional distress (IIED).⁹ Born through a series of scholarly articles published in the late 1930s, IIED grew into a full-fledged tort in the immediate postwar era as advances in psychology “verified the significance of emotional harm.”¹⁰ According to the *Restatement (Second) of Torts*, IIED—also called the tort of outrage—occurs when one “by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress.”¹¹ Applying this standard to Spicer’s actions, federal Judge Murray Schwartz issued a ruling for Miller in 1993.¹² The court denied the doctor’s motion for summary judgment, as a reasonable jury could find that his refusal to treat Miller “for unacceptable discriminatory reasons” was “beyond all possible bounds of decency” and thus could constitute sufficiently “outrageous conduct” for IIED.¹³

Miller’s suit did not survive because of Spicer’s malpractice (a claim Miller did not file) nor because of Spicer’s breach of contract (a claim the court dismissed).¹⁴ It survived because Spicer’s bigotry hurt Miller’s feelings. At a time in the United States when gay sex was criminal¹⁵ and AIDS diagnoses were nearing an all-time high,¹⁶ a federal judge recognized that homophobia itself could be tortious conduct.

Judge Schwartz was not the only one to do so. In a largely untold history during the 1990s and early 2000s, lesbian, gay, bisexual, transgender, and queer (LGBTQ) plaintiffs began to prevail in court against homophobic and transphobic language and behavior based on the pure emotional harm it inflicted on them.¹⁷ A federal judge allowed a suit to proceed against a boss for making homophobic comments at work.¹⁸ A transgender man’s mother prevailed in arguing that a police officer’s invasive, transphobic questioning of her son was

7. *Id.*

8. *Id.*

9. *Id.* at 160.

10. Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 132–33 (2010).

11. RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965).

12. *Miller*, 822 F. Supp. at 160, 168, 174.

13. *Id.* at 168–70.

14. *Id.* at 158.

15. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding, infamously, a Georgia anti-sodomy statute).

16. Lucia Torian, Mi Chen & Irene Hall, *HIV Surveillance—United States, 1980–2008*, 60 MORBIDITY & MORTALITY WKLY. REP. 689, 691 (2011), <https://www.cdc.gov/mmwr/pdf/wk/mm6021.pdf> [<https://perma.cc/PM75-BVU9>].

17. See Geoffrey Christopher Rapp, *LGBTQ+ Rights, Anti-Homophobia and Tort Law Five Years After Obergefell*, 2022 UNIV. ILL. L. REV. 1103, 1121–22 (2021) (identifying some of the central cases that signified this transformation).

18. *Forbes v. Merrill Lynch, Fenner & Smith, Inc.*, 957 F. Supp. 450, 456–57 (S.D.N.Y. 1997).

outrageous conduct.¹⁹ A lesbian woman's neighbors were held legally responsible for circulating bigoted and threatening letters to the local community.²⁰ Shell Oil Company paid \$2 million in punitive damages for a homophobic firing.²¹ Of course, this was not unbridled success. Some courts continued to hold that homophobia and transphobia were not "beyond all possible bounds of decency" and thus insufficiently outrageous for IIED recovery.²² Still, a clear shift from earlier case law had occurred.

This Note shows that LGBTQ plaintiffs found considerable success defending their basic human dignity through the tort of IIED in the 1990s and early 2000s. This understudied moment of legal creativity and self-empowerment meant that LGBTQ plaintiffs began to achieve vindication of their feelings as a matter of law.

An intuitive reason behind this wave of successful LGBTQ IIED claims is that as hostility toward LGBTQ people declined in straight society,²³ courts increasingly found acts leveled against them to fall beyond the bounds of communal decency and thus actionable in tort. This story coheres with scholars' traditional view that tort law develops in response to "majoritarian sensibilities" rather than through attention to the "subjugation of minority group members."²⁴ As LGBTQ people joined the body politic, they became harder to exclude from the communitarian baseline of outrageous conduct.

This intuitive narrative is certainly part of the story: public opinion was shifting in favor of LGBTQ people throughout the 1990s.²⁵ Yet I argue that increased social inclusion of LGBTQ people was only one factor. A historical analysis of the case law proves that the transformation in IIED for LGBTQ people during this period also had its roots in distinctly nonmajoritarian considerations. Namely, as a doctrinal matter, there was a legal paradigm shift in which courts began to account for the inherent vulnerability that comes with LGBTQ identity. It was LGBTQ people's distinct exposure to emotional harm—their subjugation and widespread lack of acceptance—that made their IIED claims all the more convincing to courts.

19. Brandon *ex rel.* Est. of Brandon v. Cnty. of Richardson, 624 N.W.2d 604, 620–25, 629 (Neb. 2001).

20. Simpson v. Burrows, 90 F. Supp. 2d 1108, 1131 (D. Or. 2000).

21. Collins v. Shell Oil, No. 610983–5, 1991 WL 147364, at *1 (Cal. Super. Ct. June 13, 1991).

22. See, e.g., Ward v. Goldman Sachs, No. 94 Civ. 6904, 1996 WL 3930, at *1 (S.D.N.Y. Jan. 3, 1996).

23. See Paul R. Brewer, *The Shifting Foundations of Public Opinion About Gay Rights*, 65 J. POL. 1208, 1208–09 (2003) (describing how hostility toward gay people declined during this period).

24. Rapp, *supra* note 17, at 1105; Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 586 (1993) (describing tort law as developing based on "communitarian notions of right and wrong," which in turn risks subordinating minority rights and beliefs).

25. See *infra* Section I.b.iv.; Brewer, *supra* note 23, at 1208–09.

Scholars have criticized IIED as a tort that tends to serve the majority through its vague standard of “outrageous” conduct.²⁶ There is, of course, much truth to this. In an infamously tautological description of IIED, the *Restatement* describes the tort of outrage as arising when “recitation of the facts to an average member of the community would . . . lead him to exclaim, ‘Outrageous!’”²⁷ Tort scholar Paul Hayden convincingly warns that “[o]ne could scarcely imagine a tort element more tied to ill-defined communitarian norms of conduct than this.”²⁸

My analysis complicates this view of IIED. This Note provides an alternative story of the tort as doing far more than bending to “ill-defined” majoritarian conceptions of what is “utterly intolerable in a civilized community.”²⁹ In particular, I frame IIED as a tort that doctrinally recognizes, and has historically targeted, the very power relations enabling one party to humiliate and denigrate another. In this respect, IIED incorporates two, seemingly conflicting forces: it appeals to majoritarian sensibilities while explicitly accounting for minority interests and vulnerabilities. The *Restatement* captures this dynamic, dictating that the “relation” between parties is relevant in evaluating IIED, as well as an “actor’s knowledge that [another] is *peculiarly susceptible* to emotional distress.”³⁰ Indeed, a prerequisite of emotional injury is the capacity—the power—to inflict that injury. For this reason, IIED has long been “knee-deep in issues relating to gender, sexuality,” and race,³¹ explicitly accounting for the “authority” of the alleged tortfeasor over the plaintiff.³² As such, the tort played a major role in the Civil Rights Era and its aftermath, particularly to combat racial hate speech.³³

My characterization of IIED provides a pathway to navigate the challenges facing IIED doctrine today. In the last twenty years, LGBTQ IIED claims have collided with important First Amendment values, forcing courts to

26. RESTATEMENT (SECOND) OF TORTS § 46(1) (AM. L. INST. 1965); see, e.g., Hayden, *supra* note 24, at 586.

27. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. (AM. L. INST. 1965).

28. Hayden, *supra* note 24, at 589.

29. *Id.*; § 46 cmt. d.

30. § 46 cmt. e. & f (emphasis added).

31. Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2121 (2007); see Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 152–54 (1982).

32. Russell Fraker, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 991 (2008).

33. Hafsa S. Mansoor, Note, *Modern Racism But Old-Fashioned IIED: How Incongruous Injury Standards Deny “Thick Skin” Plaintiffs Redress for Racism and Ethnoviolence*, 50 SETON HALL L. REV. 881, 886–87 (2019); see also *Alcorn v. Anbro Eng’g, Inc.*, 468 P.2d 216, 220 (Cal. 1970) (overruling the lower court’s dismissal of an IIED suit arising from a white defendant hurling racial epithets at his Black employee); *Ruiz v. Bertolotti*, 236 N.Y.S.2d 854, 855 (N.Y. Sup. Ct. 1962) (denying the defendant’s motion to dismiss in a case where the defendant leveled racist threats of violence against Puerto Rican plaintiffs, who therefore “suffered distress, humiliation, and emotional shock”).

reconcile the constitutional right to use anti-LGBTQ speech and the tort rights of queer³⁴ people to be protected from that speech. Prime examples include the Court's *Snyder v. Phelps* opinion in 2011, as well as state-court decisions on religious freedom.³⁵ In these cases, LGBTQ IIED claims were cast as anti-constitutional to the First Amendment and thus roundly defeated.

Clashes between the First Amendment and IIED are difficult to resolve. Yet lacking from the Court's jurisprudence is a recognition that the First Amendment and IIED may be less in conflict than they seem. I argue this to be the case in two respects, each stemming from my historical account of IIED as protective of LGBTQ minority interests.

First, under a purely majoritarian view of IIED, it is easy to view the tort as hostile to the First Amendment's vigorous protection of an individual's offensive or unpopular expression. Nonetheless, to the extent that IIED is a tool for vulnerable plaintiffs to protect themselves against powerful majorities and even dislodge communitarian norms, the tort can serve—and has served—the same values as the First Amendment. If IIED is a tool for getting minorities a seat at society's table, it can facilitate speech rather than suppress it. Subjecting minority groups to hate speech may discourage or even prevent those groups from participating in free expression.³⁶ In an apparent conflict between IIED and the First Amendment, then, I argue that the First Amendment needs to be evaluated on both sides of the equation. This is because, in the context of hate speech, both an IIED plaintiff and defendant have a First Amendment interest at stake. This account thus challenges the prevailing “stock story”³⁷ in the Supreme Court that LGBTQ equality undermines First Amendment values.³⁸

34. In this Note, I use the word “queer” broadly to refer to all people within the LGBTQ community. I thus use “LGBTQ” and “queer” interchangeably, though in fact they are not so historically: activists in the AIDS crisis reclaimed the word queer as a political identity in the late 1980s and early 1990s, whereas “LGBTQ” is a more recent term without this same political history. See *infra* note 49; Meredith G. F. Worthen, *Queer Identities in the 21st Century: Reclamation and Stigma*, CURRENT OPINION PSYCH., Feb. 2023, at 1, 1 (“Currently, many recognize queer identity as offering a space . . . for those who want to challenge the status quo and hierarchies. . . . [But], people who self-identify as queer can have different reasons for doing so and even among individuals, ‘queer’ can have multiple and evolving meanings.”); Katy Steinmetz, *Why ‘LGBTQ’ Will Replace ‘LGBT’*, TIME (Oct. 26, 2016), <https://time.com/4544704/why-lgbtq-will-replace-lgbt> [<https://perma.cc/ZF9B-B9EN>] (explaining that “LGBTQ” is a more recent term than the word “queer”).

