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First Amendment Limitations on Tort Law

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ARTICLES

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I. INTRODUCTION

Most First Amendment law has developed in response to restraints on speech imposed by statute, local ordinance, or agency regulation. Typically, the restriction arises from the words of a statute or rule, and therefore is relatively fixed, specific, and readily identifiable. It usually issues from the executive or the legislature – government actors who historically have been the villains in the great dramas that produced our free speech traditions. Because some entity of the state is normally a party to the litigation in which the restriction is challenged, the state is present to offer its interpretation of the restriction, explain its objectives, and answer objections to the means it has chosen. When the challenged restraint is a tort judgment, though, the situation is rather different. The threat exists not within the corners of a document, but in the operation of the common law, the articulation of which is scattered, incomplete, possibly changing, and sometimes contradictory. Often the content and effect of the common law is itself being contested in the very proceeding in which its constitutionality is to be decided. The

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instigator of the particular threat to speech is a private litigant and the governmental actor is the court that is asked to provide a remedy. No other agent of the state is present, so the job of speaking for it is left to the plaintiff and the court. To the extent the court takes on this responsibility, it is both advocate and judge. As the voice of the common law, the court identifies, articulates, and defends the state interest served by the challenged rule, and as guardian of the Constitution the court judges the rule's validity.

So far the Supreme Court has minimized these differences, insisting that they do not affect the Court's role.[1] Indeed, the Court often adopts more aggressive remedial strategies in tort cases than it employs in other types of First Amendment cases.[2] When the Court decides that a statute or regulation violates the First Amendment, it normally does not tell the legislature or regulator what it must do to make the measure constitutional.[3] In tort cases, however, the Court usually undertakes to correct the constitutional problem itself. This results in the displacement of tort law by federal constitutional law. The most conspicuous example is the law of defamation, in which the Court over the past forty years has progressively replaced much of the common law with federal constitutional rules. To a lesser extent, it has done the same with the law of intentional infliction of emotional distress, invasion of privacy, and interference with trade relations.

Whether this is good or bad, one might expect that it would at least occasion some discussion. If the Court had undertaken in *Gratz v. Bollinger* to tell the University of Michigan how to revise its undergraduate admissions practices to meet the demands of the Fourteenth Amendment, that surely would have provoked a lively conversation, probably within the Court but certainly outside it, about the wisdom of the undertaking and perhaps about the boundaries of the Court's power. But similar undertakings in connection with First Amendment limits on tort law have generated little discussion.[4]

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[1] *See infra* text accompanying notes 51-55.

[2] *See infra* Part V.

[3] With respect to statutes, even when the First Amendment is involved, conventional wisdom is "that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985).

[4] One important exception is Professor Richard Epstein, who questioned the wisdom of constitutionalizing large portions of defamation law and recognized the

My objective here is to explore the theoretical and practical implications of the Court's predilection for prescribing solutions to tort-speech conflicts.[5] I come to this as an outsider to the more general discussions among constitutional law scholars about federalism, judicial power, and constitutional decision making. Those debates are extraordinarily rich and are highly pertinent to this issue, but I believe a more specific perspective, from the intersection of tort law and First Amendment law, also has something to contribute. I am generally a fan of the Court's First Amendment jurisprudence, but also a tort lawyer who believes tort law has a role to play in the resolution of tort-speech conflicts. I argue in this Article that the differences between tort law and other types of restraints on speech are more significant than the Court has acknowledged, and require more care in the choice of methodologies and remedies than the Court has sometimes exercised; that the Court should attempt to preserve as large a role for the common law as the demands of the First Amendment can tolerate; and that accomplishing this may require the Court to be less eager to offer its own solutions to tort-speech conflicts.

Part II of this Article describes a gulf between the assumptions and methods of First Amendment law and those of tort law, which makes it difficult to square the demands of the First Amendment with the methods of tort law. Part III explores the nature of the state's involvement in tort cases and concludes that it is different, in ways that matter, from the more familiar forms of state action. Part IV considers the possibility that tort law's burdens on speech, which are to some extent inevitable, may be inherently incompatible with free speech – if not generally then at least in some particular torts. Setting that possibility aside without conclusively rejecting it, Part V explores ways of reconciling tort law with the First Amendment and Part VI suggests steps the Supreme Court should take to preserve a role for state courts.

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complexity of the task. *See* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 786 (1986) ("If the tort of defamation represents a delicate balance, then the Supreme Court should tread carefully where so many common law judges have trodden before."). Another is Professor Monaghan, who touched on a number of the issues discussed here in his important article, Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

[5] The Religion, Association, and Assembly Clauses of the First Amendment may also impose limits on tort law, and those might raise similar issues. But I am concerned here only with limitations arising from the Speech and Press Clauses.

I should mention a couple of preliminary matters here. The first is the range of torts to which this discussion applies. Many of the illustrations I use arise from defamation. That is the tort in which the First Amendment limitations are most familiar and most fully developed. However, it is by no means the only area to which this discussion applies. In fact, defamation is the area of speech-tort conflict that I have the least hope of influencing. The constitutional limitations on defamation are so entrenched that it is hard to imagine the Court abandoning them. But there are other speech torts, such as privacy, intentional infliction of emotional distress, and interference with trade relations, in which the Court's approach does not yet appear to be solidified, and yet others, such as trade secret law and physical harms caused by speech, that the Court has not addressed at all. Even if it is too late to change course in defamation, other paths are still open in these other branches of tort law.

By "speech torts" I mean torts in which the claim arises from the content of speech that would be fully protected by the First Amendment if it were not tortious.[6] This discussion may also have some application to torts arising from the content of speech that is not fully protected, such as obscenity or commercial speech,[7] and to tort claims that do not arise from the content of speech but may impact speech, such as claims for intrusion or trespass.[8] But the core issue I wish to discuss here is First Amendment limits on tort judgments that arise from the content of otherwise fully protected speech.

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[6] Some of this speech could be held to be fully protected even if it otherwise would be tortious, of course.

[7] *See, e.g.*, Kasky v. Nike, Inc., 45 P.3d 243 (2002), *cert. dismissed as improvidently granted*, 123 S. Ct. 2554 (2003) (holding that corporation's representations about its labor policies could be actionable under the Deceptive Practices Act because they were commercial speech).

[8] For example, the Supreme Court in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), held that the First Amendment precluded liability for disclosing conversations that the defendants knew had been taped in violation of federal wiretapping laws. The Court conceded that the liability was not content-based, but said it was unconstitutional because it penalized the publication of truthful, lawfully obtained information.

If the tort did not involve such information, it might be governed by *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), which held that the First Amendment poses no obstacle to liability based on generally applicable laws that have incidental effects on the ability of the media to gather and report news. The theory of liability in that case was promissory estoppel, but the principle presumably could apply to torts that do not target the content of speech.

The second preliminary involves the adoption of a shorthand vocabulary. The choice I am exploring is between deciding questions as a matter of federal constitutional law and deciding them as a matter of state tort law. For simplicity's sake, I employ the term "Supreme Court" as shorthand for any court deciding as a matter of federal constitutional law, and "state court" for any court deciding as a matter of state law. These must be understood as terms of art, because the matter is not quite that simple. The tort law in question is invariably state law,[9] as to which only state courts are authoritative. Federal courts in diversity cases decide state tort law issues, but only as they believe the courts of the state would decide them, so I include in the term "state courts" federal courts exercising diversity jurisdiction.[10] The Supreme Court has no power to decide questions of state tort law, for reasons I explain in Part IV, so its role in speech-tort cases is only to apply federal constitutional law. Of course other courts, both state and federal, can decide federal constitutional questions too, and conceivably the Court could give state courts a larger role, as a matter of constitutional law, in devising new First Amendment limits on tort law. To avoid having to use language that includes all these possibilities throughout the Article, I proceed as if the choice is between the Supreme Court and the state courts (as for most practical purposes it is), trusting the reader to keep in mind the complications mentioned here.

II. TORT LAW AND THE FIRST AMENDMENT ARE UNEASY BEDFELLOWS

A First Amendment challenge to a tort judgment is a clash of divergent legal cultures. The advocates speak different languages and embrace different faiths. The culture of First Amendment jurisprudence seeks precision and predictability (even though it often fails to achieve these), insists on narrow

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[9] There is some federal tort law. *See, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (recognizing federal wrongful death action for negligence in maritime law); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing federal tort action for violation of constitutional rights by federal agents). But these federal torts rarely, if ever, impact speech.

[10] Because of the general rule that the assertion of a federal constitutional defense does not create federal question jurisdiction, *see* Oklahoma Tax Comm'n v. Graham, 489 U.S. 838 (1989), most speech-tort cases tried in federal court are predicated upon diversity jurisdiction and therefore are controlled by state law, with the federal court applying state law and attempting to interpret the common law as the state's highest court would interpret it.

remedies, and distrusts juries. Tort law embraces broad, flexible principles that aim not so much to prescribe outcomes as to provide structures by which outcomes can be decided, usually by juries, in a manner that is more than a little ad hoc.

Substantive First Amendment law frequently demands that remedies be narrowly tailored.[11] In some contexts this is only a gentle insistence that there be "a reasonable fit" between the state's ends and means;[12] in others it requires the state to show that there is no "less restrictive means" of achieving its objective,[13] a demand that often is all but impossible to meet. However it is applied in the particular context, the requirement always embodies a certain amount of hostility to broad-gauge remedies. Its purpose is to authorize courts to hold a remedy unconstitutional not because it is inappropriate on the facts of the case, but because the state has cast its net too broadly.

Statutes may violate the First Amendment because they *could* be used to discriminate on the basis of content even if there is no evidence that that is their purpose.[14] They can also be held unconstitutional because they give a government official too much discretion even if there is no evidence that the discretion has been exercised improperly.[15] In all these instances, the regulation is held unconstitutional not because it has been shown to have had an impermissible effect on speech, but because it might do so.

First Amendment law pursues precision not only through its generally applicable principles, but also through the special doctrines of overbreadth and vagueness. Because of the hostility to overbroad laws, even if the speech at issue in a particular proceeding *could* be restricted consistently with the First Amendment, the restriction may be invalid if, on its face, it also reaches speech that may not be restricted.[16] Accordingly,

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[11] *See, e.g.*, Fla. Star v. B.J.F., 491 U.S. 524, 539-41 (1989); Globe Newspaper Co. v. Super. Ct. for Norfolk County, 457 U.S. 596, 608-09 (1982); Press-Enterprise Co. v. Super. Ct. of Cal. for Riverside County, 478 U.S. 1, 9 (1986). The enthusiasm for this requirement is not unanimous. *See* Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 124-25 (1991) (Kennedy, J., concurring) (attacking the demand for narrow tailoring in First Amendment analysis).

[12] Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 470 (1989).

[13] Daily Herald Co. v. Munro, 838 F.2d 380, 385 (9th Cir. 1988).

[14] *See, e.g.*, Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984); Leathers v. Medlock, 499 U.S. 439, 446 (1991); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592 (1983).

[15] Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988).

[16] Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

the court may be required to evaluate not just the restriction's application to the specific speech in question, but also its apparent applicability to other speakers.[17] An ancillary principle, which has large implications for tort law, is that an overbroad restriction cannot be saved by state courts' assurances that they will not permit the restriction to be applied in ways that would violate the First Amendment;[18] a narrowing construction can save the restriction only if the new construction on its face precludes impermissible applications.[19]

Additionally, restrictions must not be vague. A restriction on speech is unconstitutional if persons "of common intelligence must necessarily guess at its meaning and differ as to its application."[20] The First Amendment tolerates less vagueness than does due process generally.[21] Restrictions on speech must be precise enough not only to prevent the excessive deterrence that may result from uncertainty about its reach, but also "to eliminate the impermissible risk of discriminatory enforcement."[22]

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[17] *See, e.g.*, Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (holding regulation unconstitutional because of its effect on protected First Amendment activity without considering whether plaintiff's activity was constitutionally protected).

[18] *See* Dombrowski v. Pfister, 380 U.S. 479, 487 (1965) (holding that case-by-case invalidation of unconstitutional aspects of regulation would insufficiently protect First Amendment interests).

[19] *See* Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 964-65 (1984) (holding that ordinance must be invalidated in its entirety, even though in some applications it might be constitutional, because partial invalidation would not leave a "core of easily identifiable and constitutionally proscribable conduct").

United States v. American Library Ass'n, Inc., 539 U.S. 194, 123 S. Ct. 2297 (2003), seems to have observed this principle largely in the breach. As an answer to an overbreadth claim directed at a statute that denied federal funds to libraries unless their Internet access terminals employed pornography filters, the plurality accepted the Solicitor General's assurances that libraries may eliminate such filters at the request of an adult patron. In dissent, Justice Stevens argued that the "overblocking" effects of the statute could not be cured by a mechanism that was not made mandatory by the statute and was subject to discretionary application. 123 S. Ct. at 2315 (Stevens, J., dissenting). Possibly the apparent departure from the usual insistence on certainty that the narrowing will occur is explained by the fact, which the plurality emphasized, that the statute "does not 'penalize' libraries that choose not to install such software" but "simply reflects Congress' decision not to subsidize their doing so." 123 S. Ct. at 2308.

[20] Baggett v. Bullitt, 377 U.S. 360, 367 (1964).

[21] Smith v. Goguen, 415 U.S. 566, 573 (1974) (holding that, in First Amendment cases, vagueness doctrine "demands a greater degree of specificity than in other contexts").

[22] Gentile v. State Bar of Nev., 501 U.S. 1030, 1051 (1991). The Court emphasized, "The question is not whether discriminatory enforcement occurred here, and we assume that it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." *Id.*

Vagueness and overbreadth are rovers, designed to catch First Amendment infringements that might otherwise get through the regular lineup of First Amendment defenses. Together, the two doctrines are meant to require the legislature (or regulator) to be precise – to make sure not only that no protected species are caught in its net, but also that the restriction makes clear in advance which unprotected species it aims to catch.[23] These doctrines are enforced somewhat unevenly,[24] but they do sometimes demand even more precision than substantive First Amendment doctrines alone would require.

Tort law does not co-exist easily with those principles.[25] Its focus is post facto, on what actually did happen. It is inherently imprecise. This imprecision is most obvious in the familiar basic principles of negligence law, which ask whether the defendant failed to use the degree of care to be reasonably expected of a person in the same or similar circumstances,[26] whether that failure was more likely than not a cause of the plaintiff's injury,[27] and whether that injury or something like it was the kind of harm whose risk made the defendant's act negligent.[28]

Of course, negligence is rarely the basis for tort liability arising from speech. Liability usually rests on one of several more specific speech-tort theories – theories that may be less indeterminate than negligence law. But these also impose liability on the basis of concepts that are more general, broad, and vague than First Amendment law normally tolerates.

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[23] Overbreadth and vagueness both "recognize that litigants are entitled to be judged according to permissible standards – both before and after courts decide to trim any provisions in a statute." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1031-32 (2d ed. 1988).

[24] *See id.* at 1026 (noting a trend to place "a mounting burden on the *individual* to show that the apparent inhibition of protected expression is in fact highly probable and socially significant").

[25] My colleague Doug Laycock once urged a similar point to the Supreme Court: "Modern tort law is designed to compensate widely and generously; it is predisposed to impose liability. First Amendment law is designed to protect controversial beliefs, speech, and religious practices; it is predisposed to avoid liability." *See* Motion for Leave to File Brief Amicus Curiae and Brief of Amici Curiae National Council of Churches of Christ et al. at 12, Int'l Soc. of Krishna Consciousness of Cal. v. George, 499 U.S. 914 (1991) (No. 89-1399).

[26] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 3 (Tentative Draft No. 1, 2001).

[27] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 28 cmt. a (Tentative Draft No. 2, 2002).

[28] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 3 & cmt. e (Tentative Draft No. 1, 2001).

Whether a disclosure of private facts is actionable as invasion of privacy, for example, depends on whether the disclosure is one that would be highly offensive to a reasonable person and whether the fact disclosed is a matter of legitimate public concern.[29] Whether intentionally inflicted emotional distress is actionable depends on whether it is severe and whether the means by which it is inflicted are extreme and outrageous.[30] Speech that intentionally induces another to breach a contract is actionable if the interference is "improper."[31]

The most familiar source of tort liability for speech is defamation, which contains its own elaborate limitations to protect speech, and which one might therefore expect to be more precise and determinate. But for all its detail and complexity, even the tort law of defamation employs a number of concepts that are likely to strike the First Amendment lawyer as far too imprecise. A statement is defamatory if, considering "the fair and natural meaning which will be given it by persons of ordinary intelligence,"[32] it tends (at least in the eyes of "a substantial and respectable minority"[33] of the community) "to so harm the reputation of another as to lower him in the estimation of the community or deter third persons from dealing with him."[34] It is not actionable if it is "substantially true"[35] (or, in cases in which the burden of proof has been switched as a matter of constitutional law, unless it is "materially false"[36]) – that is, whether it "would have a different effect upon the mind of the reader from that which the pleaded truth would have produced."[37] Whether defenses of privilege are available depends on such questions as whether the publication is a "fair and accurate" account of a proceeding,[38] or whether the defendant acted in bad faith[39] or circulated the report more

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[29] Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993); RESTATEMENT (SECOND) OF TORTS § 652D (1977).