35. See, e.g., *Gunn v. Mariners Church, Inc.*, 167 Cal. App. 4th 206, 217–18 (2008).

36. See Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 792 (1992) (“Hate speech frequently silences its victims, who, more often than not, are those already heard from least.”).

37. Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 3, 15–16 (1984) (coining the term “stock stories” and defining them as heuristics, often damaging ones, that “help us interpret the everyday world with limited information”).

38. Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341, 344 (2021) (explaining that “the Supreme Court has gradually grown more receptive to First Amendment principles as possible mechanisms to blunt the effects of LGBT equality”).

Second, if IIED is about protecting vulnerable groups, the speech that the tort targets becomes a stronger contender for First Amendment doctrines that actively carve out certain categories of particularly low-value, even dangerous, speech from the Amendment's protection. These include the true threats, incitement, and captive audience doctrines.

This Note proceeds in three parts. Part I outlines the transitional moment in which LGBTQ plaintiffs first started to prevail on IIED claims in courts in the 1990s and early 2000s, as well as the legal paradigm shift that enabled this success. Part II examines the fraught nature of LGBTQ IIED claims in the last twenty years and their collision with the First Amendment. Part III proposes ways to reconcile First Amendment doctrine and IIED in light of their potentially shared goals, including by adopting a balancing test in speech-tort cases that considers the First Amendment interests on both sides of the constitutional equation.

This Note fills a gap in the scholarship on IIED, which largely ignores the ways in which LGBTQ plaintiffs have utilized and shaped the tort. My research captures how LGBTQ law is not a circumscribed, niche category of law, but an area that can inform broader legal questions, including the ongoing conflict between dignitary torts and free expression.

I. A PARADIGM SHIFT IN LGBTQ IIED

In the last fifteen years of the 20th century, courts went from ignoring LGBTQ identity altogether in their analyses of LGBTQ IIED claims to actively accounting for the particular vulnerabilities of queer people. Thus, common-law IIED claims started to provide LGBTQ people with powerful protections against discrimination and harassment decades before federal statutes, such as Title VII, could do so.³⁹ Ultimately, in California, courts would go so far as finding that discrimination and harassment on the basis of sexual orientation was per se outrageous conduct. This was a radical transformation in LGBTQ IIED.

A. *The Pre-1990s Period*

In the 1980s, plaintiffs filed few IIED claims responding to homophobic and transphobic conduct,⁴⁰ and when they did, they usually did not prevail. Part of the problem was that courts did not acknowledge the meaning of anti-LGBTQ epithets, which were viewed as mere “insults” rather than as badges of inferiority. In *Moye v. Gary* in 1984, defendant Clyde Gary

39. David L. Johnson, Kenneth L. Wagner & Denise K. Drake, *Supreme Court Speaks: Title VII Forbids Workplace Discrimination Based on Sexual Orientation and Transgender Status*, AM. BAR ASS'N (June 16, 2020), https://www.americanbar.org/groups/labor_law/publications/flash_archive/issue-june-2020/supreme-court-speaks [<https://perma.cc/5GPN-KK4C>] (describing the *Bostock* opinion and how it reshaped LGBTQ antidiscrimination law under Title VII).

40. See Rapp, *supra* note 17, at 1121 (noting that the first major LGBTQ IIED victory occurred in 1991).

berated his employee Dorothy Moye, a clerical worker for the Social Security Administration, calling her a “fag” in front of her daughter.⁴¹ Moye sought damages for the “mental anguish” she suffered as a result of the encounter, but the Southern District of New York dismissed the suit and denied recovery for IIED.⁴² The court not only failed to mention whether Moye herself was queer—and thus determine if the word would have had a particularly stinging effect on her—but also whether the word on its own, regardless of Moye’s identity, should have had any bearing on the case.⁴³ Eschewing the fact that Gary used a homophobic epithet, the court instead cited another 1984 case from New York, in which the court held that mere “criticism of job performance” was insufficient to state an IIED claim.⁴⁴

Courts during this period viewed the absence of federal protections for LGBTQ people as reason to ignore power imbalances in LGBTQ IIED suits. For example, in *Doe v. U.S. Postal Service* in 1985, the District Court for the District of Columbia dismissed the IIED claim of a transgender woman whose employment offer to be a Senior Clerk Typist at the U.S. Postal Service was rescinded as soon as she informed her superiors of her intention to have gender-affirming surgery.⁴⁵ Citing persuasive federal case law such as *Ulane v. Eastern Airlines Inc.*,⁴⁶ the district court looked to the fact that the plain language of Title VII does not “cover discrimination against transsexuals” to dismiss the plaintiff’s employment-discrimination claim, which in turn left the court unpersuaded that the plaintiff had a leg to stand on in tort law.⁴⁷

A 1985 Alabama IIED case, *Logan v. Sears, Roebuck & Co.*, illustrates the fundamental doctrinal flaw in how courts approached the tort in this period. Robert Logan operated a beauty salon in Birmingham, and on May 11, 1982, an employee of Sears phoned Logan to inquire about a monthly charge that he owed.⁴⁸ While on the phone, the employee told someone on her end of the line that Logan was “as queer as a three-dollar bill” because he was a man “who owns a beauty salon.”⁴⁹ There were many reasonable, doctrinally grounded

41. 595 F. Supp. 738, 739 (S.D.N.Y. 1984).

42. *Id.* at 738–40.

43. *Id.*

44. *Id.* at 740 (citing *Belanoff v. Grayson*, 471 N.Y.S.2d 91, 94 (App. Div. 1984)).

45. No. 84–3296, 1985 WL 9446, at *1 (D.D.C. June 12, 1985).

46. 742 F.2d 1081 (7th Cir. 1984). This was a case in which a transgender woman sued her employer under Title VII for sex discrimination, but where the court held that “Title VII is not so expansive in scope as to prohibit discrimination against transsexuals.” *See id.* at 1082–83, 1087.

47. *U.S. Postal Service*, 1985 WL 9446, at *2, *5 (relying on *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984)).

48. *Logan v. Sears, Roebuck & Co.*, 466 So. 2d 121, 122 (Ala. 1985).

49. *Id.* During the 1980s, the word “queer” was widely considered a slur, and LGBTQ people only began to reclaim the term at the end of the decade. Merrill Perlman, *How the Word ‘Queer’ Was Adopted by the LGBTQ Community*, COLUM. JOURNALISM REV. (Jan. 22, 2019), https://www.cjr.org/language_corner/queer.php [<https://perma.cc/F65J-WQ78>]. AIDS activists, particularly members of organizations such as Queer Nation, were instrumental in transforming the meaning of the term into a source of LGBTQ pride and affirmation. *Id.*

challenges the court could have posed regarding Logan's IIED suit, chief among them whether the comment satisfied IIED's intent element requiring at least recklessness or whether Logan's alleged anguish satisfied the tort's severe emotional distress element. Neither of these questions arose.⁵⁰

Instead, the court rejected Logan's suit because it was "unwilling to say that the use of the word 'queer' to describe a homosexual is atrocious and intolerable in civilized society."⁵¹ The judge reasoned that the word "queer," while offensive to the "homosexual community," was frequently used "by those outside that community."⁵² To be sufficiently outrageous, "conduct must be such that would cause mental suffering . . . to a person of ordinary sensibilities, not conduct which would be considered unacceptable merely by homosexuals."⁵³

In *Logan*, the court used an objective standard abstracted from the facts of the case for determining what constitutes outrage. The *Logan* court conceptualized this element of the tort based on how conduct would affect, rather than be perceived by, the average member of the community.⁵⁴ This is a crucial distinction. If "outrage" is about the impact of conduct on the reasonable person,⁵⁵ then the tort does not account for the identity of the plaintiff. On the other hand, if "outrage" is anchored in, as the *Restatement* put it, how the "recitation of the facts to an average member of the community" would lead them to respond,⁵⁶ then a queer person's identity becomes central. The first formulation results in courts asking the nonsensical question: would a straight person be hurt by homophobic conduct? The second requires them to ask: would a straight person find a queer person's experience of homophobic conduct outrageous? Adopting the former analysis, the Alabama court unsurprisingly rejected the IIED claim.⁵⁷

B. *The Turning Point*

In the early 1990s, LGBTQ IIED jurisprudence began to change. The key development was that courts started accounting for the LGBTQ identity of plaintiffs suing under the tort. A plaintiff's status as gay or transgender made injurious conduct toward them outrageous and beyond the bounds of communal decency. IIED thus emerged as not only a tort that reified evolving majoritarian sensibilities toward LGBTQ people in the 1990s, but also one that explicitly penalized wielding majoritarian power against them.

50. *Logan*, 466 So. 2d at 122–24.

51. *Id.* at 124.

52. *Id.* at 123–24.

53. *Id.* at 124.

54. *Id.* at 123 ("[I]n order to be actionable, the intrusion must be such as would outrage a person of ordinary sensibilities or cause such a person mental suffering, shame, or humiliation." (citing *Phillips v. Smalley Maint. Servs., Inc.*, 435 So. 2d 705, 708–09 (Ala. 1983)).

55. *Id.*

56. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. (AM. L. INST. 1965).

57. *Logan*, 466 So. 2d at 124.

1. Taking LGBTQ Status Seriously

The 1991 *Collins v. Shell Oil* decision was the first step. Shell Oil Company terminated executive Jeffrey Collins “for private homosexual conduct” after his secretary discovered Collins’ printed announcement inviting other men to a sex party.⁵⁸ The outing and firing of Collins led to a “lasting schism” between the plaintiff and his father, a longtime employee of Shell.⁵⁹ The California court found it critical that Shell’s opposition to Collins’ homosexuality was the “only reason defendant fired plaintiff,” and thus allowed recovery for the emotional harm caused to Collins as a gay man.⁶⁰ The court granted the plaintiff \$2 million in punitive damages for their IIED claim—on top of \$5.8 million in compensatory damages for breach of contract and wrongful termination.⁶¹

The role of queer identity in IIED analysis became even more explicit in the Delaware federal district court’s 1993 decision of *Miller v. Spicer*, described in the Introduction. Dr. Spicer’s patently homophobic behavior, denying surgical care to a patient based on pure animus and forcing that patient to languish in pain for eight days as a result, was key to the court’s IIED analysis.⁶² The judge determined that a reasonable jury could find Spicer’s conduct outrageous based on evidence that he refused to treat Miller for “unacceptable discriminatory reasons,” based his behavior on “derogatory comments” from the Beebe Medical Center’s staff, and acted on an unreasonable belief that Miller “might . . . be infected with the AIDS virus.”⁶³ For the judge, summary judgment was also not in order for the hospital.⁶⁴ A reasonable jury could find the hospital staff’s “labeling of plaintiff as homosexual in a derogatory way” and “participation in the transfer of plaintiff for a discriminatory, non-medical reason” to be “extreme and outrageous” acts.⁶⁵

2. Outrage Per Se

The *Miller* court was willing to take blatant discrimination against LGBTQ people into account when determining outrageous conduct, but California courts in the latter half of the 1990s went a step further. These courts began to recognize discrimination on the basis of LGBTQ status as *per se* outrageous conduct, giving rise to a *prima facie* case of IIED.

In *Leibert v. Transworld Systems* in 1995, a California appellate court faced an IIED claim from a plaintiff fired from his job after his employer learned that he was gay.⁶⁶ Leibert’s superiors and coworkers taunted him

58. No. 610983–5, 1991 WL 147364, at *1–3 (Cal. Super. Ct. June 13, 1991).

59. *Id.* at *2.

60. *Id.* at *4–5.

61. *Id.* at *1.

62. *Miller v. Spicer*, 822 F. Supp. 158, 169–70 (D. Del. 1993).

63. *Id.*

64. *Id.* at 171.

65. *Id.*

66. *Leibert v. Transworld Sys.*, 39 Cal. Rptr. 2d 65, 66–67 (Ct. App. 1995).

for his “effeminate manner” and called him a “fag.”⁶⁷ The court ruled that employment discrimination, “whether based upon sex, race, religious, or sexual orientation, is invidious and violates a fundamental public policy of the state” and that because the IIED claim “is premised upon the same alleged actions” as the discrimination claim, it likewise would be violative of public policy and should therefore survive a motion to dismiss.⁶⁸

Just three years later, another appellate decision in California, *Kovatch v. California Casualty Management Co.*, went in favor of a gay IIED plaintiff.⁶⁹ Daniel Kovatch was fired from his job after his boss told him, “You’re a faggot, and there is no place for faggots in this company.”⁷⁰ The court detailed a pattern of intimidation and harassment on the basis of sexual orientation, which entitled Kovatch to relief.⁷¹ The court went on to expand a previous California court’s holding, asserting that harassment on the basis of sexual orientation, just as sexual harassment, “will constitute the outrageous behavior element of a cause of action for intentional infliction of emotional distress.”⁷²

3. The Multiple Layers of Power Imbalance

LGBTQ IIED claims were not universally successful, and there were notable exceptions to the trend.⁷³ Still, there was clearly growing attention throughout this period to the power dynamics at play in IIED suits. Indeed, LGBTQ plaintiffs were even more likely to prevail when alleging abuse by straight defendants if additional power imbalances were layered on top of the underlying homophobic or transphobic conduct.⁷⁴ As we have already seen, special authority-based relationships can compound discriminatory behavior—as between a doctor and a patient in *Miller* or between employers and employees in *Collins*, *Leibert*, and *Kovatch*.

67. *Id.*

68. *Id.* at 73.

69. *Kovatch v. Cal. Cas. Mgmt. Co.*, 77 Cal. Rptr. 2d 217, 220 (Ct. App. 1998).

70. *Id.* at 221.

71. *Id.* at 221–23, 225–26.

72. *Id.* at 231 (quoting *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842, 858 (Ct. App. 1989)). Under the logic of *Kovatch*, the California courts would view sexual harassment as per se outrageous, separate from the question of whether a litigant’s LGBTQ identity was mentioned or invoked. *Id.* This maps onto the Supreme Court’s approach to Title VII in cases like *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), where the Court held that same-sex sexual harassment was violative of Title VII even where there was no mention of the victim’s sexuality. See *Oncale*, 523 U.S. at 79–80.

73. See, e.g., *Ward v. Goldman Sachs & Co.*, No. 94 Civ. 6904, 1996 WL 3930, at *1 (S.D.N.Y. Jan. 3, 1996) (finding that there was “homophobia on the part of [the plaintiff’s] coworkers” but rejecting an IIED claim because such conduct was not “so outrageous in character and extreme in degree as to go beyond all possible bounds of decency”).

74. The fact that LGBTQ identity increasingly factored into courts’ analysis of IIED in this period raises the question of how courts would handle potential IIED claims advanced among LGBTQ litigants, that is, homophobic or transphobic statements made between queer people. This is an important question in light of the shift in LGBTQ IIED that I track throughout this Note, but I leave a more extensive treatment of this phenomenon to future scholarship.

After the infamous rape and murder of transgender man Brandon Teena—later the subject of the 1999 film *Boys Don't Cry*—the Nebraska Supreme Court found in favor of Teena's estate in the case *Brandon ex rel. Estate of Brandon v. County of Richardson*.⁷⁵ JoAnn Brandon, Teena's mother, sued the county for the local police's mishandling of the case and its intentional infliction of emotional distress on her son.⁷⁶ The officer asked the rape survivor retraumatizing and dehumanizing questions about his genitals and the specifics of how the two men penetrated him, all while accusing him of pretending to be a man.⁷⁷ Furthermore, despite clear evidence that the rapists also planned to murder Teena, the police made no arrests.⁷⁸ The Nebraska Supreme Court found the "abuse of a position of power" essential to its holding that there was extreme and outrageous conduct: the officer not only bullied Teena based on his "gender identity disorder," but also did so in the officer's capacity as a law-enforcement official at a time when Teena was "particularly vulnerable," having been raped just earlier that day.⁷⁹

4. Reasons for the New LGBTQ IIED

The question remains as to why the 1990s in particular saw such a swift change in LGBTQ IIED jurisprudence. Growing public acceptance of LGBTQ people likely played a role. In 1992, seventy-one percent of Americans believed that homosexual sex was "always wrong," but this figure fell to sixty-three percent in 1994, and fifty-four percent in 1998.⁸⁰ This was a major decline, as public opinion on homosexual sex had been relatively stable since the early 1970s.⁸¹ If public acceptance of LGBTQ people was rising, as a doctrinal matter we would expect courts to find language and behavior leveled against queer people to be more outrageous than before. Because the definition of outrage is doctrinally anchored in what an "average member of the community" would find outrageous,⁸² as that average person's notion of outrage evolves, the doctrine is designed to evolve in tandem.

The 1990s were not only a time of increasing public support for LGBTQ life, but also of increasing attention to the vulnerability of LGBTQ people in American society. The ravages of HIV/AIDS created a "nationwide epidemic of fear" in the 1980s, fueling stigma towards and the marginalization of the LGBTQ people who faced the worst of the disease.⁸³ In the 1990s, that stigma began to decline.⁸⁴ One survey indicated that the likelihood someone

75. 624 N.W.2d 604, 629 (Neb. 2001).

76. *Id.* at 610–11.

77. *Id.* at 612–13.

78. *Id.* at 614.

79. *Id.* at 621–22.

80. Brewer, *supra* note 23, at 1208–09.

81. *Id.* at 1208.

82. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. (AM. L. INST. 1965).

83. Christopher Capozzola, *A Very American Epidemic: Memory Politics and Identity Politics in the AIDS Memorial Quilt, 1985–1993*, 82 RADICAL HIST. REV. 91, 93 (2002).

84. Gregory M. Herek, John P. Capitanio & Keith F. Widaman, *HIV-Related Stigma*

harbored negative feelings toward people with AIDS fell eight-to-ten percent annually each year between 1991 and 1999.⁸⁵ Mass mobilization and AIDS activism raised awareness of the real damage the disease was causing—and the importance of providing care to the most affected communities.⁸⁶ Numerous queer people came out of the closet in the face of what felt like an inescapable scourge.⁸⁷ While only about twenty-six percent of Americans stated that they had a gay friend or acquaintance in the mid-1980s, that figure jumped to forty-seven percent in 1994 and sixty percent by the end of the decade.⁸⁸

These two trends—greater LGBTQ acceptance and greater attention to LGBTQ vulnerability—provide a potential explanation for not only why LGBTQ IIED doctrine evolved, but also why it evolved in the particular way that it did. Courts were wary of excluding LGBTQ people from the gamut of outrage because LGBTQ people were increasingly seen as entitled to the same treatment as straight people. Yet perhaps more importantly, the case law also demonstrates increased judicial recognition that LGBTQ people were at risk of many harms that straight people were not—and that tort law needed to account for this difference if it sought to properly vindicate LGBTQ rights. Indeed, as *Miller* and other cases from the period establish,⁸⁹ IIED became one of the most effective legal channels available for LGBTQ people to challenge the particular stigma associated with AIDS.

C. *Lagging Transgender Rights*

Although cisgender gay and lesbian plaintiffs began to have their emotions vindicated in court throughout the 1990s and early 2000s, the fate of transgender plaintiffs lagged far behind. A case like *Brandon* was significant insofar as it signaled a broader evolution in LGBTQ IIED, but most transgender litigants did not benefit from this shift. Instead, courts remained reluctant to render transphobic conduct as per se outrageous, let alone actionable at all.

In *Underwood v. Archer Management Services*⁹⁰ in 1994, the District Court for the District of Columbia dismissed the complaint of Patricia Underwood, a transgender woman who was fired from her job as a receptionist at Archer Management Services, Inc. despite—she alleged—being

and Knowledge in the United States: Prevalence and Trends, 1991–1999, 92 AM. J. PUB. HEALTH 371, 374 (2002), <https://pmc.ncbi.nlm.nih.gov/articles/PMC1447082> [<https://perma.cc/9CFA-PA2D>].

85. *Id.*

86. See Raquel Fernández, Sahar Parsa & Martina Viarengo, *Coming Out in America: AIDS, Politics, and Cultural Change* 7–8 (Nat'l Bureau Econ. Rsch., Working Paper No. 25697, 2019), https://www.nber.org/system/files/working_papers/w25697/w25697.pdf [<https://perma.cc/YQU3-M97L>].

87. *Id.*

88. *Id.*

89. See, e.g., *Forbes v. Merrill Lynch, Fenner & Smith, Inc.*, 957 F. Supp. 450, 456 (S.D.N.Y. 1997) (ruling in favor of a plaintiff who filed an IIED claim to combat workplace harassment from his supervisor after he disclosed he had AIDS).