[30] RESTATEMENT (SECOND) OF TORTS § 46 (1965).

[31] RESTATEMENT (SECOND) OF TORTS §766 (1979).

[32] Hermann v. Newark Morning Ledger Co., 138 A.2d 61, 67 (N.J. App. Div. 1958).

[33] RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977).

[34] RESTATEMENT (SECOND) OF TORTS § 559 (1977).

[35] RESTATEMENT (SECOND) OF TORTS § 581A cmt. f (1977).

[36] *See* Rouch v. Enquirer & News, 487 N.W.2d 205 (Mich. 1992).

[37] Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991).

[38] *See, e.g.*, Medico v. Time, Inc., 643 F.2d 134 (3d Cir. 1981).

[39] *See, e.g.*, Potts v. Dies, 132 F.2d 734 (D.C. Cir. 1942) (holding privilege lost if defendant acts with bad faith or with a bad motive).

widely than necessary.[40] These are all questions of judgment that lack the predictability, certainty, and precision that First Amendment law usually demands.

In tort law the jury's role is central.[41] Most tort doctrines are aimed at shaping the issues for the jury. Tort law severely limits the role of judges, both trial and appellate. The judicial role is largely supervisory, and nearly all final substantive questions are committed to the jury. Much effort is expended allocating responsibility between judge and jury,[42] usually with a view toward preserving the jury's ultimate power to decide.

In contrast, a central tenet of First Amendment law is distrust of juries. The jury, once thought to be the chief protector of free speech,[43] is now considered one of its chief threats.[44] The Court has made its First Amendment limitations on tort law effective primarily by limiting the jury's power. In defamation, the First Amendment takes away much of the jury's power to find actual malice,[45] presume harm,[46] and determine what is defamatory.[47] It diminishes a jury's power to decide when public figures should be able to recover for intentional infliction of emotional distress[48] or when disclosures of private facts should be actionable as invasion of privacy.[49]

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[40] *See, e.g.*, Galvin v. New York, New Haven & Hartford R.R. Co., 168 N.E.2d 262, 265-66 (Mass. 1960) (holding privilege forfeited by excessive publication).

[41] DAN B. DOBBS, THE LAW OF TORTS 33 (2000).

[42] *Id.* at 36 ("Many of the tort rules and practices seen in this book can be understood as taking one side or another about the jury's appropriate role.").

[43] *See* JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 23 (Stanley Nider Katz ed., 1963) (describing Andrew Hamilton's successful argument that the jury had a right to return a general verdict). "The propositions that truth should constitute an adequate defense and that the jury should decide the whole question of libel were to become the heavy cannon of the embattled libertarians of the eighteenth century." LEONARD W. LEVY, THE EMERGENCE OF A FREE PRESS 128 (1985).

[44] For an argument that this reversal of assumptions about the jury is a logical result of changes in threats to free speech, see 2 ROBERT D. SACK, SACK ON DEFAMATION § 16.5.5.2, at 16-47 to 16-50 (3d ed. 1999).

[45] *See infra* text accompanying notes 158-60.

[46] Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (disallowing presumed damages unless actual malice is shown).

[47] *See* Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6 (1970) (holding as a matter of law that, in the context in which it was made, an accusation of blackmail could not be understood as a charge of crime). What constitutes a defamatory statement is one issue on which even common law courts often limit the jury's power by holding that the statement is as a matter of law incapable of a defamatory meaning. *See, e.g.*, San Francisco Bay Guardian, Inc. v. Super. Ct., 21 Cal. Rptr. 2d 464 (Cal. Ct. App. 1993).

[48] *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

[49] *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

The cultural differences between tort and constitutional law flow naturally from the different purposes they serve. In tort law, telling people what they should do is a secondary enterprise; whatever effect tort law has in guiding conduct arises from what it does post facto in the course of adjusting losses. Precision, clarity, and certainty therefore seem, at least, to be less important than they would be if tort law were in the business of explicitly prescribing conduct. Constitutional law is in that business, however; it exists to tell government actors what they must or must not do, and the importance of clarity and certainty are therefore obvious. Tort law is majoritarian (or perhaps populist): It assumes that lay people are at least as likely as judges to make good decisions on many of the questions that ultimately determine tort liability. Because of its countermajoritarian purposes, that assumption is unavailable in much of constitutional law.

That is not to say all the differences are inevitable. Maybe tort law is too backward-looking; perhaps it should attach more importance to its prescriptive role and therefore strive for more certainty and predictability. Maybe juries are not as good as judges would be at deciding tort liability issues, and maybe constitutional law should be less countermajoritarian. My purpose here is neither to defend nor condemn the differences, but only to describe them and suggest that they play an important role in speech-tort conflicts.

III. "THE STATE" IN SPEECH-TORT CONFLICTS

There is no doubt that tort judgments are state action and therefore are subject to First Amendment limits. It has been clear at least since *Shelley v. Kraemer*[50] that a state court's application of common law principles is state action. Since then the proposition has never been seriously questioned, and it seems clearly correct. If it would be unconstitutional for a court to impose a judgment at the command of a statute, a judgment that lacks a statutory basis can hardly be less objectionable. In *New York Times Co. v. Sullivan*,[51] the case that applied the First Amendment to a tort judgment for the first time, the Court said:

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[50] 334 U.S. 1 (1948) (holding that state court enforcement of racially restrictive covenants was state action violating the equal protection clause).

[51] 376 U.S. 254 (1964).

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.[52]

But the exercise of state power in a civil case applying only common law *is* different from the state action that the First Amendment normally guards against.[53] Eventually the Court acknowledged that "a suit by a private party is obviously quite different from the government's direct enforcement of its own laws,"[54] but it still did not address the consequences that might flow from those differences.[55] Whether tort judgments are state action is only the beginning of the inquiry; the substantive constitutional law that becomes applicable because of that determination raises many questions in common law cases that do not arise in the more familiar forms of state action. Those are the questions I address in this section.

A. *State Action in Tort Cases is Different*

The tort judgments at issue here are content-based. The general principle concerning content-based restrictions is that "the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified."[56] Some types of speech, such as perjury, misrepresentation, incitement to imminent unlawful violence, solicitation, and extortion, seem to be excepted from this rule; regulation of these apparently is at least presumptively

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[52] *Id.* at 265 (citations omitted).

[53] At the most obvious level, if the courts that apply common law in civil cases are state actors, then in other contexts there are at least *two* state actors. One is the legislature, prosecutor, government agency, or governmental body whose action is alleged to have violated the First Amendment; the other is the court that is asked to enforce or affirm that action.

[54] Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986).

[55] The Court merely reiterated the reason for treating tort suits as state action: "Nonetheless, the need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages . . . ." *Id.*

[56] *Phila. Newspapers*, 475 U.S. at 777. *See also* Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 120 (1991); *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 355-56 (11th Cir. 1987).

constitutional.[57] But unless such an exception applies, a restriction on speech is generally presumed to be unconstitutional,[58] the burden of justification is on the state,[59] and uncertainties about the effects of the restriction on speech are resolved against the state.[60] The presumption of unconstitutionality that seems to apply to these cases (at least unless the tortious speech is shown to be false) is of the sort that requires strict scrutiny.[61] Thus, "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[62]

This method of First Amendment analysis is not used in all speech-tort cases; defamation cases, for example, employ quite a different methodology. Whether the generic strict-scrutiny analysis is an appropriate method in *any* of the tort cases implicating speech is a fair question.[63] But it is the default method, the one used until the Court devises some other methodology, and it is the one that offers the clearest view of state action in speech-tort cases.

If it is "the state" or "the government" or "state officials" who must defend restrictions on speech against First Amendment challenges in tort cases, what state entity bears the burden of articulating the state's interest and justifying

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[57] *See generally* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989).

[58] *See, e.g., Simon & Schuster*, 502 U.S. at 115 ("[A] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.").

[59] *See, e.g.*, Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) ("[T]he State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.").

[60] *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983) (holding tax unconstitutional despite argument that it actually discriminated in favor of newspaper).

[61] In First Amendment jurisprudence, "strict scrutiny" is somewhat more variable than in equal protection analysis. It can require proof of something like a clear and present danger, *see, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that advocacy of violence protected unless it is directed to, and likely to, produce imminent lawless action), or proof of a compelling state interest that cannot be accomplished by less speech-restrictive means, *see e.g., Simon & Schuster*, 502 U.S. 105, or it can simply establish an unspecified "heavy presumption" against the constitutionality of the restriction, *see* N.Y. Times Co., v. United States, 403 U.S. 713, 714 (1971) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

[62] Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989) (quoting Smith v. Daily Mail Pub. Co., 443 U.S. 97, 103 (1979)).

[63] *See infra* text accompanying notes 79-89.

the restriction? It can only be a court, because no other incarnation of the state is involved. Is it the trial judge who must shoulder those burdens? Possibly so; the only act that has real consequences for the parties is the judgment,[64] and there are cases in which the Supreme Court speaks of the judgment or the result as the relevant state action.[65] Even under this conception of the state action, however, the state actor could be either the trial court that entered the judgment, the appellate court that affirmed it, or both. The question has some practical relevance in connection with the scope of appellate review. If it is the trial court that bears the burden of justification, the appellate court could confine itself to evaluating the adequacy of the trial judge's justifications rather than accepting that burden itself.

Usually, however, the Court identifies the state action somewhat more broadly, as the "state rule of law"[66] or "the application of state rules of law in state courts."[67] In these broader conceptions of state action, all the courts that had a hand in creating the common law tort in question would seem to be state actors.[68] There could still be questions as to which of their voices count, however. The reviewing court might think it necessary to consider everything that all of these courts have said by way of articulating the state's interests and justifying the tort, or it might think the only relevant voice is that of the court that brings the common law rules produced by all those other courts to bear on the specific case – namely, the court whose decision is being reviewed.[69] Again, the question has

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[64] Of course, First Amendment issues arise and have to be resolved during and even before trial, before there is a judgment. Perhaps state action at that point could be thought of as the *potential* judgment. The judge could be seen as answering a hypothetical question: "If I were to enter judgment rejecting the First Amendment argument, would that be a state action abridging speech?"

[65] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48 (1988) ("this award"); Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989) ("this result").

[66] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) ("state rule of law").

[67] Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991). *See also* Time, Inc. v. Hill, 385 U.S. 374, 376 (1967); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 n.51 (1982); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986). Sometimes the Court doesn't seem to distinguish between the state rule of law and its application by the courts to the case at hand. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) ("exposing the press to liability").

[68] To the extent that the common law in question really is common, this presumably would include the out-of-state courts that had a hand in creating the relevant tort principles.

[69] Occasionally the Court looks to a later articulation by the same state court. *See Time*, 385 U.S. at 380-85 (1967) (accepting the construction given a statute by New York Court of Appeals in a case decided while the *Hill* case was pending in the

practical consequences for the scope of appellate review. At the Supreme Court level the answer is fairly easy, at least in practice: The Court evaluates the interests and justifications that have been relied upon by the court below, and perhaps additional ones advanced by the parties, but does not canvass decisions of other courts of the state (or other states) for additional ideas. For state supreme courts, however, the answer is not so easy. Since they are the ultimate expositors of the common law, they may feel that they must look beyond the offerings of the parties and the court below.

If a tort judgment is presumptively unconstitutional and the burden is on the state to justify it, and if "the state" is a court, that court finds itself in an unusual position. It is both the arbiter of the dispute between the parties and the defender of the state's interest as expressed in the common law upon which the plaintiff relies. This is quite different from the court's role in the usual non-tort First Amendment case. In those cases we do not think of the court as the entity that poses a threat to free speech; the relevant state actor is the official or official entity whose act the court is reviewing. The court's role is to weigh the free speech implications of some other state actor's agenda, not to defend its own. In tort cases, it is not quite clear how the challenged judgment should be viewed. Is it the disinterested decision of a court that should be assumed (in the absence of contrary indications) to be as eager to protect free speech as the Supreme Court? Or should it be viewed like any other act of "the government," whose speech-suppressing tendencies have been demonstrated throughout history and against which the First Amendment must be ever vigilant?

The point is not that courts cannot be both decision-makers and advocates. In any area of law, they are rarely entirely neutral. In non-First Amendment cases, for example, courts are often required to give deference to legislative judgment, which puts the court, at the outset at least, in the role of defending the legislature against the party attacking a statute.[70] In every case, one side or the other bears the burden of persuasion, and to that extent the court is aligned with the

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Supreme Court). *See also* Milkovich v. Lorain Journal Co., 497 U.S. 1, 10 n.5 (1990) (looking to an intervening decision to determine how the Ohio courts interpreted the First Amendment's application to opinion in defamation cases).

[70] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (defending Congress's determination that farmer's production of wheat for home consumption affected interstate commerce).

other side. In criminal cases, for example, the court is supposed to be the defender of the presumption of innocence.[71] And at some point in every case, the court ceases to be neutral and becomes a defender of its decision and often of the law on which the decision is based. Opinions (of trial courts as well as appellate courts) often read more like briefs than dispassionate analysis and explanation.

Nor is the point that courts cannot be threats to freedom of speech. Many branches of First Amendment jurisprudence reflect a belief that courts *are* threats to freedom of speech, or at least are not reliable protectors of it. If courts were not themselves capable of threatening free speech, there would be no need to include injunctions in the presumptive prohibition on prior restraints[72] or to limit courts' power to exclude the press and public from their proceedings.[73] The point is only that a court's role is unusually complex when it is both the sole state actor and the decision-maker that is asked to decide whether the state action violates the First Amendment.

When the constitutionality of a *statute* is challenged in a proceeding to which the state is not a party, most states (and the federal government) require that the attorney general be notified and given a chance to intervene.[74] The obvious purpose is to give the state an opportunity to defend the challenged statute. I have found no comparable requirement for cases in which the state is not present to defend the constitutionality of a common law rule. That may reflect a belief that the court will adequately represent the state's interest in such cases, but it is

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[71] *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966) (reversing criminal conviction because of judge's failure to protect defendant from prejudicial trial atmosphere).

[72] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 546, 558 (1976).

[73] Richmond Newspapers, Inc., v. Virginia., 448 U.S. 555, 562 n.4 (1980).

[74] *See* 28 U.S.C. § 2403 (2000); ALA. CODE § 6-6-227 (2004) (as interpreted by Landers v. O'Neal Steel, Inc., 564 So. 2d 925 (Ala. 1990)); ALASKA R. CIV. P. 24(c); COLO. APP. R. 44; CONN. R. APP. P. § 63-4(a)(7); HAW. R. APP. P. 44; ILL. SUP. CT. R. 19(a); KY. R. CIV. P. 24.03; LA. REV. STAT. ANN. § 13:4448 (West 2003); ME. R. CIV. P. 24(d); MASS. R. CIV. P. 24(d); MINN. R. CIV. P. 24.04; MISS. R. CIV. P. 24(d); MONT. R. CIV. P. 24(d); NEV. R. APP. P. 44; N.H. SUP. CT. R. 31 (2003); N.J. CT. R. 4:28-4(a), (d); N.Y. C.P.L.R. 1012(b) (McKinney 2003); N.D. R. CIV. P. 24(c); OKLA. STAT. ANN. tit. 12, § 2024(D) (West 2004); PA. R. CIV. P. 235; R.I. SUPER. CT. R. CIV. P. 24(d); S.C. R. CIV. P. 24(c); S.D. R. CIV. P. § 15-6-24(c); TENN. R. CIV. P. 24.04; VT. R. CIV. P. 24(d); W. VA. R. CIV. P. 24(c); WYO. R. CIV. P. 24(d). Some other statutes do not mandate notification, but give the court discretion to decide whether notice is appropriate. *See* ARK. R. CIV. P. 24(c) ("the court may require that the Attorney General of this state be notified of such question"); KAN. R. CIV. P. 24.03 ("court may in its discretion notify the chief legal officer of the state"); MICH. R. CIV. P. 2.209(d) ("the court may require notice be given to the Attorney General").

not clear why that should be assumed if the court cannot be counted on to defend a statute.[75]

B. *Discharging "the State's" Burden*

Ultimately, of course, it is the plaintiff who bears the burden of defending the state's decision to provide a tort remedy and the terms on which the remedy issues. The public, the court, and the common law may have generalized interests in maintaining a body of law that protects reputation, privacy, or physical security, but only the plaintiff has a specific stake that will be lost if the state's interest is not successfully defended. In tort cases, the basic principle of First Amendment law referred to above[76] must be revised to say "*the plaintiff* cannot succeed without bearing the burden of showing that the restriction on speech is justified."

In a sense, placing this burden on the plaintiff is natural and inevitable. All plaintiffs ultimately bear the burden of convincing the decision-maker that they deserve a remedy,[77] and that may include the burden of showing that their desserts outweigh the costs that liability will impose on the particular defendant, other potential defendants, and the world at large.[78] But the generic strict scrutiny model of First Amendment law imposes a different kind of burden. It requires the tort plaintiff to justify more than her own case. The hostility to overbreadth and vagueness, the insistence that remedies be narrowly tailored, and many of the substantive doctrines of First Amendment law require the court to look beyond the case at hand to the effects that liability *might have on other speakers*. The tort plaintiff therefore must show not

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[75] Perhaps it reflects uncertainty as to what state official would be an appropriate defender of the common law. Although that role might not be as familiar to attorneys general as defending statutes, I do not see why they could not be asked to perform it. How zealously they would defend, or whether they would do so at all, is another question, but that is also true of their defense of statutes.