90. 857 F. Supp. 96 (D.D.C. 1994).

an “exemplary employee” and “execut[ing] her duties in a stellar fashion.”⁹¹ Parroting the same narrative it had advanced in *Doe v. U.S. Postal Service* almost a decade earlier, the D.C. court cited to Title VII case law, including the same case of *Ulane v. Eastern Airlines*, when denying recovery to Underwood.⁹² “In construing Title VII, district courts have ruled the discrimination on the basis of transsexuality is outside of Title VII’s protection,” explained the court.⁹³ Title VII’s limited reach persuaded the court that “[n]othing pleaded in the Complaint approaches [the] standard of outrageous conduct,” as pure non-discriminatory termination from one’s job was itself “insufficient” to support an IIED claim.⁹⁴ A state superior court used the same *Ulane* Title VII logic in a similar transphobic firing case in North Carolina called *Arledge v. Peoples Services, Inc.* The court reasoned that “where Congress . . . [has] expressly found such conduct to be permissible,” that is, under federal employment law, “employment actions on the basis of transsexualism cannot be considered ‘atrocious and utterly intolerable in a civilized community.’”⁹⁵

Judicial aversion toward IIED suits by transgender plaintiffs continued even after courts started applying Title VII to transgender plaintiffs by way of the landmark Supreme Court case *Price Waterhouse v. Hopkins*,⁹⁶ which made sex-stereotyping claims actionable under Title VII. In *Doe v. United Consumer Financial Services*,⁹⁷ the District Court for the Northern District of Ohio threw out a transgender woman’s IIED suit, in which she alleged that her employer, United Consumer Financial Services, fired her from a temp position when human resources discovered through an abnormally aggressive background investigation that she was transgender.⁹⁸ But allegations of a hostile inquiry from company executives and clear reports that coworkers were calling Doe “Mrs. Doubtfire” behind her back led the court to allow a *Hopkins* claim to proceed even though *Ulane* remained “viable” precedent.⁹⁹ The plaintiff argued that “United Consumer either viewed her as a man who dressed and behaved like a woman, or it considered her a woman who was insufficiently feminine.”¹⁰⁰ Either way, the employer acted on the basis of sex stereotypes.¹⁰¹ The court found the argument sufficiently persuasive to deny the defendant’s motion to dismiss Doe’s Title VII claim.¹⁰² Remarkably, even though the Title VII claim lived on, the court *still* rejected the transgender plaintiff’s IIED

91. *Id.* at 97.

92. *Id.* at 98.

93. *Id.*

94. *Id.* at 99.

95. *Arledge v. Peoples Servs., Inc.*, No. 02 CVS 1569, 2002 WL 1591690, at *3 (N.C. Super. Ct. Apr. 18, 2002).

96. 490 U.S. 228 (1989).

97. No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001).

98. *Id.* at *1, *9.

99. *Id.* at *4.

100. *Id.* at *3.

101. *Id.*

102. *Id.* at *9.

claim, asserting an “average member of the community” would not find the facts of the case outrageous.¹⁰³

As late as 2015, the Northern District of Ohio retained its stubborn dismissal of IIED claims by transgender plaintiffs. In *Cummings v. Greater Cleveland Regional Transit Authority (RTA)*,¹⁰⁴ the court considered an IIED claim from a Black transgender woman denied promotion to the position of Acting Director in the Operations Division of the RTA despite having the requisite qualifications.¹⁰⁵ Upholding many of the plaintiff’s ten claims—including violations of Ohio’s Equal Pay Act and racial and gender discrimination laws—the court still dismissed the attendant IIED claim.¹⁰⁶ In light of cases like *Leibert* and *Kovatch*, which held that sexuality discrimination was outrageous per se almost twenty years earlier, the contrast is stark: the Ohio court argued that the plausible discrimination alleged by the plaintiff was “by itself . . . insufficient to support an [IIED] claim.”¹⁰⁷

D. *The Power of LGBTQ IIED Today*

The *RTA* court has not had the last word. In more recent years, LGBTQ victories, including for transgender plaintiffs, prove the crucial role IIED plays in vindicating LGBTQ dignity and rendering phobic language and behavior actionable in tort. While contemporary success remains far from universal,¹⁰⁸ LGBTQ plaintiffs continue to feel the positive effects of the 1990s turning point, taking advantage of IIED’s attentiveness to the power imbalance between plaintiff and defendant in order to challenge a wide range of conduct: outing,¹⁰⁹ denial of medical care,¹¹⁰ and degrading acts in the workplace¹¹¹ and in receipt of services.¹¹²

In 2020, the District Court for the Northern District of Illinois upheld an IIED claim from a transgender medical technician at the Cook County jail who was outed by his supervisor amidst a culture of transphobia at the prison, in which employees consistently denigrated him as well as the prison’s

103. *Id.* at *8.

104. 88 F. Supp. 3d 812 (N.D. Ohio 2015).

105. *Id.* at 815.

106. *Id.* at 821.

107. *Id.* (quoting *Fuelling v. New Vision Med. Labs.*, 284 Fed. App’x 247, 261 (6th Cir. 2008)).

108. *See, e.g.*, *Chandler v. Pye Auto.*, No. 4:17-CV-00086, 2018 WL 4844380, at *12 (N.D. Ga. Aug. 31, 2018) (granting defendants’ motion for partial summary judgment with respect to an IIED claim against a woman subjected to sexual harassment and biphobic comments in the workplace); *Jordan v. Kimpton Hotel & Rest. Grp.*, 890 S.E.2d 417, 425–26 (Ga. Ct. App. 2023) (ruling against an IIED claim from a gay hotel guest who was harassed, mocked, stripped nude, and slurred at by police and hotel staff).

109. *See, e.g.*, *Grimes v. Cnty. of Cook*, 455 F. Supp. 3d 630, 643 (N.D. Ill. 2020).

110. *See, e.g.*, *Clark v. Quiros*, 693 F. Supp. 3d 254, 269–79 (D. Conn. 2023).

111. *See, e.g.*, *Kwiatkowski v. Merrill Lynch*, No. L-1031–04, 2008 WL 3875417, at *16–18 (N.J. Super. Ct. App. Div. Aug. 13, 2008).

112. *See, e.g.*, *Mayorga v. Benton*, 875 S.E.2d 908, 913–16 (Ga. Ct. App. 2022).

transgender inmates.¹¹³ Later, in 2023, the ACLU of Connecticut won a landmark IIED victory on behalf of a transgender plaintiff serving effectively a life sentence in state prison that denied her gender-affirming care.¹¹⁴ The prison refused to provide the plaintiff, Veronica-May Clark, proper hormone therapy despite her attempting to remove her own genitals.¹¹⁵ The court focused on the fact that the case was about “defendants in a position of power and authority over a vulnerable victim”—correctional-facility officials and physicians refusing care to a transgender woman desperate for life-saving medical assistance.¹¹⁶

The willingness of contemporary courts to uphold LGBTQ IIED claims for conduct far less severe than that faced by Clark—such as whispering a slur under one’s breath¹¹⁷ or writing a mocking comment on a draft death certificate accidentally sent to bereaved gay parents¹¹⁸—proves the broad and flexible role IIED can play in advancing LGBTQ dignity today. This success has led one scholar to conclude that the tort is the “best option” for queer plaintiffs in fighting the scourge of cyberbullying that afflicts LGBTQ youth.¹¹⁹ One example of the potential of IIED to combat homophobic cyberbullying is the tragic October 2024 case, *Amspacher v. Red Lion Area School District*.¹²⁰ The case involved the suicide of a gay ninth-grade boy, Zachary Amspacher, after a group of classmates bullied him over text, on social media, and in person.¹²¹ The group of boys hounded him with homophobic slurs and encouraged him to kill himself, leading the court to find a prima facie case of IIED and reject two of the defendants’ motions to dismiss.¹²²

II. IIED’S APPARENT COLLISION WITH THE FIRST AMENDMENT

As successful as IIED has been in advancing LGBTQ rights, the most significant recent challenge to the tort—particularly in the context of combatting homophobia and transphobia, has been the First Amendment. Some scholars contend that the Court’s recent expansion of the First Amendment’s

113. *Grimes*, 455 F. Supp. 3d at 637, 641.

114. *Clark*, 693 F. Supp. 3d at 266, 299–301.

115. *Id.* at 266.

116. *Id.* at 300.

117. *Kwiatkowski v. Merrill Lynch*, No. L-1031–04, 2008 WL 3875417, *17–18 (N.J. Super. Ct. App. Div. Aug. 13, 2008) (upholding an IIED claim against a work supervisor who called an employee a “stupid fag” under her breath).

118. *Mayorga v. Benton*, 875 S.E.2d 908, 912–14, 916 (Ga. Ct. App. 2022) (overturning dismissal of an IIED claim for a mocking comment on a teenage girl’s death certificate directed at her two grieving dads who have the same last name).

119. Juan M. Acevedo García, *Intentional Infliction of Emotional Distress Torts as the Best Legal Option for Victims: When Cyberbullying Conduct Falls Through the Cracks of the U.S. Criminal Law System*, 1 REVISTA JURÍDICA U. P.R. 85, 129, 160 (2016) (arguing that IIED is the “most promising option for victims to find redress from the perpetrators of cyberbullying attacks”).

120. No. 1:23-CV-00286, 2024 WL 4631815 (M.D. Pa. Oct. 30, 2024)

121. *Id.* at *1, *8.

122. *Id.* at *8.

reach renders IIED a dead letter.¹²³ This Part examines how we arrived at this impasse in three Sections. Section II.a. delineates the First Amendment's tense relationship with dignitary torts more broadly and how it emerged from an anxiety about protecting unpopular expression that society would normally find offensive. Section II.b. examines this particular dynamic in the context of IIED. And Section II.c. outlines the apparent war between the First Amendment and LGBTQ IIED in particular, analyzing recent case law such as *Snyder*. I do not argue in this Part that the potential tensions between the First Amendment and IIED are imagined or manufactured. On the contrary, this Part aims to identify the real judicial and scholarly anxieties about the impact of the tort on free expression. Doing so will enable a more careful attempt in Part III to begin to alleviate some of those concerns.

A. *A Fraught Relationship: Dignitary Torts and the First Amendment*

To examine the IIED-First Amendment collision alone would be to ignore a much broader story about the fraught relationship between free expression and dignitary torts. Often considered to include assault, battery, false imprisonment, defamation, invasion of privacy, and IIED, dignitary torts encompass a diverse set of conduct and thus each protect “different dimensions of individual dignity.”¹²⁴ Kenneth S. Abraham and George Edward White argue that there is no “unitary dignitary tort”—despite there being interest in creating one in the 1960s—because each tort protects a different kind of dignity.¹²⁵ For example, while IIED protects against “embarrassment, humiliation, and disrespect,” torts such as battery and invasion of privacy primarily address “liberty and autonomy.”¹²⁶

But another major reason why no unitary dignitary tort developed, argue Abraham and White, was the “unprecedented constitutional intervention into state tort law” in the twentieth century.¹²⁷ This process of “constitutionalizing . . . dignitary torts” began with the landmark case *New York Times v. Sullivan* (1964), in which the Court established an “actual malice” standard for defamation claims against public figures.¹²⁸ Before *Sullivan*, tort law was considered purely private law and thus outside the scope of the state-action requirement for raising First and Fourteenth Amendment concerns.¹²⁹ By

123. Garcia, *supra* note 119, at 162 (“[I]t has been argued that the Court’s recent decision in *Snyder v. Phelps*, has made IIED claims ‘all but obsolete.’” (quoting Elizabeth M. Jaffe, *Sticks and Stones May Break My Bones but Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of Snyder v. Phelps*, 57 WAYNE L. REV. 473, 475 (2011))).

124. JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 778 (5th ed. 2021); Kenneth S. Abraham & George Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 319, 322 (2019).

125. Abraham & White, *supra* note 124, at 341, 359.

126. *Id.* at 359.

127. *Id.* at 322.

128. *Id.* at 361–362, 364.

129. *Id.* at 363.

unambiguously holding that even common-law torts could run afoul of the First Amendment, the *Sullivan* Court began a “Constitutional Tidal Wave,” in which First Amendment considerations would fundamentally reshape dignitary tort law.¹³⁰

Crucially, animating the Court’s concern in *Sullivan* was an impression that dignitary tort liability—anchored in majoritarian notions of right and wrong, of “correct” and “incorrect” expression—would undermine the independent thought that the First Amendment aims to protect.¹³¹ The Court quoted Justice Brandeis, who stated, “Recognizing the occasional tyrannies of governing majorities, [the Founders] amended the Constitution so that free speech and assembly should be guaranteed.”¹³²

The Court soon moved from defamation to invasion of privacy, holding first in 1967 in *Time, Inc. v. Hill*¹³³ that, for “matters of public interest,” there needed to be “actual malice” for one to sustain a claim of false light.¹³⁴ Shortly thereafter in 1975, the Court ruled in *Cox Broadcasting Corp. v. Cohn*¹³⁵ that a state could not extend the invasion of privacy tort to the publication of true information available in public records.¹³⁶ In the following decade, the constitutional tidal wave finally caught up with IIED.

B. *IIED as a Threat to Speech*

In 1983, televangelist and self-described leader of the “moral majority” Jerry Falwell sued *Hustler Magazine* for IIED regarding a parody advertisement on the inside front cover of their November issue portraying the pastor losing his virginity to his mother in an outhouse.¹³⁷ The Court reasoned in *Hustler Magazine, Inc. v. Falwell* in 1988 that “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”¹³⁸ For this reason, the Court imported the “actual malice” standard from *Sullivan* to apply to public figures in the context of IIED: they must prove that the defendant made a statement or publication “with knowledge that the statement was false or with reckless disregard as to whether or not it was true.”¹³⁹

130. *Id.* at 363–364.

131. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

132. *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)).

133. 385 U.S. 374 (1967).

134. *Id.* at 387–88 (“[T]he constitutional protections for speech and press preclude the application of [a New York right-of-privacy statute] to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.”).

135. 420 U.S. 469 (1975).

136. *Id.* at 495–96 (dictating that “[t]he publication of truthful information available on the public record” is protected by the First Amendment).

137. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 48 (1988).

138. *Id.* at 50.

139. *Id.* at 56.

However, the Court went further in *Falwell*, sharing a deeper anxiety about the communitarian nature of IIED and how its indeterminacy and broadness could lead to liability for unpopular speech. “‘Outrageousness,’ in the area of political and social discourse,” wrote Justice Rehnquist, “has an inherent subjectiveness about it” that can allow jurors to impose liability “on the basis of their dislike of a particular expression.”¹⁴⁰ The tort as applied to public discourse could “run[] afoul” of longstanding First Amendment doctrine, which specifically protects speech that “society may find . . . offensive.”¹⁴¹

While the Court only formally enunciated this worry about IIED in 1988, concerns about IIED’s impact on free expression are as old as the tort itself. In the 1939 law review article credited with helping to establish the tort, famed tort scholar William L. Prosser wrote that IIED needed to remain compatible with the “freedom to express an unflattering opinion.”¹⁴² It thus makes sense that, over time, the Court’s keenness to protect offensive, unpopular expression¹⁴³ would come into conflict IIED. As IIED is a tort designed to protect people from speech that crosses the line from unpopular to outrageous, courts might understandably struggle in finding where that line lies.

Taking up where Rehnquist left off, some scholars have warned that IIED may impose a “chilling effect” on First Amendment expression¹⁴⁴ and have advocated for significantly restricting the tort.¹⁴⁵ One of the strongest critics has been Paul Hayden, who warned that IIED “may allow majoritarianism to ride roughshod over unpopular or minority rights and beliefs,” particularly in the context of religious liberty.¹⁴⁶

Robert C. Post cogently articulates the First Amendment’s tension with IIED, describing how the tort is about “penaliz[ing] those defendants who breach civility rules,” whose speech is more than simply “unpleasant or disagreeable” but rather “inconsistent with common canons of decency.”¹⁴⁷ The

140. *Id.* at 55.

141. *Id.* (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978)).

142. William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 887 (1939).

143. *See, e.g., Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”).

144. Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. 1197, 1203 (2009).

145. David Crump, *Rethinking Intentional Infliction of Emotional Distress*, 25 GEO. MASON L. REV. 287, 299 (2018) (advocating for states to restrict the outrage tort to only those instances in which a companion tort claim does not “substantially duplicate[]” the facts of the IIED claim); Hayden, *supra* note 24, at 675 (1993) (“The tort has resisted doctrinal reform due to its very indeterminacy, and it seems entirely appropriate to limit its application—killing it, if necessary, in the process—when experience tells us it sweeps too broadly.”).

146. *Id.* at 586.

147. Robert C. Post, *The Constitutional Concept of Public Disclosure: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 624–625 (1990).

problem, then, is that First Amendment doctrine is decidedly agnostic to any given community's rules of decency, resting instead on the "possibility of using speech to create new identities" and shake fundamental norms.¹⁴⁸ The threat of IIED is that it would "enable a single community to use the authority of the state to confine speech within its own notions of propriety."¹⁴⁹

C. *The First Amendment Comes for LGBTQ IIED*

The First Amendment has a direct impact on LGBTQ IIED in particular, both by way of the so-called "matters of public concern" doctrine¹⁵⁰ and religious freedom. In *Snyder v. Phelps* in 2009,¹⁵¹ the Fourth Circuit considered an IIED suit against the Westboro Baptist Church for a provocative protest against the acceptance of gay people in the military during the funeral of Matthew Snyder, a marine killed in Iraq.¹⁵² Snyder's father filed suit for IIED (as well as defamation and intrusion on seclusion), arguing that the Church's protest—which included signs stating "Fag Troops," "God Hates Fags," and "Thank God for Dead Soldiers"—inflicted severe emotional distress on him when he saw news of the protest on television later that day.¹⁵³

The Fourth Circuit found that because the Church was speaking about a "matter of public concern," that is, the "issue of homosexuals in the military" and "the political and moral conduct of the United States and its citizens," its First Amendment defense categorically defeated the *prima facie* case of IIED.¹⁵⁴ The Supreme Court soon affirmed the Fourth Circuit on appeal, agreeing that imposing a jury verdict on the defendants for IIED would penalize Westboro for expressing its views on a "matter of public concern."¹⁵⁵

The Court's opinion rested in part on the same view in *Falwell* that imposition of tort liability would subject unpopular speakers to prevailing majoritarian sensibilities. Quoting the famous flag-burning case, *Texas v. Johnson*, the Court stated, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."¹⁵⁶

In an analogous strand of case law, courts have looked to First Amendment religious freedom as categorically overriding LGBTQ IIED. In *Gunn v. Mariners Church* in 2008, a California appeals court dismissed an IIED claim resulting from a homophobic firing under the "ministerial exception," which provides special protection to religious organizations from

148. *Id.* at 630–31.

149. *Id.* at 632.

150. See generally Mark Strasser, *What's It to You: The First Amendment and Matters of Public Concern*, 77 MO. L. REV. 1083 (2012) (tracking the development of the "matters of public concern" doctrine over time).

151. 580 F.3d 206 (4th Cir. 2009).

152. *Id.* at 210–11.

153. *Id.* at 212, 222–23.

154. *Id.* at 222–24.

155. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

156. *Id.* at 458 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

antidiscrimination suits in employing ministers.¹⁵⁷ The Supreme Court later solidified the ministerial exception as an affirmative defense to liability for employment decisions in the 2012 case *Hosanna-Tabor v. EEOC*, holding that it extended even to religious teachers in private religious schools.¹⁵⁸

III. THE FUTURE OF IIED

In this Part, I argue that the Court's current approach to the IIED-First Amendment collision is overly simplistic, failing to account for the special role IIED can play in protecting minorities from majoritarian attack. This simplicity manifests in two ways.

First, if IIED accounts for LGBTQ people's unique vulnerability, protecting the community from majoritarian degradation, then the tort is not necessarily in tension with First Amendment values. In fact, IIED can also encapsulate the same values as the First Amendment, protecting unpopular minorities against egregious, subordinating speech that could render those groups silent in the public sphere. In this respect, when IIED and the First Amendment appear to clash, courts should account for the potential harm to First Amendment expression on both sides of that equation. To illustrate this point, if someone calls me a "fag" on the street, my IIED claim amplifies my ability to speak as a queer person as much as it silences my bully. That does not yield an answer to our clash, but it does reorient the analysis, preserving one of the fundamental functions of IIED and ensuring that courts account for all of the First Amendment interests at stake. The core of my contention is that IIED is not just about civility rules. The tort of outrage accomplishes much more than that, as it protects one's dignity and one's ability to speak. As a result, analyzing IIED as though it were solely about "civil discourse" may lead courts to the wrong result.

Second, my understanding of IIED suggests that the kind of speech that the tort penalizes might fall within the scope of doctrines that provide exceptions to the First Amendment's coverage, especially the true-threats, incitement, and captive-audience doctrines. These doctrines dictate, respectively, that the First Amendment does not cover speech intended to intimidate and instill fear, speech that incites imminent lawless conduct, and unwanted speech foisted on listeners who cannot avoid it. I argue that these three doctrines further enable courts to reconcile the apparent collision between IIED and the First Amendment.