[76] *See supra* text accompanying note 56.

[77] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 94 (Little, Brown, & Co. 1923) (1881) (asserting that letting injuries lie where they fall is a central principle of the common law).

[78] These are the kinds of burdens many tort plaintiffs face in establishing duty. *See, e.g.*, DOBBS, *supra* note 41, at 582 (2000) (stating that duty is constructed by courts from the building blocks of policy and justice). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 cmts. c-g (Tentative Draft No. 2, 2002) (identifying the following as appropriate factors in determining the existence of duty in tort cases: social norms, effects on other bodies of law, relationship between defendant and plaintiff, administrability, and effect on other governmental decisions).

only that a judgment in her case will not unjustifiably abridge freedom of speech, but also that the tort scheme she invokes will not unduly abridge speech in other cases. She must defend not only the tort's application to her, but also its potential application to others.

The significance of this burden can best be appreciated by observing it in action. In *Florida Star v. B.J.F.*[79] the sheriff's department erroneously released the name of a rape victim and the defendant newspaper published it while the assailant was still at large. The woman received several phone calls from a man who threatened to rape her again. Both the sheriff's department and the newspaper acted in apparent violation of a criminal statute forbidding the disclosure of names of rape victims in instruments of mass communication. The woman brought a civil suit against both for their violation of the statute. The sheriff's department settled for $2,500. The woman won a $100,000 jury verdict against the newspaper.

The Supreme Court reversed on the ground that the remedy the state had provided her was not a narrowly tailored response to the interest in protecting rape victims' privacy.[80] The reasons were that: (1) liability for publishing information the government itself had made available would be especially likely to result in media self-censorship;[81] (2) liability for violating the statute under principles of negligence per se bypassed issues that might have helped the defendant in a common-law action for invasion of privacy, such as whether the victim's identity was already widely known and whether the defendant acted negligently;[82] and (3) the state had failed to apply its prohibition evenhandedly because the statute applied only to media of mass communication and thus would not cover disclosures of the name through gossip.[83]

It is not clear that any of those objections were actually applicable to B.J.F.'s claim. First, the judgment did not threaten to induce either the sheriff's department or the newspaper to self-censor, because both had policies against disclosure of rape victim's names and both said they had violated those policies inadvertently in disclosing B.J.F.'s

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[79] 491 U.S. 524 (1989).
[80] *Id.* at 538.
[81] *Id.* at 535-36.
[82] *Id.* at 539.
[83] *Id.* at 540.

name.[84] Second, it is difficult to see why a common-law action might have produced a different outcome than negligence per se: In order to obtain punitive damages she had proved that the defendant was not merely negligent, but had "acted with reckless indifference to the rights of others,"[85] and there was no indication that anything other than the newspaper story had made her identity known.[86] Third, in addition to the negligence-per-se remedy based on violation of the statute, Florida recognized a common law action for invasion of privacy, which presumably would have applied to gossips or other nonmedia sources who disclosed B.J.F.'s name.[87]

The irrelevance of the objections to the case at hand is the natural consequence of applying general First Amendment principles to tort cases, because under those principles the question is not the effect on the defendant's speech. The problem was not that B.J.F.'s favorable judgment unjustifiably burdened the newspaper's speech; it was that the state had chosen "too precipitous a means"[88] of protecting her. She lost not because she deserved to lose, nor even because allowing her to win would abridge free speech. She lost because the Court believed the terms on which the state extended its remedy would allow too many others to win, and *that* would abridge free speech. As in most speech-tort cases, it was the predicted effect on *other cases* that made the judgment unconstitutional.

Articulating the state's interest in protecting reputation, privacy, and emotional and physical security, and justifying the state's common law remedies as narrowly tailored methods of doing so, are not familiar roles for either plaintiffs or state courts. Most plaintiffs probably assume that if they can find a common law tort that affords a remedy for their injury, and if they can meet the requirements of that tort, they will win unless the defendant carries the burden of showing that such a result would be unconstitutional. They are mistaken, of course; once the defendant asserts a First Amendment defense, the burden effectively shifts to the

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[84] *Fla. Star*, 491 U.S. at 528, 536.

[85] *Id.* at 529.

[86] *Id.* at 528.

[87] *See* Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962) (holding that plaintiff stated valid common law invasion of privacy claim against media defendant under Florida law).

[88] *Fla. Star*, 491 U.S. at 537.

plaintiff to justify the remedy.[89] State court judges also take the common law remedies as a given; their opinions rarely contain elaborate articulations of the state's reasons for protecting interests like reputation and privacy. They may feel moved to advert to the long history of defamation as evidence that it protects an important interest, or to the rapid acceptance of the privacy protection once Warren and Brandeis proposed it, but it generally does not occur to them that they need to write opinions that are capable of convincing the Supreme Court of the need for, and appropriateness of, the common law remedies. They are not accustomed to writing exegeses that re-examine the purposes served by these remedies and the possible availability of other methods of achieving those purposes. But that is the role that either the plaintiff or the state court must accept under the analysis that casts either or both of them as "the state."

These difficulties can be alleviated somewhat by adopting a method of First Amendment limitation other than generic strict scrutiny. For example, the constitutional law of defamation consists of an elaborate doctrinal structure of substantive and procedural rules. Judgments that satisfy these rules require no further First Amendment analysis, presumably because the Supreme Court in devising this doctrinal apparatus has already applied something equivalent to strict scrutiny, albeit at a more abstract level, and has decided that the common law of defamation as modified by the prescribed constitutional rules is a narrowly tailored means of achieving a sufficiently important state interest. The advantage of this prescribed-rules methodology is that once it is fully developed,[90] the prescription tells plaintiffs and courts in advance what First Amendment hurdles a tort judgment

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[89] This is clearest in cases like *Florida Star*, 491 U.S. 524, in which the courts apply a generic form of First Amendment strict scrutiny. It is less obvious in cases that employ more particularized constitutional rules, such as defamation cases, but something similar happens there too. In those, the plaintiff has the burden of satisfying Court-created surrogates for strict scrutiny, such as actual malice.

[90] During the time the prescribed rules are being developed, they do little to relieve plaintiffs and state courts of the burdens described above. If the Court in developing such rules is engaging in a more abstract version of strict scrutiny, the plaintiffs in those cases and the state courts whose judgments are being challenged are in more or less the same position as the plaintiff and state courts in *Florida Star*, 491 U.S. 524. Whether the state's remedy (and the plaintiff's judgment) survives depends on their ability to persuade the Court that the burden imposed on speech is justifiable (or at least that it can be made so by a lesser rather than a greater constitutional limitation).

must clear. Its disadvantage is that it puts the Supreme Court in the business of deciding tort-like questions and calcifying those choices as constitutional law – the practice I question in this Article. Whether the predictability gained by the prescribed-rules methodology outweighs this disadvantage is a question to be considered in Part IV.

IV. TORT LAW'S BURDENS ON SPEECH

A. *Some Deterrence of Speech is Inevitable*

If the objective of First Amendment law is to assure that no protected speech will be deterred, all tort law is a threat. Deterrence is one of the objectives of tort law, and law never achieves its objectives perfectly. No matter how carefully tort law is calibrated, speakers can rarely be certain that they will be immune from liability. There will always be some uncertainty as to what the common law is, what version of it will be applied to a particular set of facts, or whether the court might decide to change it. Unless juries are removed from the process entirely, there will always be doubt as to how the jury will evaluate the facts and apply the law. Even if judges made all the decisions, some of this doubt would inevitably remain.

The deterrence that arises from uncertainties about outcomes is compounded by uncertainties about the likelihood of litigation. Even if the speaker is confident that the tort rules will not result in liability, there remains the risk that a prospective plaintiff who does not share that assessment may put the speaker to the costs – financial and other – of finding out. This risk is difficult to estimate because it depends on many imponderables, such as the law's uncertainty, the factual complexity of the potential case, the availability of procedures for early resolution, the litigiousness of potential plaintiffs, and their tenacity and resources.

Fine-tuning doctrine or procedures can never entirely remove the burden that tort law imposes on speech. Attempting to do so is likely to lead to an endless incremental progression toward abolition, as has happened in defamation. In *New York Times Co. v. Sullivan*[91] the Court identified "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

[91] 376 U.S. 254 (1964).

open . . . ."[92] But the law of defamation even as modified by the *New York Times* rule continued to inhibit debate, so the Court adopted, one by one, numerous other constitutional limitations on defamation law.[93] Finally, after twenty-five years and twenty-seven Supreme Court decisions, defamation law was effectively disabled, at least in the sphere of public affairs, and debate about those matters ceased to be significantly inhibited by the law of defamation.[94]

If this is to be the eventual outcome of attempts to accommodate tort law with the First Amendment, there is much to be said for reaching that result sooner rather than later. A generation of plaintiffs could be spared the illusion that tort law gives them a remedy, a generation of defendants could be spared the expense and uncertainty of litigating each step in the dismantling of the tort law, and the public could have the benefits of "uninhibited, robust, and wide-open debate" a generation sooner.

Even if tort liability is not to be rejected ex ante in all cases where the harm results from the content of speech, certain specific torts or tort theories might well be preemptively dispatched. For example, ordinary negligence law probably can never be sufficiently protective, at least when applied to truthful speech. A number of courts have concluded that the false light branch of privacy law is unjustifiable for various reasons.[95] A few have reached similar conclusions regarding public disclosure of private facts.[96]

But preempting specific tort theories does not eliminate the burden on speech entirely, because as long as other tort theories remain available, plaintiffs will try to shift their claims into those other categories. In *Hustler Magazine, Inc. v. Falwell*, the Supreme Court seemed to fear that public figures

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[92] *Id.* at 270.

[93] These included extending the actual malice rule to public figures, criminal libel, and disparagement cases; imposing limits on recovery by private plaintiffs; narrowing the definition of actual malice; restricting recovery for rhetorical excesses, nonfactual statements, substantially true reports of confusing government reports, and misquotation; reversing the burden of proof as to truth; and requiring independent review of libel judgments. For more history and details of these additions, see David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991).

[94] *See id.* at 488 n.2 (citing these decisions chronologically).

[95] *See* Renwick v. News and Observer Pub. Co., 312 S.E.2d 405, 411 (N.C. 1984); Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998).

[96] *See* Anderson v. Fisher Broad. Cos., 712 P.2d 803, 814 (Or. 1986); Hall v. Post, 372 S.E.2d 711 (N.C. 1988).

barred from recovering for defamation would attempt to recover for intentional infliction of emotional distress.[97] A rash of claims for intrusion and related torts in the 1980s and 1990s was widely thought to be the result of the increasing difficulty of recovering for defamation.[98] Lawyers who recognize that their clients' claims for physical harms will not succeed as simple negligence claims have been ingenious in proposing modified negligence theories that offer slightly more speech-protective alternatives.[99]

The only way to be sure tort liability does not deter speech is to abolish it in all cases in which the harm results from speech. That of course need not and will not happen, because not all speech is constitutionally protected. No one thinks it necessary to avoid deterring intentional misrepresentation or solicitation of crime.[100] But much tort liability arises from speech that is otherwise fully protected – truthful speech about matters of public concern – and that too will always be deterred to some extent unless tort liability is abolished in all cases arising from that category of speech. But doing that would sacrifice other important values, such as privacy and emotional and physical security. Whether we are willing to forfeit those values in the interest of free speech is the heart of the matter. One might argue that those interests would be better served by other legal remedies, such as injunctions or criminal prosecutions, but those would face constitutional objections too.[101] Whatever its defects, tort law is

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[97] *See* 485 U.S. 46, 56 (1988).

[98] *See* Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 202 (1998) (identifying a "disturbing trend" by plaintiff's lawyers to circumvent First Amendment limitations on defamation, invasion of privacy, and intentional infliction of emotional distress by suing on other tort theories such as trespass and fraud); David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161, 162-63 (1997) ("Subjects of unflattering stories now increasingly turn to what cheerleaders for the media derisively term 'trash torts,' primary among them fraud and trespass.") (footnote omitted).

[99] *See, e.g.*, Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992) (allowing recovery for wrongful death on modified negligence theory); Clift v. Narragansett Television L.P., 688 A.2d 805 (R.I. 1996) (permitting wrongful death claim for suicide to proceed on uncontrollable impulse theory).

[100] Why that is so has generated much interesting discussion. *See generally* GREENAWALT, *supra* note 57; STANLEY EUGENE FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO (1994).

[101] *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931) (holding that First Amendment prohibits enjoining defamatory newspaper as public nuisance); Gilbert v. National Enquirer, Inc., 51 Cal. Rptr. 2d 91 (1996) (denying request to enjoin invasion of privacy).

the only existing legal protection for these interests. We cannot assume that if it is abolished, some other remedy will be provided in its place. For the present, at least, the question is whether tort law protects sufficiently important interests that it should be preserved despite some ineradicable level of burden on protected speech. The answer to that question is far from self-evident.

B. *Are The Burdens Justifiable?*

The least controversial justification for retaining some liability is the goal of compensating injured parties. As Fred Schauer has demonstrated,[102] one effect of denying tort liability for harms caused by speech is to relieve the public of the need to pay for the benefits of free speech. When, in the interest of free speech, compensation is denied to those whose reputations are damaged, whose privacy is invaded, or whose physical or emotional security is invaded, it is the victims who bear the cost of free speech.[103] The First Amendment argument is not that the usual goal of imposing the costs on those who benefit is inapplicable to these cases, or that it is somehow fair that these injured individuals bear the cost of free speech,[104] or that it would be unjust to transfer the costs to the tortfeasors. Rather, it is that doing so would deprive the public of the benefits of free speech.[105]

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[102] Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

[103] *Id.* at 1326-27.

[104] The Court's occasional attempts to argue that it is fair to place the burden of free speech on the injured individuals are unconvincing.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court asserted that "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Id.* at 345. But that argument is circular. They have "voluntarily" assumed that risk only in the sense that the law imposes it on them. One could as well argue that it is fair to draw and quarter them as long as they know the law allows it.

In *New York Times Co. v. Sullivan*, the Court argued that the constitutional privilege to defame public officials is a "fair equivalent" of the privilege that allows public officials to defame others. 376 U.S. 254, 282-83 (1964). But there is no correlation between the level of privilege that a defamed public official must overcome and the privilege available to her when she defames someone. As a plaintiff, the public figure must overcome the uniformly high barrier established by the actual malice standard, while the privilege available to public officials as defendants varies widely, ranging from absolute privilege for judges and those at the very highest levels of the executive branch to merely the common law qualified privilege for most public officials.

[105] Schauer, *supra* note 102, at 1334.

This is by no means the only instance in which the law requires the individual to bear costs for the greater good,[106] but it is something of an anomaly in a system that generally insists that individuals be compensated when their assets are appropriated for public benefit.[107] No one claims that permitting confiscation of reputation, privacy, or security in the interest of free speech is an inherently good thing.[108] The most that can be said for it is that it is a necessary, or at least expedient, evil. Socializing losses by requiring those who benefit to compensate those who bear the burdens is clearly the better solution unless it cannot be efficiently accomplished. That it cannot is entirely possible; as tort reformers are successfully arguing in many other areas, the costs of transferring burdens of speech torts from the victims to the tortfeasors may be greater than the benefits. But as Professor Schauer says, "that the cost of a constitutional right is being borne disproportionately by victims of its exercise ought at least to occasion more thought, especially in the First Amendment area, than it has to date."[109]

More controversial, but possibly important also, are justifications that have to do with goals other than compensation. The importance of these considerations, as well as their independence from the compensation justification, can be seen by taking Professor Schauer's uncoupling of free speech a step further. Imagine a world in which all those injured by speech were compensated by an infinitely munificent private benefactor, so none of the rest of us would have to pay for the benefits of free speech; would we then want to free those whose speech inflicts the injuries from any form of legal accountability?[110] If we would not – if we would fear that

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[106] Professor Schauer mentions zoning regulations and trade embargoes as examples of other legal choices that impose costs on individuals for the greater good. *Id.* at 1348, 1356. Many conspicuous current examples can be found in those aspects of the tort reform movement that deny compensation in the interest of reducing insurance premiums or curtailing litigation.

[107] *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (holding that the Fifth Amendment prohibits government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

[108] Some do suggest that permitting this confiscation might not be as bad as leaving non-speech-related injuries uncompensated, either because speech is less immediately dangerous than conduct, *see* MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 18-19 (1984), or because the consequences of speech are more speculative than those of action, *see* RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 201-03 (1977). But arguing something is less bad is a long way from arguing that it is inherently good.

[109] Schauer, *supra* note 102, at 1357.

[110] *Cf. id.* at 1356 (recognizing the possibility of noncompensatory objectives).

unrestrained freedom of speech might produce distortion of public discourse, threats to civility and tolerance, abuse of power, or loss of credibility and reliability, for example – then it would be clear that compensation is not the only goal of liability in the speech torts.[111] The debate as to whether speech should be immunized from tort liability should include the possibility that potential liability serves a useful role as an instrument of social control.[112] I suspect the reluctance to openly consider legal accountability as an independent goal has more to do with distrust of the legal institutions that might exercise that power than it has to do with the desirability of the goal itself; it would be hard to argue against some form of legal accountability if we were confident it could be administered neutrally.

Whether tort law restricts speech too much depends on one's assessment of the severity of the burdens and the strength of the countervailing interests. It is clear, however, that no amount of tinkering will eliminate the burdens entirely.

V. RESOLVING TORT-SPEECH CONFLICTS

The argument that tort law must be limited by the First Amendment rests on a peculiar premise: that courts applying tort law cannot be trusted to respect free speech values, but that courts applying constitutional law can. The argument is especially curious, because in all except those few cases that reach the Supreme Court, the same courts are making the decisions. But the argument is far from specious. For one thing, even if one believes that tort law generally can be trusted to protect speech, there is something to be said for having two lines of protection, one grounded in tort law and the other in the powerful rhetorical and historical traditions of the First

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[111] I have stated my own conclusion on these matters elsewhere:

> Some form of libel law is as essential to the health of the commonweal and the press as it is to the victims of defamation. Without libel law, credibility of the press would be at the mercy of the least scrupulous among it, and public discourse would have no necessary anchor in truth.

Anderson, *supra* note 93, at 490.

[112] *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986); Robert C. Post, *The Social Foundations of Privacy Law: Community and the Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989). In both articles, Professor Post argues eloquently that these torts serve purposes that have at least as much to do with creating and preserving social norms as with compensating individuals for injury.

Amendment.[113] "Your Honor, this is a First Amendment case" may capture a judge's attention in a way that "This is a tort case with free speech implications" does not.

Second, constitutional law provides a check on juries that would not be available if tort judgments were not considered state action. Courts reviewing judgments as a matter of tort law normally do not review the correctness of results, especially jury verdicts; they review the trial judge's decisions on questions of law[114] and unless they find error in those they rarely question the result.[115] First Amendment law permits – and sometimes requires – the reviewing court to step outside that procedurally constrained role and evaluate the effect that the result can be expected to have on speech, quite apart from the correctness of the trial judge's specific rulings.[116] Of course this expansive species of judicial review did not exist in First Amendment law until the Supreme Court created it, and there is no intrinsic reason why judicial review in tort law could not be expanded to include a similarly wide-ranging appraisal of effects.[117] But the possibility of such a major departure from the fundamental culture of tort law is a questionable substitute for the already-established practice of aggressive judicial review in First Amendment law.

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[113] For a perceptive essay on the importance of the rhetorical tradition in First Amendment law, see Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988).

[114] DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 1 (2d ed. 1998).

[115] One of the few instances in which courts have some power to reject the jury's result simply because they disagree with it is in connection with awards of punitive damages. *See, e.g.*, Green Oil Co. v. Hornsby, 539 So. 2d 218, 222-23 (Ala. 1989) (holding that trial judge properly reduced damage award despite presumption of correctness of jury verdict); Trans. Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994) (requiring intermediate appellate courts to scrutinize punitive damage awards).

[116] In *Sullivan*, the Court asserted that if the judgment against *The New York Times* (and the damages sought in four other lawsuits based on the same publication) were permitted, "[w]hether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." 376 U.S. at 278.

[117] As they have been expanded, for example, in response to Supreme Court decisions holding that due process requires intensified judicial review of punitive damages. *See, e.g.*, Life Ins. Co. of Georgia v. Johnson, 701 So. 2d 524 (Ala. 1997) (describing extensive review required by combination of state law and federal constitutional requirements). State constitutional provisions guaranteeing a jury trial might impose some outside limits on state courts' power to expand judicial review. *Cf.* Sorrell v. Quality Stores, Inc., 633 N.E.2d 504 (Ohio 1994) (holding unconstitutional statute requiring courts to deduct collateral payments).

A. *How the Court Decides Speech-Tort Cases*

The courts have universally assumed that tort liability is neither exempted from nor foreclosed by the First Amendment. As long as that is so, courts must decide how to decide what the First Amendment permits. This question is an intricate one for several reasons, one of which involves an under-appreciated fact about the Supreme Court's power: the Court lacks – or at least does not exercise – common-law power to change tort law. Because of this, the how-to-decide question touches on the limits of the Court's Article III power, practical and prudential limits on judicial power, and the dynamics of interaction between tort law and constitutional law.

The significance of the Court's inability to modify tort law can be appreciated by looking at a system that does not have that limitation, such as Australia. The Australian constitution protects freedom of political communication.[118] The High Court initially gave effect to that freedom in the field of defamation by creating a constitutional rule[119] similar to that of *New York Times Co. v. Sullivan*.[120] The High Court soon reconsidered, however, and chose instead to protect the freedom of political expression by expanding the common law of qualified privilege.[121] That option was available because the High Court has power to determine the common law.[122] Because the High Court's decisions on common law matters are binding on the Australian state courts, its decision to protect political speech with an expanded common law privilege was almost as effective[123] as a constitutional rule would have been.[124] The High

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[118] *See* Australian Capital Television Pty Ltd. v. Commonwealth (1992) 177 CLR 106.

[119] *See* Theophanous v. Herald & Weekly Times Ltd. (1994) 182 CLR 104.

[120] 376 U.S. 254 (1964).

[121] *See* Lange v. Australian Broad. Corp. (1997) 189 CLR 520. The article that first brought home to me the importance of this alternative was Adrienne Stone, *Freedom of Political Communication, The Constitution and the Common Law*, 26 FED. L. REV. 219 (1998).

[122] *See* Patrick Keyzer, Pfeiffer, Lange, *The Common Law of the Constitution and the Constitutional Right to Natural Justice*, 20 AUSTRALIAN BAR REVIEW 87 (2000).

[123] High Court interpretations of the common law can be superseded by state statutes. See Western Australia v. Commonwealth (Native Title Act Case) (1995) 183 CLR 373. The *Lange* decision acknowledged that if state legislation adopted a less speech-protective privilege than the one recognized as a matter of common law in *Lange*, the court would then have to decide whether the *Lange* rule was constitutionally mandated. See *Lange*, 189 CLR at 575.

[124] *See* Adrienne Stone, *Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication*, 25 MELB. U. L. REV. 374, 412 (2001).

Court left the exact contours of the expanded privilege to be worked out by the states, retaining, of course, the power to reject, accept, or modify their work.[125] Moreover, the High Court retained the power to reinstate a constitutional rule should the common law approach prove "intractably inconsistent" with the constitutional norm.[126]

The Supreme Court does not enjoy that flexibility. Whatever it does, it does as a matter of constitutional law. Possibly this need not be so. The Court may have the power to create federal common law to protect freedom of speech. Professor Field has argued that the Court has power to create a federal common law rule whenever it interprets any federal constitutional provision or statute as authorizing it to do so.[127] If such an implicit authorization is to be found in any constitutional provision, the First Amendment would seem to be a good candidate. Professor Monaghan has argued for "[r]ecognition of a congressionally reversible, constitutionally based common law implementing the guarantees of individual liberty,"[128] of which the First Amendment surely would be a prime example. The Court does occasionally create federal common law, sometimes when the justification for doing so seems far less compelling than that of protecting speech.[129] And it has asserted that it has authority to do so when "the interstate or international nature of the controversy makes it inappropriate for state law to control,"[130] a rationale that would seem highly applicable to at least some speech-tort conflicts.[131]

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[125] *See Lange*, 189 CLR at 575.

[126] *See id.* at 566.

[127] Martha A. Field, *Sources of Law: The Scope of the Federal Common Law*, 99 HARV. L. REV. 881, 887-88 (1986).

[128] Monaghan, *supra* note 4, at 44 (1975).

[129] Boyle v. United Tech. Corp., 487 U.S. 500, 518 (1988). *See* Monaghan, *supra* note 4, at 18 (arguing that reasons for creating uniform federal common law to protect civil liberties are "at least as weighty as considerations of governmental convenience which have justified a uniform federal law in other contexts").

[130] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

[131] This rationale, for example, might be applicable to questions about jurisdiction and choice of law in Internet defamation cases. *See, e.g.*, Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002); Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002). The most famous Internet defamation case to date, *Dow Jones & Co. v. Gutnick* (2000) 210 CLR 574, involved the assertion of jurisdiction by an Australian court. Preemption of state law by a federal common law rule could not address that international issue, but it could address the matter of assertion by U.S. states of jurisdiction over foreign defendants, and a consistent rule within the U.S. might at last be a start toward an international resolution.

But the Court has never created federal common law to protect speech, at least not explicitly.[132] Almost two hundred years ago the Court renounced the kind of general common law power that the Australian High Court exercises.[133] The determination to leave common law questions to the state courts is so strong that the Court will not review such questions even when they are raised in cases in which the Court has undoubted jurisdiction by virtue of other issues that are properly federal.[134] The Court's declaration in *Erie* that "there is no federal general common law"[135] has thus far been assumed to apply to the law of defamation and other speech torts. The Court has no general supervisory power over state courts, as it has over federal courts.[136] Thus, when a tort judgment threatens free speech values, the only way to invoke the Supreme Court's jurisdiction is to claim a First Amendment violation, and the only response available to the Court is a constitutional one. Its solutions to speech-tort conflicts become rules of constitutional law, not tort law. The decisions may require state courts to modify,[137] or even abandon,[138] parts of their tort law, but Supreme Court decisions are not themselves tort law.

Constitutional responses to unconstitutional tort judgments can take several forms. These can be located metaphorically along the spectrum of judicial mimimalism to judicial maximilism suggested by Professor Sunstein.[139] In the tort context, the minimal response is a simple declaration of unconstitutionality. The Court did something close to this, though not very forthrightly, in one tort case, *NAACP v. Claiborne Hardware*.[140] The opinion in that case amounts to

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[132] Professor Monaghan argued some of the Court's constitutional interpretations would be better understood as subconstitutional principles of common law even though the Court did not recognize them as such. Monaghan, *supra* note 4, at 2-3.

[133] U.S. v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 32-33 (1812).

[134] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874).

[135] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[136] *See* Smith v. Phillips, 455 U.S. 209, 221 (1982).

[137] *See, e.g.*, Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777-78 (1986) (requiring states to reverse the burden of proof as to truth or falsity in libel cases about matters of public concern).

[138] *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975) (forbidding states from imposing liability for disclosure of private facts that come from public judicial records).

[139] Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 6, 15 (1996).

[140] NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

little more than a declaration that the judgment in question is unconstitutional, without further attempt to say how the tort of interference with patronage would have to be modified to make it constitutional. This is what the Court normally does when it holds a statute unconstitutional. It does not rewrite the statute to make it constitutional.[141] The Court's identification of the constitutional infirmity may make the solution obvious, but the Court still leaves it to the legislature to make the correction.[142] The legislature is presumed to be better equipped than the Court to decide whether the constitutional objection makes it impossible (or impractical) to achieve the legislature's objectives, whether the limitation alters the balance of costs and benefits enough to require broader modifications of the statutory scheme, or whether some entirely different approach to the problem (e.g., a carrot rather than a stick) may be preferable in light of the constitutional problem.[143]

In some situations the Court might want to make clear that the problem lies not merely with the result reached in the particular case, but is endemic in some aspect of the state's tort scheme. In such a case, the Court would not merely hold the judgment unconstitutional, but would identify the aspects of the liability scheme that make it unconstitutional, as the Court did in *Florida Star*.[144] This response is located a bit farther along the continuum, but it still consists only of identifying the constitutional problem, not prescribing the solution. The Court does something analogous to this when it holds a statute unconstitutional on its face, making clear that the problem is

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[141] The Court can, and sometimes does, construe a federal statute narrowly to save it from unconstitutionality. *See, e.g.*, United States v. Del. & Hudson Co., 213 U.S. 366 (1909). Even as to federal statutes, the space for saving constructions is severely limited in First Amendment cases by the principle that the statute as narrowed must not be vague. *See* Aptheker v. Sec'y of State, 378 U.S. 500, 515-17 (1964). This power is limited as to state statutes, however, by the principle that the state court's interpretation of the statute is conclusive. *See* Smiley v. Kansas, 196 U.S. 447, 455 (1905).

[142] State courts may also have a role in correcting the infirmity. Because they, unlike the Court, have the power to authoritatively construe state statutes, the Court may invite them to make saving constructions that the Court itself could not make. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 397 (1967) (holding that a state statute would be unconstitutional unless given the narrowing construction specified by the Court, but leaving it for the state courts to decide whether to adopt that construction).

[143] *See, e.g.*, Marchetti v. United States, 390 U.S. 39, 58-60 (1968) (refusing to engage in a saving construction of a statute because it could not be sure Congress would think the statute worthwhile with the proposed modification).

[144] Fla. Star v. B.J.F., 491 U.S. 524 (1989).

larger than the result in the particular case.[145] In the statutory context, however, the Court recognizes that this is strong medicine, not to be prescribed as the routine remedy, even for abridgements of speech.[146] In the tort context, broad-spectrum remedies are the norm.

Farther along the spectrum is the response that not only holds the judgment (and possibly also specified portions of the state's tort law) unconstitutional, but also provides a test, or more accurately a method of analysis, that the Court has used to decide the constitutional question and presumably will use in deciding such questions in the future. *Florida Star*[147] is again an example of this approach. The Court identified the problematic aspects of the law on which the judgment was based, but it also announced a test: "[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may be lawfully imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . ."[148] The holding was simply "that no such interest is satisfactorily served by imposing liability . . . under the facts of this case."[149] Future litigants are free to propose their own solutions, but with the knowledge that they will not be acceptable unless they are "narrowly tailored to a state interest of the highest order." This is the only Supreme Court decision so far that adopts a test for tort liability rather than a prescription.[150]

It is possible, of course, to describe a prescription as a test. One could say, for example, that actual malice is "the test" by which the Court will decide whether a libel judgment is permissible. But when a "test" permits only one doctrinal response, it is what I call a prescription, and it is the kind of

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[145] *See, e.g.*, Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (holding statute unconstitutional because of its impact on a wide range of speech).

[146] *See, e.g.*, Virginia v. Hicks, 539 U.S. 113 (2003) (holding that state court should not have administered "strong medicine" of facial invalidity even though statute might be invalid as applied).

[147] 491 U.S. 524 (1989).

[148] *Id.* at 541.

[149] *Id.*

[150] If the decision in *Florida Star* is wrong, it is not because the approach is wrong. One might argue that the Court chose an inappropriate test, or applied it inappropriately to the case at hand. In fact, I think it did both; as indicated above, I think it is unrealistic to demand that tort remedies be "narrowly tailored," but even under that standard, I think the rather precise remedy Florida provided B.J.F. should have been accepted as sufficiently "narrowly tailored." But whatever one's position on those questions, *Florida Star* cannot be faulted for choosing to address the problem with a test rather than prescribe a solution.

response with which this Article is concerned. There is a difference between constitutional prescriptions and "tests" of constitutionality, although the distinction is not always easy to maintain. Prescriptions say, "These are the rules you must follow if your remedy is to be constitutionally permissible." Tests say, "These are the criteria by which your remedy will be judged; you choose the remedy and we will tell you whether it meets the test."

In tort cases, the Court usually does not choose any of these less ambitious responses; the standard response is at the maximilist end of the spectrum. When the Court holds a tort judgment in violation of the First Amendment, it usually prescribes the solution. Prescribed solutions can be simple or elaborate. An example of the former is the rule that states may not impose liability for disclosing privacy-invading information obtained from judicial records that are open to public inspection.[151] An example of the latter is the phalanx of constitutional rules limiting defamation. To recover for libel or slander, a public official must prove that the defendant acted with actual malice.[152] Elected officials,[153] candidates for public office,[154] and appointed officials who have or appear to the public to have substantial responsibility for or control over governmental affairs[155] must be treated as public officials. The same rules apply to public figures,[156] and anyone who is involved in the resolution of important public questions, or who by reason of his or her fame shapes events in areas of concern to society, is treated as a public figure.[157] To prove actual malice, the plaintiff must show that the defendant knew the defamatory statement was false, or had serious doubts about its truth.[158] That must be shown by clear and convincing proof,[159] and each reviewing court must subject a finding of actual malice to independent review instead of the normal clearly

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[151] Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

[152] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[153] Garrison v. Louisiana, 379 U.S. 64 (1964).

[154] Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).

[155] Rosenblatt v. Baer, 383 U.S. 75 (1966).

[156] Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967).

[157] Associated Press v. Walker, 388 U.S. 130 (1967) (decided together with *Curtis*), *cert. granted*, 389 U.S. 28 (1967) (granting certiorari, reversing, and remanding for proceedings not inconsistent with *Curtis*, 388 U.S. 130).

[158] St. Amant v. Thompson, 390 U.S. 727 (1968).

[159] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

erroneous standard.[160] Private persons who are not public figures but who are defamed in connection with matters of public concern must meet all the preceding requirements in order to recover presumed or punitive damages but may recover for actual injury by showing that the defendant was negligent.[161] All of the preceding types of plaintiffs must bear the burden of proving that the defamatory statement is false.[162] States may not permit recovery for rhetorical hyperbole,[163] statements that cannot be reasonably interpreted as stating actual facts about the plaintiff,[164] or deliberate misquotation that does not materially alter the meaning,[165] and those determinations are to be made as a matter of law rather than left to juries.[166] All of these are constitutional rules that displace common law rules that are wholly or partially inconsistent.