A. *IIED and the First Amendment: Friends, Not Just Foes*

This Note does not contend that the *Snyder* Court came to the wrong result. There were many reasons for the Court to side with the Westboro Baptist Church. The Church protested on a public sidewalk a thousand feet

157. *Gunn v. Mariners Church, Inc.*, 167 Cal. App. 4th 206, 217 (2008).

158. *Hosanna-Tabor v. EEOC*, 565 U.S. 171, 196 (2012).

from the funeral, adhering to police guidance.¹⁵⁹ Moreover, Matthew Snyder's father Albert did not see what was written on the protestors' signs until he turned on the television that night, thus reducing the immediate emotional harm their speech had on him.¹⁶⁰

And yet, the Court's analysis was incomplete. Not once did the Court consider the particular First Amendment effects of the Westboro Baptist Church's hateful speech—namely, its use of homophobic slurs—nor did it consider the seemingly crucial questions of whether the late Matthew was gay, which he was not,¹⁶¹ or whether his grieving father Albert was gay, which he was.¹⁶² Because Albert was gay, one would expect the Church's speech to inflict a kind of emotional harm on him that courts would be especially sensitive to. Seen in this light, the case morphs from a deeply offensive display into a more particularized denigration, which is the kind of harm we saw courts keen to protect against in Part I.¹⁶³

Writing in response to the Fourth Circuit opinion, before the Supreme Court weighed in the following year, Deana Pollard Sacks argued that the problem in *Snyder* was the Court's failure to balance countervailing constitutional interests.¹⁶⁴ The Court failed to account for the fact that the "ultimate social effect" of the decision "may be to drive [LGBTQ] Americans into seclusion to avoid being targeted for hateful harassment, thereby limiting their First Amendment . . . freedoms."¹⁶⁵ In fact, in ruling for the Church, courts emboldened the defendants' exercise of "heterosexual majoritarian privilege."¹⁶⁶ Due to this particular "clash of interests," Sacks concluded that "any way the Court decides the case, someone's First Amendment ox will be gored."¹⁶⁷

Scholars have highlighted the recurring worry that the First Amendment can erode the very expressive environment it seeks to protect. This was Owen

159. *Snyder*, 562 U.S. at 449, 457.

160. *Id.* at 449.

161. Robert Barnes, *Supreme Court Rules First Amendment Protects Church's Right to Picket Funerals*, WASH. POST (Mar. 2, 2011), https://www.washingtonpost.com/politics/supreme-court-rules-first-amendment-protects-churchs-right-to-picket-funerals/2011/03/02/ABDzbrM_story.html [https://perma.cc/PU7S-BX4J] (stating that "[t]he church chose Matthew Snyder's funeral somewhat by chance; he was not gay").

162. Michael Smerconish, *He Looked Hate in the Eye*, POLITICO MAG. (Mar. 7, 2014), <https://www.politico.com/magazine/story/2014/03/al-snyder-westboro-baptist-church-104353> [https://perma.cc/AV24-LBLR] (describing how Albert Snyder had come out as gay even before his late son Matthew enlisted in the army).

163. See, e.g., *Kwiatkowski v. Merrill Lynch*, No. L-1031-04, 2008 WL 3875417, at *17-18 (N.J. Super. Ct. App. Div. Aug. 13, 2008); *Mayorga v. Benton*, 875 S.E.2d 908, 912-14 (Ga. Ct. App. 2022).

164. Deana Pollard Sacks, *Snyder v. Phelps, the Supreme Court's Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE L.J. F. 193 (2010), <http://yalelawjournal.org/forum/snyder-v-phelps-the-supreme-courts-speech-tort-jurisprudence-and-normative-considerations> [https://perma.cc/3Y7F-7MU8].

165. *Id.*

166. *Id.*

167. *Id.*

Fiss's central concern in the wake of *R.A.V. v. St. Paul* in 1992,¹⁶⁸ in which the Court struck down a city ordinance targeting speech that "disfavored subjects of 'race, color, creed, religion or gender'" after it was applied against a group of teenagers who burned a cross in a Black family's yard.¹⁶⁹ Fiss maintained that "cross-burning does not merely insult [B]lack and interfere with their right to choose where they wish to live": such a gravely dehumanizing and intimidating action "interferes with their speech rights" by "discourag[ing] them from participating in the deliberative activities of society."¹⁷⁰ For Fiss, the state's failure to sanction such egregious speech meant that Black people were "silenced as effectively as if the state had intervened to silence them."¹⁷¹

Post put the problem in similar terms, claiming that inherent in First Amendment doctrine is a tension between "critical interaction"—the sharing of vehemently different views—and "rational deliberation"—the ability of each speaker to come to the table in the first place.¹⁷² Post came to a parallel conclusion as Fiss, arguing that "the paradox of public discourse requires that critical interaction must at some point be bounded," as critical interaction, when taken to its extreme, has the ability to overturn rational deliberation altogether.¹⁷³ Crucially, neither Fiss nor Post hoped for some "overarching reconciliation" to the paradox.¹⁷⁴ Instead, they both called for a more delicate balancing act by courts, one that recognizes the doctrinal complexity that hate speech generates.¹⁷⁵

Indeed, when it comes to the particular kinds of speech that IIED has so frequently tried to cover—racial and homophobic epithets and other bias-motivated harassment—the traditional First Amendment concept of a "free marketplace" of ideas no longer holds.¹⁷⁶ Not only do the communities on the other side of that speech come to the table as unequal partners in public discourse, but also lack the words to respond to that speech. Richard Delgado and Jean Stefancic famously noted that "there is no correlate—no analog—for hate speech directed toward whites. Nor is there any countering message that

168. Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281, 287–288 (1995).

169. *R.A.V. v. St. Paul*, 505 U.S. 377, 378–79 (1992). The Court was particularly concerned about viewpoint discrimination, arguing that "in its practical operation the ordinance goes beyond mere content, to actual viewpoint, discrimination." *Id.*

170. Fiss, *supra* note 168, at 287.

171. *Id.*

172. Post, *supra* note 147, at 642.

173. *Id.* at 682.

174. *Id.* at 683.

175. For example, Fiss looked to the "delicate balance" between "preserving the state's neutrality in public debate" and "enabling the state to fulfill its police power function." See Fiss, *supra* note 168, at 286. Post similarly stated that "[d]octrinal formulation should assist courts in the evaluation of these considerations [i.e., those underlying the paradox], rather than masking them under wooden phrases and tests." See Post, *supra* note 147, at 683.

176. Tasnim Motala, *Words Still Wound: IIED & Evolving Attitudes Toward Racist Speech*, 56 HARV. C.R.-C.L. L. REV. 115, 141–42 (2021).

could cancel out the harm of “[N]——. . . .”¹⁷⁷ Slurs by their nature are thus conversation-enders, leaving those receiving them without any reply.

Finally, in the LGBTQ context, there is a special importance to the First Amendment. William N. Eskridge writes that LGBTQ life is inherently expressive because “[s]exual conduct—from hand-holding to kissing to intercourse—is expressive.”¹⁷⁸ Under this view of what Eskridge calls the “sexualized [F]irst [A]mendment,” hate speech is particularly restrictive of First Amendment expression in the LGBTQ context, forcing queer people to pack their expressive bags and return to the silence of the closet.¹⁷⁹

B. *The Dangers of a One-Sided Approach*

Accounting only for the defendant’s First Amendment interests for an IIED claim that targets anti-LGBTQ (and other derogatory) hate speech can lead to incongruous results. Without considering the First Amendment interests on both sides of such a case, courts risk factoring in the LGBTQ identity of the plaintiff solely to negate rather than bolster the IIED claim. For example, in a case like *Snyder*, the fact that the Westboro Baptist Church was targeting *queer people* specifically further entitled the Church to the “matters of public concern” doctrine.¹⁸⁰ It was their speech on “homosexuality in the military” that convinced the Court to situate the Church’s expression on the “highest rung of the hierarchy of First Amendment values.”¹⁸¹

Imagine a slightly different case: someone yells at a queer-presenting student on the sidewalk, “You fags are taking over everything—our military, our schools, and now our streets.” If the Court were to follow *Snyder*’s approach, looking only to the First Amendment interests on one side of the case, the queerness of the plaintiff would only work against them. This would contravene the historical and doctrinal role of queer identity in LGBTQ IIED claims that I tracked throughout Part I.

This is not an abstract scenario. In 2015, the Sixth Circuit considered the IIED claim of a college student, Christopher Armstrong, and wrote an opinion that reads like a direct response to *Snyder*. Armstrong was the first openly gay student council president of the University of Michigan¹⁸² and fell victim to an

177. RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS? WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY* 95 (2d ed. 2018).

178. WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 177 (1999).

179. *Id.* at 178.

180. *Snyder v. Phelps*, 562 U.S. 443, 454 (2011).

181. *Id.* at 452 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). A similar argument can be made for religious-liberty cases like *Gunn*, where the very fact of the plaintiff’s queerness solely gives rise to a religious-liberty claim that weakens the IIED claim. Where the Court fails to consider the plaintiff’s countervailing First Amendment interests, the plaintiff’s queer identity functions only to hobble, not strengthen, the IIED claim. See *Gunn v. Mariners Church, Inc.*, 167 Cal. App. 4th 206 (2008).

182. Chris Armstrong, *What It Meant to Me*, UNIV. MICH. (July 15, 2020), <https://giving.umich.edu/um/w/what-it-meant-to-me-chris-armstrong> [<https://perma.cc/5U8D-QW5E>] (describing Armstrong as the school’s first openly gay student-body president).

online campaign of homophobic harassment from the state's former Assistant Attorney General Andrew Shirvell.¹⁸³ Shirvell wrote on his Facebook page that Armstrong was "dangerous," a "radical homosexual activist," and a "major-league fanatic."¹⁸⁴ Soon after, Shirvell set up a Facebook group and blog to persistently harass Armstrong, placed the student's face next to an image of a swastika, and made an appearance on Comedy Central's *The Daily Show*, where he stated that Armstrong was "acting like a gay Nazi."¹⁸⁵ As part of his "protest[]," Shirvell also showed up outside of multiple parties that Armstrong attended.¹⁸⁶ Armstrong sued Shirvell for a host of dignitary torts—defamation, false light, intrusion, and IIED, among others—and received a \$4.5 million jury award.¹⁸⁷

On appeal, the Sixth Circuit declined to take the *Snyder* approach: it actively considered the vulnerability of Armstrong, factoring in Armstrong's unique susceptibility to emotional harm in the same way courts have tried to do since the 1990s.¹⁸⁸ The court highlighted that Shirvell's actions were "motivated largely by discrimination" and that, for this reason, among others, a "reasonable person could certainly find this conduct extreme and outrageous."¹⁸⁹

The Sixth Circuit's attention to the vulnerability of Armstrong in evaluating his IIED claim is a departure from *Snyder*'s reasoning. While there are important differences between the cases, the fact that the appellate court ensured that it was factoring Armstrong's queer identity into its calculus to bolster, rather than just call into question, the strength of the outrage claim remains deeply consequential for future LGBTQ IIED.