A less elaborate set of prescribed constitutional rules limits the tort of intentional infliction of emotional distress: Public officials and figures who sue for emotional distress intentionally inflicted by satire must show[167] a false statement of fact made with knowledge or reckless disregard of falsity.[168]

The claim that the Court usually prescribes its own solutions to speech-tort conflicts is only slightly hyperbolic. One might assume that these solutions are products of the normal litigation process and therefore are "prescribed" by the Court

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[160] Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984). Defendants are entitled to independent review when actual malice is found, but not when there is a finding of no actual malice. *See* Brown v. K.N.D. Corp., 529 A.2d 1292, 1294-95 (Conn. 1997) (holding that the "clearly erroneous" standard applies to a finding of actual malice).

[161] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[162] Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

[163] Greenbelt Coop. Pub. Ass'n v. Bressler, 398 U.S. 6, 14 (1970); *see also* Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 62-63 (1966).

[164] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 17 (1990); Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974).

[165] Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991).

[166] Milkovich v. Lorain Journal Co., 497 U.S. 1, 17 (1990) (stating that these are questions of law to be independently reviewed by appellate state courts).

[167] The assertion that plaintiffs "must show" something under these constitutional rules is not quite accurate. The Court rarely orders anyone to do anything, and it does not literally tell the states what to do in tort cases. Its edicts are conditional: "If you want to award damages to public officials for harm to reputation, you must require them to prove actual malice." The same thing sometimes happens with statutes, though less frequently: the Court may say, in effect, "If you want to accomplish the aims of this statute, you must do *x* or *y*." *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 78 (1964) (holding that a state cannot apply its criminal libel statute to defamation of a public official without proving knowledge or reckless disregard of falsity).

[168] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988).

only in the sense that the Court accepts them after they have been proposed by litigants and accepted or rejected by state courts. That is not always the case. Some of the solutions the Court has prescribed so far were neither proposed by the litigants nor considered by the state courts. They were devised by the Court itself without benefit of advocacy or consideration by state courts. For example, the Court adopted the rule that allows private persons to recover for actual injury by proving negligence rather than actual malice even though neither of the parties proposed it and the lower courts did not consider it.[169] The rule that actual malice must be shown by clear and convincing proof also was invented by the Court without having been proposed by the parties or considered by the courts below.[170] The actual malice test itself is in substance the Court's invention; *The New York Times* did propose a test bearing that name but it bears little resemblance to the test the Court prescribed.[171]

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[169] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-52 (1974). The issues addressed by the parties and the courts below involved the applicability of the actual malice test; no less onerous alternatives were proposed. In the Supreme Court, the plaintiff argued, under the rather confusing heading "Petitioner's Right of Privacy Has Been Wrongfully Destroyed by Respondent," that defamers of non-public figures should have to meet a probable-cause standard analogous to that required of the government in Fourth Amendment cases. *See* Brief for Petitioner at 34-35, *Gertz* (No. 72-617). The defendant responded to this with a one-paragraph assertion that editors would have to obtain a prior judicial determination of probable cause, which would amount to censorship. *See* Brief for Respondent at 19, *Gertz* (No. 72-617). That is as close as the parties came to advocating any element of the solution adopted by the Court.

[170] The Court introduced this requirement offhandedly in *Sullivan* by saying the proof presented in that case "lacks the convincing clarity which the constitutional standard demands." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964). Subsequent cases make clear, however, that this standard supplants the usual preponderance of evidence standard in cases in which actual malice must be shown. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-55 (1986) (holding that the convincing clarity standard must be applied even at the summary judgment stage under the Federal Rules of Civil Procedure).

[171] *The New York Times*' principal argument was that public officials should be absolutely barred from recovering for defamation arising from criticism of their official conduct. As an alternative, it proposed that the Court follow the lead of a number of commentators and lower courts that had advocated expanding the common law fair comment privilege to include false statements of fact about public officials if not made with actual malice. *See* Brief for Petitioner at 53-54, *Sullivan* (No. 39). Those authorities referred to the common law concept of actual malice, however, and that allowed actual malice to be shown by lack of good faith or lack of due care rather than the far more rigorous knowing-or-reckless-falsity standard that the Court adopted.

> The proof is made from an interpretation of the writing, its malignity, or intemperance by showing recklessness in making the charge, pernicious activity in circulating or repeating it, its falsity, the situation and relations of the parties, the facts and circumstances surrounding the publication, and by other evidence appropriate to a charge of bad motives as in other cases.

Tort cases are not the only ones in which the Court prescribes solutions to constitutional problems. When what is challenged is not a statute but a practice or procedure, the Court sometimes specifies how it must be changed to make it constitutional. The best known examples are in criminal law, where the Court has prescribed such measures as the *Miranda* warning[172] and the exclusionary rule[173] to guard against violations of defendants' Fifth and Fourth Amendment rights. Elsewhere in First Amendment law, the Court has prescribed procedures that must be followed in movie censorship[174] and in closing courtrooms.[175] And in school desegregation cases, the Court famously specified steps that schools had to take toward integration.[176] These are exceptional interventions, however; in speech torts, prescribed solutions are the norm.

It is not clear why the Court feels obliged, or even authorized, to prescribe solutions in tort cases. It could simply declare the tort judgment unconstitutional, leaving it to the state courts to decide how to modify their common law to eliminate the First Amendment objection.

One reason the practice has not generated much protest may have to do with the setting in which it originated. The Court first embarked on this course in *New York Times Co. v. Sullivan*.[177] That case came from Alabama in the early 1960s, and the political and judicial climate in that time and place

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Coleman v. MacLennan, 98 P. 281, 292 (Kan. 1908). *See also* Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 893 (1949) (arguing "only that the defendant should be protected where it appears that he acted in good faith and with due care"). *The New York Times* argued, rather disingenuously:

> This approach draws a line between expression uttered with the purpose of harming the official by an accusation known to be unfounded, and expression which is merely wrong in fact, with denigrating implications. It thus makes an essential element of liability an intent similar to that which elsewhere has been deemed necessary to sustain a curb on utterance . . . .

Brief for Petitioner at 53-54, *Sullivan* (No. 39) (citing Dennis v. United States, 341 U.S. 494 (1951)). Actual malice as used in the authorities cited by *The New York Times* was a concept far short of intent.

[172] *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966). If there was ever any doubt as to whether the *Miranda* warning was constitutionally prescribed, it was removed by *Dickerson v. U.S.*, 530 U.S. 428 (2000).

[173] *See* Mapp. v. Ohio, 367 U.S. 643, 657 (1961).

[174] *See* Freedman v. Maryland, 380 U.S. 51, 60-61 (1965) (requiring expedited procedures to determine whether movies can be banned on the ground of obscenity).

[175] *See* Press-Enterprise Co. v. Super. Ct. of Cal. for Riverside County, 464 U.S. 501, 510 (1984) (requiring trial judges to make "findings specific enough that a reviewing court can determine whether the closure order was properly entered").

[176] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28-29 (1971).

[177] 376 U.S. 254 (1964).

made it hard to argue that the Supreme Court should have merely declared the judgment unconstitutional and allowed the state courts to decide what to do about it.[178]

A second reason for the lack of protest may be that prescribing rules for tort cases does not seem as hostile to comity principles as rewriting a statute. The Court is not repudiating a legislative decision;[179] it is merely replacing one judge-made rule with another. Indeed, the Court has sometimes gone out of its way to suggest that it is only doing what common law courts have always done, or something very similar.[180] But having renounced common law power, doing what common law courts do should be a source of uneasiness, not a source of comfort. The Court is making rules of substantive law, and if it is a bad idea to do that as a matter of common law, we might expect some explanation as to why it is a good idea when done in the name of constitutional law. Of course it is the Court's unquestioned duty to say what the constitution forbids, and sometimes what it requires. But if there are important reasons why the Court should not impose its solutions on tort problems through the common law, one would not expect those reasons to simply disappear when the Court imposes the solutions as a matter of constitutional law.

The obvious answer is that when there are constitutional rights to be protected, the Court has powers that it otherwise does not. Indeed, when the constitutional right in question is freedom of speech, the Court's power may be especially expansive.[181] Many believe the Supreme Court has a

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[178] *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 89 (1991) (asserting that if the Court had not intervened aggressively in *Sullivan*, "there was the real risk that an Alabama jury would find whatever facts were necessary to justify the imposition of liability").

[179] One exception is *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), in which the Court held unconstitutional a statute assigning defendants the burden of proving truth in defamation cases. The statute merely codified the universal common law rule, however, so the Court's decision was less a repudiation of legislature than of the common law. In *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967), the Court held unconstitutional a judgment based on the New York privacy statute, but the Court declined to hold the statute unconstitutional in the expectation that "the New York courts will apply the statute consistently with the constitutional command." *Fla. Star, Inc. v. B.J.F.*, 491 U.S. 524 (1989), was a negligence per se action based on violation of a criminal statute, but the constitutionality of the statute itself was not at issue. The statute was later held unconstitutional by the state courts, however. State v. Globe Communications Corp., 648 So. 2d 110 (Fla. 1994).

[180] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

[181] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105-179 (1980) (arguing that the Constitution's central commitment is to political democracy and the Court therefore must be especially vigilant to protect

special responsibility to protect speech, one that requires more than a passive or reactive role.[182] Some argue that the importance of free speech requires the Court to not merely decide cases, but to use the opportunities that cases provide to articulate clear and expansive principles.[183] My colleague Lawrence Sager suggests that the Court may be thought of as a sort of quality control inspector, in charge of maintaining a vigorous system of free speech. If the Court merely held tort judgments unconstitutional, leaving courts free to react to those decisions as they see fit, speech might be freed from unconstitutional burdens too slowly, or perhaps never. Recalcitrant courts could respond to the Court's decision by modifying their tort law enough to present a different constitutional question but not enough to meet all the constitutional objections, and only a long series of Supreme Court decisions would finally remove the burden.

But these arguments do not explain the difference in treatment between statutes and tort judgments. The Supreme Court's special responsibility for speech applies no less to statutes than to tort law. Legislatures too could react grudgingly to Supreme Court decisions, replacing unconstitutional statutes with others slightly different but also unconstitutional.[184] Yet the Court does not treat that possibility as a justification for telling the legislature what it must do, at least not until the legislature demonstrates its mala fides. Moreover, if foot-dragging were a problem, prescribing detailed constitutional rules would not necessarily solve it. Courts determined to resist the Supreme Court's constitutional

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the types of speech on which democracy depends). The origins of this proposition are usually traced to United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that the Court's review may be more searching when applied to legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation").

[182] *See, e.g.*, Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1027 (arguing that in First Amendment cases, "A Supreme Court opinion should strive for more than a 'fair balancing' in the individual case before the Court. . . . [T]he risks of case-by-case adjudication may be too great and broader prophylactic rules may be appropriate.").

[183] *See, e.g.*, Harry Kalven, Jr., *The New York Times Case: A Note on 'The Central Meaning of the First Amendment'*, 1964 SUP. CT. REV. 191 (praising the Court for seizing the opportunity provided by that case to declare the unconstitutionality of seditious libel and to identify that as the central meaning of the First Amendment).

[184] For example, when the Court struck down Congress's attempt through the Communications Decency Act to protect minors from sexual depictions on the Internet, *see* Reno v. ACLU, 521 U.S. 844 (1997), Congress promptly passed the Child Online Protection Act, which aimed to accomplish the same thing and was also held unconstitutional, *see* ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003).

prescriptions can always apply those grudgingly too, delaying their implementation by forcing the Supreme Court to deal repeatedly with slight variations in application.

Despite having forsworn the power to make rules of tort law, the Court typically resolves speech-tort conflicts by prescribing tort-like constitutional rules that displace tort law. I turn now to the pros and cons of that approach.

B. The Merits of Detailed Prescriptions

1. Advantages

There are several reasons for preferring Supreme Court solutions to those the state courts would reach. One has to do with the role of juries. As mentioned above, the Court's decisions in tort cases have significantly reduced the jury's power.[185] The Court asserted in *New York Times Co. v. Sullivan* that the Seventh Amendment does not preclude it from reviewing factual determinations to make sure constitutional rules have been properly applied.[186] State courts engaged in revising state tort law do not have the benefit of that trump card. Their solutions have to satisfy state constitutions, almost all of which guarantee a right to jury trial in civil cases.[187] If the route to protecting speech from tort lies in restricting juries, the Supreme Court is better positioned to do that than the state courts.

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[185] *See supra* text accompanying notes 151-68. *See also* Susan M. Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO ST. L.J. 1753, 1806-08 (1998).

[186] 376 U.S. 254, 285 n.26 (1964). The Seventh Amendment might not be much of an obstacle anyway, because it does not apply to state courts, Eilenbecker v. Plymouth County District Court, 134 U.S. 31 (1890), Olesen v. Trust Co. of Chicago, 245 F.2d 522 (7th Cir. 1957), and because it is a weak guarantee even in federal courts, *see* Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977) (denying right of jury trial in federal proceeding).

[187] *See* 1 GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 57 (1977) (stating that all state constitutions guarantee a right of jury trial in criminal cases and that "[a]lmost without exception they guarantee the jury in civil cases as well"). The strength of these state guarantees varies widely. *Compare* Smith v. Printup, 866 P.2d 985 (Kan. 1993) (permitting legislature to take away jury's power to determine amount of punitive damages despite constitutional provision that right to jury trial shall remain inviolate), *with* Lakin v. Senco. Prods., Inc., 987 P.2d 463 (Or. 1999) (holding legislature's limit on noneconomic damages in violation of state constitutional right of jury trial). For a good example of the intricacies of complying with state jury trial guarantees, see William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"*, 69 TEXAS L. REV. 515 (1991).

Another reason for preferring the Court's solutions to those that the state courts would reach may be a belief that state courts will be less sensitive to speech interests. There was a period when that was surely true – when the Supreme Court was more dependably protective of speech than the state courts. It was in that period when the Court's practice of prescribing detailed solutions to tort conflicts developed. But it is not at all clear that the Court has been more protective historically or that it will continue to be so. The Court did not become a force in the protection of speech in any context until well into the twentieth century,[188] and did not become a force in the tort context until 1964.[189] Now state courts are sometimes more protective of speech than the Supreme Court.[190] Of course, there is and is likely to always be considerable variation in the states' commitment to free speech, and more specifically, their willingness to prefer speech interests over tort interests.

That implicates another reason for preferring Court-prescribed solutions: national uniformity. The Court has used the First Amendment to achieve a degree of national uniformity in tort-speech conflicts that would be impossible if the solution to the constitutional problems were left to the common law. Indeed, the resulting nationalization of remedies may be as important as the substantive rules themselves. Having to evaluate the liability schemes of fifty jurisdictions imposes a considerable burden on speech in itself, quite apart from the actual effects of those schemes. This is not an enormous burden today because the common law rules are generally similar from state to state, but even now the risk of speaking cannot be evaluated confidently without investigating the possibility that a state whose law might be relevant might

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[188] Most commentators identify the Espionage Act cases of the World War I era as the dawn of First Amendment jurisprudence in the Supreme Court. *See, e.g.*, G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996). My colleague David Rabban has shown that those decisions had roots in the civil liberties movement that emerged in the generation preceding that war. *See* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

[189] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), was the first decision holding a tort judgment unconstitutional.

[190] *See, e.g.*, State v. Henry, 732 P.2d 9, 18 (Or. 1987) ("In this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or even universally considered 'obscene.'"); Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1054 (Colo. 2002) ("With respect to expressive freedoms, this court has recognized that the Colorado Constitution provides broader free speech protections than the Federal Constitution.") (citing numerous cases applying those broader protections).

employ a variant rule. If a larger share of the task of resolving speech-tort conflicts were left to the states, we could expect more state-to-state variation and consequently more difficulty in evaluating risk. Replacing common law tort rules with federal constitutional rules, whatever their substance, provides consistency, uniformity, and predictability, making it easier for interstate speakers to know what they can safely say. Today there is little speech that is not capable of crossing state lines, making this a matter of some importance, not only for the national media but for the entire system of freedom of expression.

Nonetheless, it would be a rather large step for the Court to hold that the First Amendment requires it to nationalize tort law in order to avoid the burdens on speech that arise from state-to-state variations.[191] One would expect the Court to reject that proposition,[192] at least until it is persuaded that media and other interstate speakers cannot solve that problem by the means by which others who covet national uniformity have overcome the disadvantages of federalism – namely, uniform acts or federal legislation.[193] If the Court is unwilling to wait for Congress or the states to enact those solutions, it could take the initiative itself by replacing state tort law with federal common law. [194]

Limiting juries, consolidating free speech jurisprudence in the Supreme Court, and achieving national uniformity have contributed greatly to the system of freedom of expression we have today. The Court has never advanced these as justifications for its intervention in tort law, however, and whether it can appropriately do so is at least debateable.[195] If

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[191] Acceptance of this rationale would seem all the more anomalous today in light of the Court's present disinclination to allow the commerce clause to be used as a shortcut to national uniformity. *See, e.g.*, U.S. v. Lopez, 514 U.S. 549 (1995) (rejecting government's argument that national interest in facilitating learning, preventing insurance losses due to violent crimes in schools, and protecting right to travel brought federal statute regulating firearms in school zones within commerce power); U.S. v. Morrison, 529 U.S. 598 (2000) (holding that congressional findings as to effects of gender-motivated violence on national productivity were insufficient to bring federal Violence Against Women Act within commerce power).

[192] *Cf.* Atherton v. FDIC, 519 US. 213, 219-20 (1997) (holding that general need for uniformity is not sufficient in itself to justify creation of federal common law).

[193] "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress." Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966).

[194] *See supra* text accompanying notes 127-31.

[195] Learning that their descendants believe free speech can only be protected by restricting the jury would certainly come as a surprise to John Peter Zenger and

some or all of these are the grounds for aggressive intervention in tort law, the Court should identify and articulate them and make the argument that these benefits outweigh the advantages of preserving the usual division of responsibility between the Court and the states.

2. Disadvantages

The arguments against the Court's practice of prescribing solutions when it concludes that tort judgments violate the First Amendment are both theoretical and prudential. At the theoretical level the practice raises questions relating to federalism and judicial power. Strictly speaking, the only question before the Court when a tort judgment allegedly violates the First Amendment is whether the state has done something that abridges the freedom of speech. Of course the Court can do more than answer "yes" or "no." No one doubts that the Court has the power to explain what the offending provision is and why it is unconstitutional. But questions arise when the Court moves beyond that toward a more prescriptive role.

a. The Court's Power

One might argue that the Court lacks power to prescribe solutions to tort-First Amendment problems. Such prescriptions look a lot like those species of rules that are called subconstitutional,[196] or quasi-constitutional,[197] or prophylactic,[198] or deterrent remedies,[199] or safe harbor rules,[200]

Andrew Hamilton, who won their fame as free speech heroes by expanding the jury's role in libel cases. *See* ALEXANDER, *supra* note 43, at 22-26.

[196] *See* Monaghan, *supra* note 4, at 35, 44-45.

[197] *See* John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1030 (1974).

[198] *See* New York v. Quarles, 467 U.S. 649, 653 (1984) (describing as prophylactic the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), which requires police to warn detainees of their right to remain silent); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U. L. Rev. 100, 105 (1985) (defining a prophylactic rule as one "that functions as a preventive safeguard to insure that constitutional violations will not occur," and which therefore may be invoked even if there may have been no violation of constitutional rights in the case under review).

[199] Like prophylactic rules, these are created for the purpose of deterring future violations of constitutional rights, but Professor Grano distinguishes them from prophylactic rules on the ground that they only apply in cases of litigants whose constitutional right has actually been violated. *Id.* at 103-04.

or constitutional incidental rights,[201] or constitutional common law[202] – judge-made rules not found in the Constitution itself but thought necessary to enforce explicit constitutional provisions.[203] The best known and most criticized of the species is the *Miranda* rule, requiring police to inform suspects of their right to counsel and their right to remain silent.[204]

Some contend such rules are beyond the Court's powers.[205] Others argue that they are within the Court's power but, unlike "core" constitutional principles, can be modified by Congress or the states.[206] Others suggest they are a legitimate "substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions."[207] Still others argue that they are unexceptionable.[208]

One's view of the central or core purposes of the First Amendment tends to determine one's view of whether First Amendment limits on tort law are prophylactic rules.[209] Professor Monaghan, arguing that prophylactic rules are permissible only as a species of constitutional common law that

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[200] *See* Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001).

[201] *See id.*

[202] Monaghan, *supra* note 4, at 3.

[203] *See* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 202, 208 (1988).

[204] Miranda v. Arizona, 384 U.S. 436 (1966). In *Dickerson v. U.S.*, 530 U.S. 428 (2000), the Court attempted to fudge the lower court's characterization of *Miranda* as "prophylactic" by insisting that "*Miranda* is a constitutional decision." But of course that need not mean that it isn't also prophylactic. *See infra* note 226. For a good sample of the criticism of *Miranda*, see the series of articles published in connection with the symposium entitled Miranda *after* Dickerson*: The Future of Confession Law*, 99 MICH. L. REV. 879 (2001).

[205] Justice Scalia, dissenting in *Dickerson*, charged that the Court's imposition of "what it regards as useful 'prophylactic' restrictions upon Congress and the States . . . is an immense and frightening anti-democratic power, and it does not exist." 530 U.S. at 446 (Scalia, J., dissenting). *See also* Grano, *supra* note 198.

[206] *See* Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925 (1999).

[207] *See* Monaghan, *supra* note 4, at 2-3.

[208] *See* Strauss, *supra* note 203, at 190 (arguing that prophylactic rules are not exceptional but are a central and necessary feature of constitutional law); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 455-56 (1998) (arguing that prophylactic rules should be viewed as prototypes of constitutional jurisprudence, not exceptions).

[209] I use here the term prophylactic rules to refer to all of the types of rules described above. *See, e.g.*, Grano, supra note 198, at 105-06 & n.23 (arguing that the term should be confined to a subset of the rules the Court has described as prophylactic). For my purposes here the proposed distinctions are not important.

can be reversed by Congress, made an ambivalent attempt to distinguish defamation rules on the ground that they are "true constitutional rules" of the kind that has been conceded to be within the Court's power since *Marbury v. Madison*: "That defamation in connection with public officials is actionable only if knowingly or recklessly false impresses me as an 'interpretative' constitutional rule, if the central thrust of the [F]irst [A]mendment is taken to eradicate the law of seditious libel."[210] But of course preventing seditious libel is *not* the central thrust of the constitutional rules of defamation. If it ever was, it certainly ceased to be once those rules were expanded to protect defamation of nongovernmental public figures[211] and private plaintiffs.[212]

Whether one believes protecting falsehood is a core First Amendment purpose goes a long way toward determining whether these rules are prophylactic. In some areas – most notably symbolic speech[213] and artistic expression – the Court seems to have expanded First Amendment purposes well beyond truth-seeking.[214] With respect to speech torts, however, the Court has adamantly rejected the idea that First Amendment objectives extend beyond the protection of truth.

> [T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are 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."[215]

The centrality of the truth-falsity dichotomy in the Court's approach to speech-tort problems is obvious in its response to the risk that liability for intentional infliction of emotional distress might suppress political satire. Although truth or falsity bears no necessary relation to the existence or severity of injury or to the value of the satire, the Court firmly anchored

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[210] Monaghan, *supra* note 4, at 33.

[211] Associated Press v. Walker, 388 U.S. 130 (1967) (decided together with *Curtis*), *cert. granted*, 389 U.S. 28 (1967) (granting certiorari, reversing, and remanding for proceedings not inconsistent with *Curtis*, 388 U.S. 130).

[212] Gertz v. Robert Welch, Inc., 418 U.S. 323, 351-52 (1974).

[213] Cohen v. California, 403 U.S. 15 (1971).

[214] *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (holding that nude dancing is "within the outer ambit of the First Amendment's protection").

[215] *Gertz*, 418 U.S. at 340 (citations omitted).

its response to that dichotomy: Satire that inflicts emotional distress is unprotected if it contains demonstrably false statements of fact that could be reasonably misunderstood as truth.[216]

Under this view of First Amendment purposes, all but one of the constitutional limitations on defamation and intentional infliction of emotional distress are clearly prophylactic. Truthful speech is protected by the rule that a plaintiff must prove the falsity of the defamatory statement;[217] all the other rules therefore protect false speech – i.e., speech that has no First Amendment value – in the belief that it is necessary to do so in order to avoid chilling truthful speech that does have First Amendment value.[218] Just as *Miranda* excludes some confessions that have not been coerced, and whose use therefore would not violate the actual prohibition of the Fifth Amendment, so the defamation rules preclude liability in some cases in which the speech is false and therefore is not entitled to the actual protection of the First Amendment.

Of course one might take a broader view of the First Amendment's purposes. If its goal is to encourage everyone to speak freely – for purposes such as venting steam and achieving fulfilment through self-expression, as well as (or in lieu of) pursuing truth – then protecting falsehoods is not merely a means to an end. Professor Emerson[219] and Professor Baker,[220] among others, have made eloquent arguments for the recognition of such purposes. Justice Scalia must have had such a view in mind when he argued that the Court's rules for defamation are not prophylactic. He said they are "a measure of strategic protection" rather than prophylactic rules "because the Court has viewed the importation of 'chill' as *itself* a violation of the First Amendment – not because the Court thought it could go beyond what the First Amendment *demanded* in order to provide some prophylaxis."[221] But of course if the purpose of the First Amendment is to protect

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[216] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

[217] *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

[218] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

[219] *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970).

[220] *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-54 (1989).

[221] Dickerson v. United States, 530 U.S. 428, 459 (2000) (Scalia, J., dissenting) (emphasis in original).

truthful speech, then protecting some falsehoods to prevent chilling truth is *not* the end in itself and is indeed prophylactic. Justice Scalia's argument makes sense only if the chill to be avoided is something broader than the risk of deterring truthful speech – for example, the danger of deterring people from speaking freely *falsely*.

There is much to be said for the argument that truth is not the exclusive goal of the First Amendment. In connection with speech torts, however, the Court does not appear to have embraced broader goals. That argument therefore cannot exempt the rules the Court has prescribed for these torts from the controversy that surrounds prophylactic rules. Given the vigor of that debate in other contexts, it seems remarkable that so little attention has been paid to the legitimacy of prophylactic rules in limiting tort law.

For reasons that will become apparent, I think prophylactic rules are at least as troublesome here as in other contexts. But I am not interested in arguing that what the Court has done so far in prescribing constitutional rules to limit tort law exceeds its power. For one thing, the Court has recently reasserted its power, not only to make what it concedes is a prophylactic rule, but also to prevent Congress from repealing it.[222] This is an emphatic rejection not only of the proposition that prophylactic rules are illegitimate, but also of the view that such rules are within the Court's power only if the Court recognizes the legislature's power to reject them.[223] Since the rule in question in that case was the most controversial of all the Court's prophylactic rules, attempting to persuade the Court to change its mind in a context that has generated much less criticism strikes me as a quixotic undertaking.

Secondly, the Court might worry that the lack-of-power argument threatens too much settled law.[224] Many of the principles of First Amendment jurisprudence that control areas other than torts look very much like prophylactic rules, too.[225] My argument is that prophylactic rules are especially

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[222] *See id.* at 444 (holding unconstitutional Congress's attempt to overrule *Miranda*).

[223] *See* Landsberg, *supra* note 206, at 974-75.

[224] *Cf.* Klein, *supra* note 200, at 1037 ("Constitutional criminal procedure is rife with prophylactic rules . . . .").

[225] "[T]he most significant aspects of first amendment law can be seen as judge-made prophylactic rules that exceed the requirements of the 'real' first amendment." Strauss, *supra* note 203, at 198.

troublesome in tort law, but the argument that the Court lacks power to make such rules would be hard to confine to that sphere.

Finally, I do not want to rest my case on something as easily contestable as the distinction between "real" or "core" constitutional principles on the one hand, and prophylactic rules on the other.[226] We have seen how easily a rule can move from the subconstitutional to the "core" category depending on the definition of the "core" First Amendment concept.[227] A rule can be moved in the other direction too. For example, if the First Amendment precludes content-based discrimination on the ground that the government simply has no business concerning itself with the content of people's speech, the presumption against content-based regulation would be a core principle rather than a prophylactic rule. But if one regards the core First Amendment purpose as being to prevent discrimination against disfavored messages, the presumption against content-discrimination becomes just a prophylactic shield against the "core" evil, viewpoint discrimination.[228]

In any event, since the Court is the ultimate arbiter of its power, the success of the lack-of-power argument depends on persuading the Court to stop what it has been doing. I think prudential considerations are powerful enough to persuade the Court to refrain from prescribing detailed solutions to tort-speech conflicts even if it believes it has the power to do so.[229]

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[226] *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 259-60 (3d ed. 2000). Perhaps the ultimate proof of the manipulability of that distinction is the majority's opinion in *Dickerson*, 530 U.S. 428 (2000). Justice Scalia points out in his dissent that the majority in *Dickerson*, although unwilling to claim that the *Miranda* warning is actually required by the constitution itself, argues that it is not a prophylactic rule because it is "constitutionally based." *Dickerson*, 530 U.S. at 446 (Scalia, J., dissenting). The majority's evasions are especially perplexing because the question before the Court was "whether Congress has constitutional authority to . . . supersede *Miranda*," *id.* at 437 – a question quite different from whether *Miranda* is prophylactic. *See* Monaghan, *supra* note 4, at 2-3; Landsberg, *supra* note 206, at 974.

[227] *See supra* text accompanying notes 209-12.

[228] *See* Strauss, *supra* note 203, at 198-99; *see also* Dorf & Sabel, *supra* note 208, at 456.

[229] The power and prudence arguments are not entirely distinct, of course; the existence of strong prudential arguments against exercise of the power might convince the Court that it could not have been intended, or should not be deemed, to have the power.

b. Prudential Arguments

One of the objections to prescriptions, perhaps the central one, is that they cut all other actors out of the process of deciding how to protect constitutional values. Prescribed solutions – at least those that specify what the Constitution requires rather than what it forbids – tend to be self-executing. The Court speaks directly: to police, prosecutors, and defense attorneys, or, in tort, to future litigants. To the extent that these actors accept the prescriptions as conclusive and self-sufficient, there is no need for the mediating role of the legislature or the law-making processes of courts; the Court becomes the only relevant law-maker. That of course is precisely why the Court has found prescribed solutions attractive in situations like *Miranda* and *Sullivan*, where the Court lacked faith in (or patience with) the usual processes of law.

But bypassing those processes precludes the experimentation, flexibility, and adaptability that are thought to be the virtues, not only of federalism but also of the common law. In other fields, those virtues currently command newfound respect from the Court. Solicitude for federalism, at least as against congressional incursions on state sovereignty, is very much in vogue.[230] Activism on behalf of constitutional rights, though still apparent occasionally,[231] is generally in disfavor. For example, the Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one," even for constitutional violations.[232] Justice Scalia says implied constitutional torts are "a relic of the heady days in which this Court assumed common-law powers to create [implied] causes of action . . ."[233] and are even more objectionable than causes of action implied from statutes "since an 'implication' imagined in the Constitution can presumably

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[230] My colleague Louise Weinberg has conveniently collected the major decisions that exemplify this solicitude in her article, *This Activist Court*, 1 GEO. J.L. & PUB. POL'Y 111, 111 n.3 (2002). For commentary on the phenomenon, see, for example, Michael C. Dorf, *No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court*, 31 RUTGERS L.J. 741 (2000); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001).

[231] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (holding that statute criminalizing same-sex sodomy violates liberty right protected by due process).

[232] Correctional Services Corp. v. Malesko, 534 U.S. 61, 67 n.3 (2001).

[233] *Id.* at 75 (Scalia, J., concurring).

not even be repudiated by Congress."[234] The issues are different, of course, but if it is wrong for the Court to imply tort remedies for constitutional violations, we might at least expect the Court to explain why it is right for it to prescribe solutions for constitutional violations arising from tort law.

If federalism and the common law are valuable for the pluralism they bring to bear on such matters as enforcement of contracts and ownership of property, it is hard to see why we should applaud their abandonment in the resolution of speech-tort conflicts. Such conflicts implicate values of the highest order: freedom of speech and freedom of the press on one side, and on the other, reputation, honor, privacy, civility, personal integrity, and physical safety. These are values that may be weighed differently in various times, places, and circumstances,[235] as is obvious from the fact that virtually all of the rest of the world weighs these values differently than we do in the United States.[236]

Whatever the merits of prophylactic rules in other contexts, excluding the common law courts from the process of resolving speech-tort conflicts is especially questionable for several reasons. One is that the peculiarities of the state action concept in tort cases ought to counsel caution on the part of the Supreme Court. Another is that there is unlikely to be a single best solution to such conflicts. Yet another is that the Supreme Court is not particularly well-equipped to choose the solution. These difficulties derive from the nature of the constitutional issue in a tort case. Freedom of expression is a system – not just of specific rules, but of premises, procedures,

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[234] *Id.*

[235] *See* MICHAEL CHESTERMAN, FREEDOM OF SPEECH IN AUSTRALIAN LAW: A DELICATE PLANT 168-91 (2000) (describing disparate values that influence responses to defamation in various legal systems).

[236] The highest courts of Canada, Australia, New Zealand, and the United Kingdom have all rejected the U.S. Supreme Court's approach to defamation. *See* Hill v. Church of Scientology of Toronto, 126 DLR 4th 129 (Supreme Court of Canada 1995); Lange v. Australian Broadcasting Co., (1997) 189 CLR 520; Lange v. Atkinson, [2000] 3 N.Z.L.R. 385; Reynolds v. Times Newspapers, Ltd., [1999] 3 WLR 1010 (House of Lords). Article 10 § 2 of the European Convention on Human Rights rejects the idea that freedom of expression is to be preferred over other interests such as reputation and privacy. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10(2), 213 U.N.T.S. 222 (entered into force Sept. 3, 1953). *But see* Rajagopal v. State of Tamil Nadu, A.I.R. 1994 S.C. 264. In *Rajagopal*, the Indian Supreme Court followed U.S. precedents with respect to defamation of public officials, disclosure of private facts contained in public records, and prior restraints on publication. *See generally* Susanna Frederick Fischer, *Rethinking* Sullivan: *New Approaches in Australia, New Zealand, and England*, 34 GEO. WASH. INT'L L. REV. 101 (2002).

presumptions, conventions, and predilections.[237] The same is true of tort law. It is a system for the resolution of disputes arising from various kinds of wrongs. Each specific tort has a body of rules, but also a retinue of premises, procedures, presumptions, evidentiary tools, and allocations of power between judges and juries.[238]

As I have argued above,[239] treating the state's common law, or a tort judgment based on it, as state action puts the court reviewing the constitutionality of that state action in an unfamiliar dual role. It is both the voice of the state and the judge of the merits of the state's position. Keeping the constitutional and tort aspects of the solution separate does not eliminate this problem, but mixing them exacerbates it. State courts of necessity must decide both tort and constitutional questions, but the Supreme Court decides only constitutional questions. When the Court prescribes tort-like solutions under the rubric of constitutional law, it becomes the articulator and evaluator of both the free speech concerns and the competing tort interests. When it refrains from doing so, it preserves the state court's power to speak for the state's interests as expressed through the common law – within the limits set by the Court's constitutional judgment, of course. This does nothing to alleviate the dual-role problem while the state court is considering the constitutional questions, but a separation of roles at the remedial stage is still desirable.