But the Sixth Circuit went even further than this. It questioned whether the simple fact of Armstrong's queerness made the speech a matter of public concern at all. In this respect, the *Armstrong* court rooted its holding in the fact that Shirvell's speech was disentitled to First Amendment protection because it was predominantly about Armstrong's "private" life, not matters of public concern.¹⁹⁰ While Shirvell claimed that Armstrong would "discriminate against Christian, pro-life, and pro-family people" and expressed his opposition to the student leader's position on gender-neutral housing on campus, this was only a "small amount" of Shirvell's overall message.¹⁹¹ The same could not be said for the Westboro Baptist Church's speech in *Snyder*, noted the court.¹⁹²

This is a crucial distinction between the two cases. In *Snyder*, the Church was primarily targeting queerness as a social and political phenomenon. For this reason, the First Amendment should have been operating in the two

183. *Armstrong v. Shirvell*, 596 Fed. App'x 433, 437 (6th Cir. 2015).

184. *Id.* at 437.

185. *Id.* at 437–39.

186. *Id.* at 439–40.

187. *Id.* at 440–41.

188. *Id.* at 452.

189. *Id.*

190. *Id.* at 445–46.

191. *Id.* at 439, 445–46, 452–53.

192. *Id.* at 452–53.

directions described above. In *Armstrong*, however, Shirvell's main message was that he hated Armstrong as an individual because Armstrong was gay. In cases like *Armstrong*, where the hate speech falls short of "public concern" by focusing predominantly on the private life of the queer victim, the First Amendment exists on only *one* side of the IIED case: it exclusively assists the plaintiff. The Sixth Circuit may not have cited Fiss, Post, and Eskridge on the antisubordinating role of the First Amendment, but by relying on IIED's special role in combatting discriminatory speech, the opinion implicitly recognized that a plaintiff's IIED claim can serve the same values as the First Amendment.

C. *First Amendment Carveouts for IIED*

This Part so far has focused on the ways the First Amendment and IIED can be friends in addition to foes. This Section calls into question whether the two have to be in conflict at all. I argue in this Section that, according to the theory of IIED as a tool for protecting vulnerable minorities against majoritarian attack, the types of hate speech that the tort targets become stronger candidates for exceptions to the First Amendment as so-called "low-value,"¹⁹³ or "proscribable"¹⁹⁴ speech.

First Amendment expression is of course not an unbounded right,¹⁹⁵ and landmark Supreme Court cases like *Chaplinsky v. New Hampshire*¹⁹⁶ in 1942 have carved out of the First Amendment's reach certain categories of speech, such as obscenity, libel, and so-called "fighting words," those that are "plainly likely to cause a breach of the peace by the addressee."¹⁹⁷ In *Chaplinsky*, the Court stated that these categories of speech all play "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."¹⁹⁸

One critical caveat to my argument in this Section is that I do not seek for courts to provide special, across-the-board solicitude to LGBTQ people in deciding whether homophobic or transphobic speech falls into one of the proscribable-speech categories. This could well be inconsistent with the First Amendment prohibition on content discrimination and the even more suspect subcategory of viewpoint discrimination.¹⁹⁹ The Court held in *R.A.V. v. St.*

193. See generally Jeffrey Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297 (1995) (describing the development of the doctrinal concept of "low-value speech").

194. *R.A.V. v. St. Paul*, 505 U.S. 377, 383–84 (1992).

195. Heath Hooper, *Sticks and Stones: IIED and Speech After Snyder v. Phelps*, 76 MO. L. REV. 1217, 1224 (2011) (explaining that the Court "has carved out very narrow exceptions regarding speech limitations, striking a delicate balance between the need to protect speech and the need to protect individuals from injury").

196. 315 U.S. 568 (1942).

197. *Id.* at 573.

198. *Id.* at 572.

199. Content-neutral regulations of speech are generally subject to intermediate constitutional scrutiny, whereas content-based and viewpoint-based regulations are generally subject to strict scrutiny. R. Randall Kelso, *Clarifying Viewpoint Discrimination in Free Speech Doctrine*, 52 IND. L. REV. 355, 356, 428 (2019).

Paul that “[t]he First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects.”²⁰⁰ This principle applies even to a “content-defined subclass of proscribable speech.”²⁰¹ In other words, the government can run afoul of the First Amendment even when it disallows—based on content—some but not other speech within an otherwise proscribable category.²⁰² I thus do not advocate that courts fashion a hard rule granting less First Amendment protection to homophobic or transphobic speech on the basis of that speech’s content. This, I believe, might raise other constitutional questions.

Instead, I advocate in this Section for judicial attention to the fact that LGBTQ plaintiffs bringing IIED claims are often strong *candidates* for applying “proscribable” speech doctrines. That is, because queer IIED plaintiffs are especially vulnerable, the speech that they challenge often falls under the true-threats, incitement, and captive-audience doctrines. On a case-by-case basis, then, courts should account for these doctrines before they categorically override LGBTQ IIED claims that seemingly clash with the First Amendment.

Another caveat is that not all of proscribable-speech doctrines are ready-made for the average LGBTQ IIED plaintiff. For example, the Court has over time severely limited the fighting-words doctrine in cases such as *Cohen v. California* (1971), in which the Court held that the exception was only for language that provokes a “violent reaction” from the addressee.²⁰³ This effectively restricted the doctrine to “personally abusive epithets directed at one-on-one unambiguous invitations to a brawl.”²⁰⁴ This makes the fighting-words doctrine of little use in the context of hate speech, as it “assumes an encounter between two persons of relatively equal power acculturated to respond to face-to-face insults with violence,” not an attack on the most vulnerable sectors of society.²⁰⁵

1. True Threats

Bloody brawls notwithstanding, the Court has recognized other areas of speech that lie outside of the First Amendment’s reach. For the purposes of IIED, the most important among them is the category of true threats. True threats occur when “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”²⁰⁶ In *Virginia v. Black* in 2003, the Court addressed the constitutionality of Virginia’s anti-cross-burning statute, distinguishing the case from *R.A.V. v. St. Paul* because the Virginia statute’s basis “consists entirely of the very reason its . . . class of speech is proscribable.”²⁰⁷ In other words, while

200. *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992).

201. *Id.* at 389.

202. *Id.* at 387.

203. 403 U.S. 15, 20 (1971).

204. Rosalie Berger Levinson, *Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided Snyder*, 46 *SUFFOLK U. L. REV.* 45, 55 (2013).

205. *Id.* at 55–56.

206. *Virginia v. Black*, 538 U.S. 343, 344 (2003).

207. *Id.* at 361–362 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992)).

the St. Paul ordinance in *R.A.V.* focused on prohibiting certain types of political speech against certain groups, and thus constituted impermissible content discrimination under the First Amendment, Virginia's law targeted the true-threats category the Court had already disallowed.²⁰⁸ The statute was therefore constitutional on this account.²⁰⁹

As I have shown, IIED often penalizes the same speech as is included in the Court's true-threats doctrine. When someone shouts a slur at a queer or Black person on the street, the immediate response is a fear of attack.²¹⁰ Especially if IIED is used to protect vulnerable minorities against bigoted or discriminatory speech, the tort becomes a mechanism for dignifying plaintiffs in the face of an acute "fear of violence," and the most egregious IIED defendants from this vantage point may be disintitled to First Amendment protection.²¹¹

Prosser himself recognized in his trailblazing article on IIED that it was nonsensical that tort law—by way of assault—protected only physically induced but not verbally induced fear of violence.²¹² He criticized how tort law "permitted recovery for the movement of a hand that might frighten the plaintiff for a moment, and denied it for coldly menacing words that kept him in terror of his life for a month."²¹³

Courts have applied the true-threats doctrine to an LGBTQ IIED claim in the context of a potential clash with the First Amendment. In *Simpson v. Burrows*²¹⁴ in 2000, the District Court for the District of Oregon held in favor of a lesbian woman, V. Jo Anne Simpson, who was tormented by a straight couple, Howard and Jean Burrows, through a series of at least twelve hostile letters circulated around their town of Christmas Valley.²¹⁵ The letters called Simpson an "immoral abomination" who was converting the town into a "mecca for Queers, Lesbians, Perverts & other degenerates."²¹⁶ The letters soon turned violent, stating that Simpson should leave the town "head first or feet first."²¹⁷ Simpson testified that she felt her life was in danger, had trouble sleeping, and

208. *Id.*

209. The Court held the statute unconstitutional on other grounds. *Id.* at 365. Writing for herself and three other Justices, Justice O'Connor argued that the statute's provision making cross burning in public view a prima facie case of intent to intimidate was overbroad. *Id.*

210. See HUM. RTS. WATCH, "LIKE WALKING THROUGH A HAILSTORM:" DISCRIMINATION AGAINST LGBT YOUTH IN U.S. SCHOOLS 24 (2016), <https://www.hrw.org/report/2016/12/07/walking-through-hailstorm/discrimination-against-lgbt-youth-us-schools> [<https://perma.cc/EQ68-X5SC> (arguing that slurs lobbed at LGBTQ students in U.S. schools produce immediate fear of violence and hostility)].

211. Levinson, *supra* note 204, at 57.

212. Prosser, *supra* note 142, at 880.

213. *Id.*

214. 90 F. Supp. 2d 1108 (D. Or. 2000).

215. *Id.* at 1112–14.

216. *Id.* at 1114.

217. *Id.*

ultimately had to move out of town because she was so scared.²¹⁸ The Court held that because the letters constituted “true threats,” they were outside the pale of both the First Amendment and of Oregon’s state constitutional protection of free speech, and Simpson’s IIED claim prevailed.²¹⁹

2. Incitement

A close cousin to the true-threats doctrine is incitement. In *Brandenburg v. Ohio*,²²⁰ the Court held that speech which “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action” is outside the scope of the First Amendment.²²¹ The standard for incitement is decidedly high, requiring more than the “mere tendency of speech to encourage unlawful conduct.”²²² For example, the Court in *Brandenburg* struck down Ohio’s Criminal Syndicalism Act, a criminal statute punishing those who “‘advocate or teach the duty, necessity, or propriety’ of violence ‘as a means of accomplishing industrial or political reform.’”²²³ The speech instead needs to lead to “imminent lawless action.”²²⁴

While some scholars have argued that *Brandenburg* sets the standard “so high as to be almost insurmountable,”²²⁵ others have argued that it could be directly applicable to IIED speech-tort cases.²²⁶ Specifically, incitement is doctrinally distinct from fighting words in the sense that it is about instigating lawless action rather than inviting the addressee to a brawl. It therefore could be more relevant to emotionally harmful speech leveled against vulnerable groups, who—while less likely to punch someone screaming a slur at them—are more likely to face mob attack or other pile-on harassment, whether it be in a school lunchroom or from Shirvell’s Facebook campaign.²²⁷

3. Captive Audience

Finally, the captive-audience doctrine—allowing for the regulation of offensive speech when an audience cannot avoid that speech²²⁸—is also highly relevant to LGBTQ IIED cases. The Court correctly rejected this argument in

218. *Id.* at 1121.