The second reason for skepticism about Court-prescribed solutions has to do with the nature of the task. When a tort judgment is challenged on the ground that it violates the First Amendment, the challenge is rarely confined to a single specific rule of tort law. The common denominator of all these cases is the "chilling effect" – the risk that tort liability will suppress speech by deterring other speakers.[240] The argument is not that tort law has suppressed the speech of the litigant invoking the First Amendment;[241] claims for damages

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[237] *See* EMERSON, *supra* note 219.

[238] *See* DOBBS, *supra* note 41, at 10-24 (describing characteristics, methods, and processes of tort law).

[239] *See supra* text accompanying notes 64-75.

[240] Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 889 n.173 (listing twenty cases in which the Supreme Court has discussed the chilling effect in connection with defamation).

[241] Tort defendants could make nonconsequentialist arguments, for example, that it is unfair to punish them for engaging in protected speech without regard to the effect that punishment will have on future speech, but they almost never make these

are necessarily cases in which the tort law that is under attack *failed* to deter the speech. Nor is it necessary for the speaker to claim that its own future speech will be deterred, and typically they do not. The claim is that the tort law chills the speech of others. The validity of the argument depends upon the likelihood and consequences of liability. That requires an assessment of all the factors upon which liability is based and all the factors that will affect the consequences that flow from liability, including the likely amount of damages and the maximum possible damages. In other words, it requires a complete appraisal of the relevant tort law and the system that administers it.

To resolve a tort-speech conflict, a court must first determine how the law governing the tort in question – statutory as well as common law – affects speech. In tort law generally, and in speech torts specifically, the effects of any single rule may be exacerbated or ameliorated by its interplay with other rules. A few examples: (1) The law of negligence generally requires strict proof of causation – a finding that but for the defendant's negligent act, the injury would not have occurred.[242] But occasionally, when it is clear the defendant has been negligent and the nature of the negligence makes it impossible for the plaintiff to prove but-for causation, the law permits a plaintiff to proceed on some lesser showing of causation.[243] (2) The basic law of defamation requires no proof of the defendant's fault,[244] but it recognizes numerous common law privileges that prevent plaintiffs from prevailing unless they show some impropriety or abuse by the defendant to overcome

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arguments. A zealous textualist might say that is because the First Amendment only forbids "abridging" of speech. The only restrictions that literally "abridge" speech are prior restraints; after-the-fact consequences, such as criminal penalties, "abridge" only future speech. If the First Amendment forbade the "punishment" of speech, that language would make it easier to argue that it was a fairness rule, designed to prevent the injustice of penalizing one who provides the benefits of free speech. The term "abridge" may suggest a more instrumental purpose for the First Amendment, to guard against the prospective effects of restrictions on speech.

The explanation that seems more likely to me is that petitioners cast their arguments in terms of external consequences because they do not expect the Court to grant certiorari "merely" to prevent unfairness to a litigant.

[242] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 26 (Tentative Draft No. 2, 2002).

[243] Summers v. Tice, 199 P.2d 1 (Cal. 1948), Sindell v. Abbott Labs., 607 P.2d 924 (1980); Ybarra v. Spangard, 208 P.2d 445 (Cal. Dist. Ct. App. 1949).

[244] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

claims of privilege.[245] (3) In theory the law of libel requires no proof of actual injury,[246] but in practice it is difficult to recover without such proof.[247] In each of these instances, as in most tort cases, the outcome is a product of many variables, not all of which are independent.

This appraisal of the law's effects must include an appreciation of the interplay between common law and statutes. Speech torts are predominantly common law causes of action. Only in rare instances is one established by statute.[248] Statutes often play a role, however. In some states the common law rules have been codified;[249] in these states common law interpretations often continue to control, however, even to the extent of trumping statutory language.[250] Statutes sometimes enter the picture by analogy to negligence per se; the plaintiff alleges that the defendant's violation of a statute resolves as a matter of law one or more of the elements of the cause of action.[251] There are many statutory defenses, some of which abrogate the common law,[252] some of which supplement it,[253] some of which merely codify it,[254] and some of which seem to be eventually absorbed into the common law.[255]

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[245] The Restatement identifies ten absolute privileges and eight conditional privileges. *See* RESTATEMENT (SECOND) OF TORTS, Ch. 25 Defamation: Defenses (1977).

[246] *Gertz*, 418 U.S. at 346.

[247] Anderson, *supra* note 93, at 502-03.

[248] *See, e.g.*, Howell v. New York Post Co., 81 N.Y.2d 115, 612 N.E.2d 699, 596 N.Y.S.2d 350 (1993) (holding that the tort of invasion of privacy in New York is governed exclusively by sections 50 to 51 of the Civil Rights Law).

[249] The best known example is California. *See* CALIF. CIV. CODE §§ 44-48 (Deering 2003).

[250] *See, e.g.*, Dolenz v. Tex. State Bd. Of Med. Exam'rs, 981 S.W.2d 487, 489 & n.4 (Tex. App. 1998) (relying on Restatement definition of libel rather than statutory definition). *See also* Gugliuzza v. K.C.M.C., Inc., 606 So. 2d 790, 792 (La. 1992) (following common law rule that libel of the dead is not actionable despite state criminal statute defining libel to include defaming the memory of the deceased).

[251] *See e.g.*, Fla. Star Inc. v. B.J.F., 491 U.S. 524, 529 (1989) (citing state court's opinion, 499 So. 2d 883 (1986), in which the Florida District Court of Appeal held that the defendant's violation of a statute forbidding publication of rape victims' names established as a matter of law all elements of the plaintiff's claim except causation and damages).

[252] *See, e.g.*, 47 U.S.C. § 230 (2000) (modifying the common law to grant Internet service providers complete immunity from liability for republishing defamation). *See* Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997).

[253] *See, e.g.*, CAL. CIV. CODE § 47(e) (Deering 2003) (extending the privilege to report official proceedings to nonofficial public meetings).

[254] *See, e.g.*, Renfro Drug Co. v. Lawson, 144 S.W.2d 417, 419 (Tex. Civ. App. 1940) (holding that Texas statute defining libel merely codifies common law).

[255] For example, the privilege in defamation law to make a fair and accurate report of official proceedings is statutory in most states, *see, e.g.*, OHIO REV. CODE ANN. § 2317.05 (Anderson 2003), but is now recognized as a matter of common law in other

It is no simple matter to determine how the law of any particular tort affects speech.[256] It is not enough to evaluate all of the relevant statutory and common law. Assessing the likelihood that speech will be chilled requires evaluating not only the aggregate influence of the system of law, but also the net effects of all the forces that influence speakers, nonlegal as well as legal.[257] These include not only pressures to self-censor, but also incentives to speak, such as professional norms (which seem to provide strong incentives to take risks at the higher levels of journalism) and market forces (which seem to provide incentives, perhaps even stronger, at the lower levels).[258] As the Court has recognized in other contexts, speech may sometimes be hardy and not easily chilled.[259] Because it is never possible to identify and quantify all the variables that militate for or against publication, chilling effects are necessarily speculative.[260]

Those difficulties arise from the first and easiest step in solving a tort-speech conflict. The second step, devising an appropriate solution, is even more difficult because it involves prediction as well as evaluation. It requires a court to predict how a proposed solution will *change* the law's effect on speech. As Professor Fallon observed in deciding how much defamation to protect:

> [T]he Court's task [is] not only to balance, in an abstract way, the First Amendment interest in promoting the free flow of critical comment against the states' interest in protecting reputation. The Court also [has] to make more concrete, empirical, and predictive assessments about the relative proclivity of the press to engage in self-censorship under alternative liability regimes; about the proportion of truthful and untruthful assertions that would be

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states, *see, e.g.*, Kernick v. Dardanell Press, 236 A.2d 191 (Pa. 1967) (holding statements made by public officials in their official capacity immune from damages for defamation unless malice is proven).

[256] As Professor Epstein said, "The key to understanding the law of libel is to view it as an integrated whole, in which the choice of one rule on one issue is heavily influenced by the rules adopted on another question." Epstein, *supra* note 4, at 786.

[257] Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978).

[258] David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975). For an empirical study of the effects of libel law on media in Great Britain, see ERIC BARENDT, ET AL., LIBEL AND THE MEDIA: THE CHILLING EFFECT (1997). The authors conclude that the chilling effect works quite differently on different sizes and types of media.

[259] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

[260] *See* Landsberg, *supra* note 206, at 971.

> chilled by such regimes; about the harms that would be done by false speech and the benefits of truthful speech that would be forgone under various imaginable rules; and about the practical competence of the courts to administer particular liability standards fairly.[261]

Such predictions depend on many factors: how future litigants interpret the change, whether the lower courts accept the change enthusiastically or reluctantly, the Court's own willingness to engage in ongoing supervision to assure compliance.[262] They also depend on external factors: broader changes in the law,[263] procedural changes,[264] and changes in jury predilections. They may be affected even more by nonlegal developments such as changes in the media, in the political climate, and in public enthusiasm for free speech.

Of course, all legal decisions, like most other important decisions in public life (and for that matter, private life), have to be made on the basis of imperfect information. No court or legislature ever has enough empirical evidence to *know* what is the best solution to a speech-tort conflict – but neither do they *know* whether punishment deters crime, tort law advances the general welfare, or free speech promotes democracy. Law makes most of its choices on the basis of sketchy information, accumulated wisdom, experience, and intuition.[265] The difficulty of determining how a change in tort law will affect speech is not a reason for avoiding decisions in tort-speech conflicts. But it is a reason for skepticism about resolving them with a single, rigid constitutional rule. Situations that admit of no single optimal solution, or at least not one that we may confidently

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[261] *See* Richard H. Fallon Jr., *Implementing the Constitution*, 111 HARV. L. REV. 54, 63 (1997).

[262] The Court vigorously supervised the application of its constitutional rules for defamation, deciding twenty-seven cases in the twenty-seven years after *New York Times Co. v. Sullivan*. *See* Anderson, *supra* note 93, at 487 n.2. By way of contrast, the Court has decided only two cases involving disclosure of private facts. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); Florida Star v. B.J.F., 491 U.S. 524 (1989).

[263] Examples of broad changes include tort reforms such as restrictions on joint and several liability and caps on punitive damages.

[264] One example is interlocutory appeals. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 51.014(6) (Vernon 2003) (giving news media right of interlocutory appeal from denial of summary judgment motions based on First Amendment). Another example is loser-pays attorney fees. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 42.004 (Vernon 2003) (awarding litigation costs, including attorneys' fees, against parties who reject settlement offers that turn out to be significantly more favorable to them than the eventual judgment).

[265] Professor Lidsky tells me I should add to this list, "sensational anecdotes."

identify, are precisely those in which the pluralism of federalism and the common law are most valuable.[266]

The third reason for doubting the wisdom of excluding common law courts from the resolution of speech-tort conflicts has to do with institutional competence. The Supreme Court's expertise and sensitivity in matters of free speech is unquestionable. If there is a specialized court for free speech anywhere in the world, the Supreme Court is it. It sees and decides every type of First Amendment case, from picketing[267] and symbolic speech[268] to pornography[269] and national security.[270] It is the engine that has driven the development of the remarkable system of freedom of expression in the United States. Even when changes in ideology and politics led to retrenchments in other areas, the Court has not reversed direction as to free speech.[271]

In matters of tort law, however, the Court is generally[272] less expert. It does see bits and pieces of tort law, in maritime cases[273] and cases based on specific federal statutes[274] or some

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[266] The countervailing consideration, of course, is that the uncertainties of the common law process are likely to increase the risk of self-censorship. As is often the case in law, the ultimate choice is between one evil and another.

[267] *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000) (upholding state restrictions on anti-abortion picketing).

[268] *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (recognizing constitutional right of high school students to wear black armbands in protest).

[269] *See, e.g.*, Ashcroft v. ACLU, 535 U.S. 564 (2002) (holding that statute's reliance on community standards to identify material harmful to minors does not by itself render statute unconstitutionally overbroad).

[270] *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (finding unconstitutional a federal injunction against newspapers prohibiting the publication of a classified government study); Snepp v. United States, 444 U.S. 507 (1980) (per curiam) (finding former CIA employee in breach of a fiduciary obligation when he published certain information without first submitting it to the CIA for review, as he had agreed).

[271] *See* Lucas A. Powe Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 676 (2003) (book review) (stating that under Chief Justice Rehnquist the Court's free speech jurisprudence "retained a largely Warren Court slant"). One can never be sure, of course, whether the latest decision against free speech, *see, e.g.*, U.S. v. American Library Ass'n, Inc., 539 U.S. 194 (2003), might signal a change of direction.

[272] Of course, the Court acquires expertise when it inserts itself deeply into an area of tort law, as it has done in constitutionalizing much of the law of defamation. But the question here is what tort expertise the Court brings to the task of resolving speech-tort conflicts, not what it can learn on the job.

[273] *See, e.g.*, Miles v. Apex Marine Corp., 498 U.S. 19 (1990); McDermott, Inc. v. AmClyde & River Don Castings, Ltd., 511 U.S. 202 (1994); Exxon Co. v. Sofec, Inc., 517 U.S. 830 (1996).

other federal claim,[275] but tort law is not part of its usual portfolio.[276] In matters of tort law the state courts in general are likely to have more information, wider experience, and sounder intuitions than the Supreme Court, because they deal regularly with all aspects of the entire tort system. Their view of its effects may not be first-hand, but it is closer to ground level than the Court's. It is true that most speech-tort cases involve specialized bodies of law, such as defamation or invasion of privacy, that differ substantially from the more general tort principles that govern most of the tort cases that state courts see.[277] These torts can be as novel and unfamiliar to state courts as they are to the Supreme Court. But familiarity with the entire tapestry of tort law is still useful, because despite their particularized aspects, these cases nevertheless are part of the larger tort tradition, share many of the fundamental assumptions of tort law, and use most of the same methods as the more familiar torts.[278]

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[274] *See, e.g.*, Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (2000); Jones Act, 46 U.S.C. § 688 (2000); Federal Tort Claims Act, Pub. L. No. 79-601, 60 Stat. 842 (codified as amended in scattered sections of 28 U.S.C.).

[275] Examples include claims that awards of punitive damages in tort cases are unconstitutional. *See* State Farm Mutual Auto. Ins. Co., v. Campbell, 538 U.S. 408 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

[276] I undertook to count the Court's tort decisions in the five-year period from 1998 through 2002, but abandoned the endeavor because of the difficulty of developing an objective definition of what counts as a tort case. A search for decisions using the word "tort," "maritime," admiralty," or "damages" turned up 190 hits but the vast majority of those are not tort cases by any standard. Some of them, however, could be classified as tort cases: for example, cases claiming that punitive damage awards are unconstitutional, invoking immunity under the Federal Tort Claims Act or the Eleventh Amendment, claiming that state tort actions are pre-empted by federal statutes or regulatory schemes, or invoking 42 U.S.C. § 1983 as a remedy for a wrong that might also be a tort. It is clear to me that the Court sees a fair number of cases in which tort issues are involved, but that the number of cases in which the Court actually interprets and applies tort principles is small.

[277] The only major subset of speech-tort cases that are likely to be brought on general tort theories such as negligence are those involving physical harms caused by speech.

[278] Another concern related to institutional competence has to do with political pressures. If one believes decisions ought to be based on independent judgments about how best to accommodate speech and tort interests, one has to worry that those judgments might be distorted by special interests. The interests that have the largest stake in these decisions are the media and entertainment industries. It is possible that the Supreme Court is better able than the state courts (particularly those that are elected) to resist the special pleading of those interests. But my impression is that both are generally sensitive to those interests, and the only generalization that seems safe to me is that judicial decisions by courts of either level are preferable to decisions by legislatures in this regard.

VI. PRESERVING A ROLE FOR STATE COURTS

A. *Leaving Solutions to the States*

In an ideal world, responsibility for reconciling tort liability with the demands of the First Amendment would be clearly divided. The Supreme Court would decide whether a tort judgment violates the First Amendment. Identifying the kinds of speech that require protection, and the degree of protection required, are at the heart of the Court's responsibility and competence. There is no reason for the Court to defer to anyone on these questions. Answering them is part of the enterprise of deciding what the First Amendment means.