219. *Id.* at 1129–30.

220. 395 U.S. 444 (1969).

221. *Id.* at 447.

222. Levinson, *supra* note 204, at 57–58.

223. *Brandenburg*, 395 U.S. at 448.

224. *Id.* at 449.

225. Lyrissa Lidsky, *Brandenburg and the United States War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009, 1010 (2002).

226. *See, e.g.*, Levinson, *supra* note 204, at 58–60; García, *supra* note 119, at 151.

227. García, *supra* note 119, at 151 (arguing that “incitement could apply in cases where the cyberbully might be able to remotely incite people who are in physical proximity to the victim to cause a direct threat of imminent lawless action with a high probability such action would promptly ensue”).

228. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (“The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”).

Snyder because the plaintiff “could see no more than the tops of the picketers’ signs.”²²⁹ However, in cases in which LGBTQ people are being subjected to emotional harm, an audience could quickly become captive, perhaps out of fear that an attempt to flee would inflame the situation. The Court has required that “speech physically or aurally invade a zone of privacy” in order to trigger the captive-audience doctrine.²³⁰ This might apply to many of the LGBTQ IIED cases we have already seen, such as *Armstrong*, in which potential tortfeasors physically disrupt the private life of the plaintiff.

Some scholars have argued that the modern era of cyberbullying and online hate speech requires expanding the bounds of the captive-audience doctrine.²³¹ Alexander Brown, for example, claims that it is often impossible to avoid “unwelcome messages and content” that hate speakers bombard at others over the phone and the Internet.²³² This departs from courts’ traditional understanding of the doctrine, which historically extends only to speech that an audience cannot avoid by “averting their eyes.”²³³ Brown points out that because modern technologies not only make it easier to spread hate, but also are a prerequisite for participation in everyday life, it might be unreasonable to expect someone to avert their eyes from their own email or text messages.²³⁴ With increasing rollbacks of social-media companies’ content-moderation policies,²³⁵ this argument gains additional bite: unfiltered, targeted, and persistent online hate speech can inundate an individual’s phone or feed, rendering them captive to bigoted speakers.

D. Doctrinal Implications

This Part has demonstrated that the First Amendment and IIED are less in opposition than the *Snyder* Court acknowledged. There are two core implications of my analysis. First, courts should adopt a balancing test as they evaluate apparent collisions between IIED and the First Amendment: IIED plaintiffs

229. *Snyder v. Phelps*, 562 U.S. 443, 460 (2011).

230. Christina Wells, *Regulating Offensiveness: Snyder v. Phelps, Emotion, and the First Amendment*, 1 CAL. L. REV. CIR. 71, 77 (2010); see also *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994) (permitting a restriction on loud protests near a medical clinic); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (permitting a restriction on disruptive protests near schools).

231. Alexander Brown, *Averting Your Eyes in the Information Age: Online Hate Speech and the Captive Audience Doctrine*, 12 CHARLESTON L. REV. 1, 2–3 (2017).

232. *Id.* at 32.

233. *Cohen v. California*, 403 U.S. 15, 21 (1971) (holding that someone wearing a shirt that read “F—the Draft” in a courthouse was not subject to the captive-audience doctrine because people could “effectively avoid further bombardment of their sensibilities by averting their eyes”); see also *Spence v. Washington*, 418 U.S. 405, 412 (1974) (holding that a flag hanging from the second floor of a building did not fall under the captive-audience doctrine because pedestrians could simply look away from the display).

234. Brown, *supra* note 231, at 33, 46.

235. See, e.g., Robert Booth, *Meta’s Content Moderation Changes ‘Hugely Concerning’, Says Molly Rose Foundation*, GUARDIAN (Jan. 27, 2025, 7:01 PM EST), <https://www.theguardian.com/technology/2025/jan/28/metasp-content-moderation-changes-hugely-concerning-says-molly-rose-foundation> [<https://perma.cc/WAK4-RBGA>].

may themselves possess First Amendment constitutional interests. Second, courts should pay attention to power imbalances as they consider whether the First Amendment provides the speech of IIED defendants any coverage in the first place, looking specifically to the carveout doctrines I described above.

My position supports the view of scholars like Sacks, who argues for a broader balancing test in speech-tort cases.²³⁶ Sacks' proposed standard contains three considerations: (1) the plaintiff's level of vulnerability, (2) the nature of the speech as public or private, and (3) the nature of the injury, including whether there was also harm to one's person or property.²³⁷ I would add countervailing First Amendment interests as its own consideration. Furthermore, I argue that before even arriving at the balancing test, courts should more carefully consider whether the potentially sharp inequality between the plaintiff and defendant means that the First Amendment does not cover the emotionally injurious speech to begin with.

To be sure, this approach would constitute a substantial reshaping of the Court's current view of the IIED-First Amendment clash. The Court would first need to account for potential carveouts to First Amendment protection, such as the true-threats, incitement, and captive-audience doctrines, in light of the power imbalances at play. This is where the LGBTQ status of the plaintiff, something that the Court in *Snyder* ignored, becomes crucial. Hate speech is more likely to be a "true threat" if it is directed at the person it is about—and if that person is part of a group that has historically faced violence in the wake of hearing that language. Moreover, if such language is leveled at a queer person, we might worry that the speech is highly susceptible to incite violence by others and thus further disentitled to First Amendment protection. Finally, that hate speech is leveled at a queer person might indicate a greater likelihood that the victim is captive due to fear of escalated attack if they attempt to escape.

If none of the above doctrines apply, the court would then proceed to balance the constitutional interests at stake. Under the first prong, it would again be attentive to the identity and position of the victims, and whether that in turn makes them especially vulnerable to the allegedly tortious speech. Crucially, beyond considering the nature of the speech as public or private, as well as whether the injury also caused harm to one's person or property, the court would take into account the First Amendment interests of the plaintiff in addition to the defendant. The court would need to ask itself: when student council president Armstrong is cyberbullied and verbally harassed because of his sexuality, what happens to his voice and the voice of his community in the face of that vitriol? Will the next student president fear speaking about their sexuality? Will future LGBTQ students refuse to run in the first place? Even in a case like *Armstrong*, in which the plaintiff prevailed and the court accounted for the homophobic nature of the defendant's speech, the court still never considered these questions.²³⁸ The judges in that case failed to acknowledge that

236. Sacks, *supra* note 165.

237. *Id.*

238. See *Armstrong v. Shirvell*, 596 Fed. App'x 433 (6th Cir. 2015).

hateful words—when targeted at a particular, vulnerable community—jeopardize expressive interests, thus ignoring the subordinating force that those words can play in the national marketplace of ideas.²³⁹

The benefit of this balancing test is that, by accounting for countervailing First Amendment interests in a speech-tort case, courts would not be penalizing speech based on its hateful content. They would instead be weighing the many First Amendment interests at stake in a given case to ensure that they arrive at the most just and speech-maximizing result even as, to borrow Sacks' metaphor, someone's First Amendment ox inevitably gets gored.

CONCLUSION

This Note challenges the notion that IIED is a purely majoritarian tort. Through tracking the doctrinal development and history of IIED in the context of LGBTQ rights and the fight for LGBTQ dignity, I have aimed to paint a more nuanced picture. IIED has been as much about upending power imbalances as about promoting communitarian civility rules. To view the tort solely as a way to "police" hurtful language and behavior in favor of prevailing societal norms would be to ignore not only the ways diverse, vulnerable plaintiffs have deployed the tort to protect their own dignity, but also how courts have doctrinally accounted for those plaintiffs' unique susceptibility to emotional and dignitary harm.

The latter portion of the Note engages with the most recent challenge to LGBTQ IIED: an oversimplified reading of the First Amendment that eschews the at-times conflicting values inherent in the Amendment and that, in turn, oversimplifies IIED, too. Drawing from the fact that IIED is not just a tort for the majority, I argue that IIED and the First Amendment may not be as conflicting as courts have made them out to be. In my view, the First Amendment and IIED can at times be friends rather than foes, with IIED protecting groups that would otherwise be silent from degradation and thus encouraging those groups to engage in greater First Amendment expression. In recognizing the ways that the First Amendment and IIED can work together, courts can engage in a more judicious balancing of the constitutional interests that arise on both sides of an IIED suit. Finally, I show how the unique vulnerability of IIED plaintiffs—their increased likelihood of facing true threats and incitement, as well as becoming a captive audience—means that courts should more carefully evaluate in each case whether the First Amendment covers IIED defendants at all.

Perhaps unsurprisingly, IIED has taken a very different path than what Prosser initially envisioned in 1939.²⁴⁰ The inherent indeterminacy of IIED doctrine, particularly the vague notion of "outrage," has made the tort the site of successive efforts to expand and contract it within academia and the

239. *See id.*

240. *See* Cristina Carmody Tilley, *The Tort of Outrage and Some Objectivity About Subjectivity*, 12 J. TORT L. 283, 304–06 & n.117 (2019).

courts.²⁴¹ This Note is just one more voice in that long history of contestation. What comes next depends in large part on the creativity of LGBTQ IIED plaintiffs and their lawyers. At times of immense queer struggle in the past, including the depths of the AIDS crisis, IIED served as a way to vindicate queer dignity. Now as the queer community faces new existential threats from the highest levels of government²⁴² and technologies that make the spreading of hate far easier than ever before, IIED—and the First Amendment values that it supports—can continue to shape how LGBTQ people fight for their liberty.

241. *Id.*

242. See e.g., Ayana Archie & Jaclyn Diaz, *Trump Signs an Order Restricting Gender-Affirming Care for People Under 19*, NAT'L PUB. RADIO (Jan. 29, 2025, 5:00 AM EST), <https://www.npr.org/2025/01/29/nx-s1-5279092/trump-executive-order-gender-affirming-care> [<https://perma.cc/5PMV-8SHS>].