Ideally the Court should *not* decide how tort law should be modified to achieve the right level of protection. That should be left to the state courts. It is a question to which there is unlikely to be a single right answer, and which therefore is likely to benefit from the experimentalism of the common law and federalism. It is a question that can only be answered on the basis of speculations, intuitions, predictions, and judgments about the effect that changes in law will have on potential tortfeasors and those they harm – matters that the state courts are probably better suited to evaluate than the Supreme Court.

As a practical matter, such a sharp division of responsibility would be difficult to achieve, but it is useful nevertheless to consider how such a regime would work. The state courts' solutions would be subject to Supreme Court review, of course; their modifications of tort law might or might not be sufficient to solve the constitutional infirmity. But by insisting that solutions originate in the state courts, the Court in deciding on their sufficiency would have the benefit of ideas that had been contested, evaluated, and articulated below. When the Court held a judgment unconstitutional, the case would go back to the state court for further proceedings to determine how the tort law should be modified, and on subsequent review the Court would at least have the benefit of those proceedings.

Realistically, of course, only a small fraction of the cases would come back to the Court for a second time. It might be clear from the Court's initial decision that there is no modification that could permit the plaintiff to win, in which case the plaintiff presumably would capitulate or the state court would render judgment against her if she did not. If the

initial decision left room for a modification that might permit the plaintiff to prevail, the defendant would have a substantial incentive to settle. If there was no settlement and the parties continued the contest, the state court would provide a solution, but the losing party might not seek Supreme Court review, and if she did the Court would be under no obligation to grant it. As in any other case, even if the Court thought the result unconstitutional, it might not believe the matter worthy of certiorari. Thus, by the time the Court reviewed the sufficiency of state solutions to the constitutional problem, it could have the benefit of many cases decided by many different courts. It would also have the benefit of experience: One would expect the parties and the state courts to adduce whatever evidence could be found – anecdotal or impressionistic if not empirical – as to how various solutions had worked.

Obviously, developing constitutionally permissible common law limitations on tort law under this rigid division of responsibilities would be slow and uneven. A long period of trial and error might be required before the acceptable parameters of liability emerged. However desirable it might be, complete compartmentalization of roles is for these reasons impractical. Nevertheless, there are a number of things the Court could and should do to make the ideal more approachable.

When the Court holds a tort judgment unconstitutional, it should attempt to identify as precisely as possible what it is about the judgment that impermissibly abridges speech. Asserting that the law on which the judgment is based will have a chilling effect provides little guidance; all tort law has chilling effects. It is just as unhelpful to provide a laundry list of criticisms without indicating which are crucial to the decision. For example, in *New York Times Co. v. Sullivan*, the Court identified eight different complaints about the common law of defamation.[279] If the Court believes the problem lies in

[279] 376 U.S. 254 (1964). The Court asserted that the common law of defamation (1) requires the defendant to prove truth, thereby subjecting the defendant to the risk of unprovability, *id.* at 279; (2) permits judgments far larger than criminal penalties would be without the safeguards of the criminal process, *id.* at 277-78; (3) allows damages to be awarded without proof that the plaintiff's suffered any pecuniary loss, *id.* at 267; (4) allows recovery for minor errors in statements that are substantially correct, *id.* at 286; (5) causes publishers, because of uncertainties about the outcome of litigation, to withhold information that in fact would be protected, *id.* at 279; (6) does not recognize a defense of good faith, *id.* at 267; (7) allows impersonal criticism of government to be transmuted into personal libel, *id.* at 291-92; and (8)

the cumulative effect of the named defects,[280] it should say so. If it believes that each of the defects is independently serious enough to make the judgment unconstitutional,[281] it should say that. In yet other cases, the Court may wish to rest its decision on one or more specific defects but at the same time identify other defects that might also be fatal; that apparently was the Court's objective in *Sullivan*.[282] Identifying the problem precisely is not the same thing as prescribing a solution; it merely gives the state courts some guidance as to where to look for possible solutions.

The Court should deal forthrightly with the possibility that different types of speech might require different levels of protection from tort liability. The Court has been reluctant to explicitly endorse variable levels of protection for the understandable reason that such distinctions can easily be expressions of personal preference.[283] But in fact, variable protection is found throughout First Amendment law. Commercial speech[284] and indecent speech[285] are familiar examples of genres of speech that receive some reduced level of protection. Even categories of speech that were once thought to receive no protection have morphed into various species of lesser-protected speech; obscenity,[286] defamation,[287] fighting

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gives public officials a privilege to defame citizens without a reciprocal privilege for citizen criticism of officials, *id.* at 282-83.

[280] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), may be an example of a cumulative-defects case. The Court noted that the tort of intentional infliction of emotional distress made no allowance for political satire, attached controlling weight to the speaker's bad motives, and allowed liability to be predicated on a jury's subjective determination of "outrageousness." The Court did not indicate whether these objections were fatal independently or only cumulatively.

[281] *See e.g.*, Fla. Star v. B.J.F., 491 U.S. 524, 537-41 (1989) (identifying "three independent reasons" why the judgment was unconstitutional).

[282] The Court did not adopt rules designed to deal with the issues of minor errors and difficulty of proving truth in *Sullivan*, but did so in later cases. *See* Time Inc. v. Pape, 401 U.S. 279 (1971); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

[283] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). In *R.A.V.*, the majority rejected Justice Stevens's suggestion that the Court should abandon its categorical approach to content-based restrictions in favor of "a more complex and subtle analysis, one that considers the content and context of the regulated speech and the nature and scope of the restriction on speech." *Id.* at 428.

[284] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

[285] FCC v. Pacifica Found., 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968).

[286] Freedman v. Maryland, 380 U.S. 51 (1965).

[287] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64 (1964).

words,[288] and advertising[289] now receive various levels of protection. It is too late to pretend that because "speech is speech" it must all be protected equally.

Even within the field of tort liability, we know that some distinctions between different types of speech are permissible. Speech about private persons requires less protection from the law of defamation than speech about public figures,[290] and speech that is not about matters of public concern probably requires less than speech that is.[291] Beyond that, the Court has given little guidance. It is unclear, for example, whether gossip about celebrities[292] or pornography[293] or commercial speech[294] requires the same protection from tort law as political speech. Whether movies,[295] video games,[296] and other forms of entertainment require the same level of protection as newscasts is a question of large importance in cases involving copycat crimes, suicides, and other physical harms alleged to have been caused by speech. Half a century ago, the Court announced rather grandly that entertainment is "as much entitled to the protection of free speech as the best of literature."[297] Since then it has distinguished commercial speech[298] and pornography[299] from other forms of protected speech.

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[288] *Compare R.A.V.*, 505 U.S. 377 (holding that state may not ban cross-burning done with intent of expressing racial hostility), *with* Virginia v. Black, 538 U.S. 343 (2003) (holding state may ban cross burning done with intent to intimidate).

[289] *Central Hudson Gas*, 447 U.S. 557; Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[290] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[291] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

[292] *See* Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1984).

[293] *Compare* Herceg v. Hustler Magazine, Inc. 814 F.2d 1017 (5th Cir. 1987) (majority opinion), *with id.* at 1025-30 (Jones, J. concurring and dissenting) (arguing that pornography should not receive the same level of First Amendment protection as other speech).

[294] *See, e.g.*, Proctor & Gamble Co. v. Amway Corp., 242 F.3d 539, 548 (5th Cir. 2001) (holding that defamation requires less First Amendment protection when it occurs in commercial speech).

[295] Byers v. Edmondson, 712 So. 2d 681 (La. App. 1998); Olivia N. v. Nat'l Broad. Co., 126 Cal. App. 3d 488 (1981).

[296] *See* James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002) (extensively reviewing the pros and cons of extending First Amendment protection to video games to protect their maker from liability for wrongful death); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002) (dismissing wrongful death claims on the ground that video games are protected by the First Amendment).

[297] Winters v. New York, 333 U.S. 507, 510 (1948).

[298] Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

Whether those choices, made in quite different contexts, should be the starting point for analysis of tort problems is not at all clear. For example, the Court has asserted that commercial speech requires less protection because it is less easily chilled.[300] If that is so, might not the same be true of entertainment, at least entertainment that causes death or serious physical injury? Or if it is not, might the social cost of chilling creativity in entertainment be different from the costs of chilling news? How important is the distinction between truthful speech and falsehood? So important that truthful speech may never be subjected to tort liability? Or are there some areas in which the truth of the harmful statement has little relevance? Truth is irrelevant in cases of extortion and solicitation, even though the consequence is serious criminal penalty. Should it also be irrelevant, or at least occupy something less than the central role that it plays in defamation, in torts such as interference with contract or invasion of privacy?[301]

If the Court were to decide that certain types of speech may be given less protection, it should try to explain why that is so. If entertainment requires less protection than political speech, is it because the former is less likely to be chilled, or because entertainment is a less important type of speech and the chill therefore less objectionable? If some types of truthful speech are not always protected, is it because those types of speech lack public importance, or because those are instances where the truth is the source of the harm?

Some clarity about these premises would be helpful even if the Court is to continue prescribing its own solutions, but it is especially important if solutions are to be left to the state courts. When the Court prescribes its own solutions, it can avoid answering these questions directly because its solutions will implicitly reflect the answers. But if responsibility is to be divided, that option is not available, and state courts will need to know as specifically as possible how much protection various types of speech must be given, and why.

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[299] FCC v. Pacifica Found., 438 U.S. 726 (1978), Ginsberg v. New York, 390 U.S. 629 (1968).

[300] *Va. Bd. of Pharmacy*, 425 U.S. at 771-72 & n.24.

[301] Even if truth does not preclude liability for torts like these, one can imagine that courts might conclude that false statements that invade privacy or interfere with contract might be entitled to less protection than truth.

Even if the Court took these steps to facilitate the shift of solution-devising authority to the state courts, practical difficulties would remain. Some of them have to do with judicial economy and efficiency. Dividing the responsibility would increase the amount of litigation required to develop the boundaries of constitutionally permissible tort liability. That would impose costs not only on courts, but also on litigants; they are likely to waste energy and money litigating over the constitutionality of possible solutions – litigation that is unnecessary when the Court prescribes the solution. Neither the decisions of the Supreme Court nor those of the state courts would be truly final; the former would remain subject to implementation by the states and the latter would remain subject to Supreme Court review. There might be confusion as to how much of a state court's solution was tort law and how much constitutional law – a risk that does not exist when everything is decided by the Supreme Court.

Serious as these difficulties are, it should be noted that they are not entirely different from the inefficiencies that result from the Court's practice with respect to unconstitutional statutes. There too, much litigation could be avoided if the Court would specify the solution by saying how the statute should be rewritten to make it constitutional. The Court's refusal to do this means that legislatures have to decide whether to take another stab at the matter, parties have to spend energy and money litigating the constitutionality of the new statute, and courts have to decide more cases to resolve matters that the Court could have resolved in its initial decision if it were willing to assume the responsibility of saying not only what is unconstitutional, but also what would be constitutional. If that price is worth paying to avoid trespassing on the legislature's turf, it is not clear why it is not worth paying to avoid invading the state courts' province.

The question is whether the benefits of leaving constitutionally required adjustments of tort law to state courts outweigh the practical difficulties of doing so. One's answer probably depends on one's level of satisfaction with the results produced by the present practice of Court-prescribed solutions. For example, one who thinks the Court's extensive modifications of the law of defamation are a success will probably see little reason to shift the job of prescribing solutions to state courts. On the other hand, if one thinks the constitutional law of defamation unnecessarily sacrifices

reputation, civility, or the integrity of public discourse, the prospect of a different approach may be attractive.

I hasten to add, however, that conclusions as to defamation should not necessarily be controlling with respect to other speech torts. As I have acknowledged, the Court is unlikely to retreat from its aggressive intervention in defamation. The real question is not whether that model of intervention should be continued in the field of defamation, but whether it should be extended to other areas. The Court has shown some uneasiness about exporting the model,[302] and rightfully so. Even if aggressive constitutional intervention is an appropriate response in defamation, it may not be appropriate in other speech torts. For example, media liability for physical harms caused by copy-cat crimes and how-to publications raises a number of issues – such as causation, foreseeability, and scope of liability – that tort law deals with constantly but that are rarely the focal point of constitutional adjudication.[303]

B. Palliatives

In principle it makes sense to leave to the state courts the job of modifying tort law to make it compatible with the First Amendment. That would require a rather dramatic break with forty years of Supreme Court practice, however. All who value the protection of free speech may well be uneasy about the prospect of exchanging a practice that we know protects speech fairly reliably for a new one whose reliability would not be known for years. If the thorough separation of functions described in the preceding section seems too risky, there are still a number of ways to encourage state courts to play a larger role.

Encouraging state courts to provide their own solutions to speech-tort conflicts is easier said than done. The truth is, state courts have shown little interest in forestalling Supreme Court intervention by resolving the problems through tort law.

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[302] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (concerning intentional infliction of emotional distress); Time, Inc. v. Hill, 385 U.S. 374 (1967) (concerning statutorily imposed liability for unconsented commercial use of name or picture of person).

[303] *See* David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957, 1008 (2002) (applauding fact that by not prescribing a constitutional straightjacket for physical harm cases, the Court has made it possible for tort law to continue working out solutions).

The Court's perceived hegemony in free speech matters seems to have a paralyzing effect on state courts. When the Court tells a legislature that its statute is unconstitutional, it throws down a gauntlet. If the legislature wants to achieve its objective, it has to look for another way to do so. Whatever political pressure induced the legislature to act in the first place may still be active, and there are institutional actors – staff and committees – whose job it is to consider how to respond. When the Court holds a common law result unconstitutional, the gauntlet is rarely picked up. Even when the Court implicitly invites alternative solutions, the state courts have not responded vigorously. Those courts have no power to respond sua sponte, of course, and for reasons that are by no means clear, the plaintiffs who lose in the Supreme Court do not seem to be inclined to propose alternatives.[304] State legislatures and perhaps Congress could also offer solutions, but they have shown even less interest in doing so. The Court's decisions, even when they do not actually preclude state solutions, often have preclusive effect.[305]

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[304] When the Court holds a tort judgment unconstitutional, it almost always remands "for further proceedings not inconsistent with this opinion." We might expect the plaintiff, who at that point has lost under the theory on which the judgment was based, to eagerly propose alternative theories that would be "not inconsistent" with the Court's decision. Rules relating to the amendment of pleadings, estoppel, and res judicata may preclude plaintiffs from advancing new theories at that stage, however. If there is no further report of the case, as often happens, it is hard to know what happened. The plaintiff may have been procedurally precluded from proceeding further, may have simply been exhausted (financially or otherwise), or may have been able to advance a sufficiently plausible alternative theory to induce the defendant to settle. Occasionally subsequent reports reveal that the plaintiff was able to succeed on an alternative theory. *See* Gertz v. Robert Welch, Inc., 680 F.2d 527 (7th Cir. 1982) (concerning libel plaintiff, who, despite Supreme Court decision holding that he could only recover for actual injury because he had not proved actual malice, on retrial proved actual malice and was allowed to recover presumed and punitive damages). In *Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394 (9th Cir. 1996), after losing in the Supreme Court, the plaintiff was able to proceed on an alternative theory but was ultimately unsuccessful.

The failure of subsequent plaintiffs to offer alternatives to the Court's solution may have to do with the realities of funding litigation. Contingent-fee lawyers may be reluctant to bring suits in which success depends on persuading the state courts to adopt a rule different from the one applied by the Supreme Court in a similar case. The safe course is to either take the case and try to win it under the existing Supreme Court precedent or, if that appears unlikely, turn it down. Of course, there are some clients wealthy enough to pay lawyers to take such gambles, and some contingent-fee lawyers daring enough or ignorant enough to do so, but the economics of tort litigation tend to work against the development of alternatives to the solutions the Supreme Court prescribes.

[305] This tendency can be seen in the context of the rule in *Miranda v. Arizona*, 384 U.S. 436 (1966). Before *Miranda* was decided, the American Law Institute was at work on a Model Code of Pre-Arraignment Procedure that would have addressed the

The following suggestions for enlarging the state courts' role in resolving speech-tort conflicts must be evaluated against this backdrop of passivity on the part of the state courts. All require changes in the Supreme Court's approach to such cases. Some of these comport with conventional ideas about good judicial practice and should be noncontroversial, whereas others are more contestable. [306]

1. Proceed Incrementally

The Court should, and usually does, invalidate a tort judgment on a narrow ground even when it believes there may also be broader grounds for objection. The Court has done this scrupulously with respect to the tort of invasion of privacy. Twice it has been asked to hold that states may not impose liability for truthful disclosures of privacy-invading information, and both times it has left that question open, holding the judgment unconstitutional on narrower grounds.[307] Proceeding incrementally at least gives states an opportunity to revise their tort law in ways that may make it constitutional by the time the Court has to face the broader question.[308] This will prove inefficient, of course, if the Court eventually determines that the tort cannot be made compatible with the First Amendment. When the Court is certain that is true, it

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problem of coerced confessions by allowing police to question a suspect for four hours without a lawyer, provided the session was tape recorded. *Miranda* had been argued, though not decided, by the time the ALI was scheduled to act, and the pendency of that decision persuaded the Institute not to vote. After the decision came down, the ALI abandoned its proposal and eventually adopted a provision that required the *Miranda* warning. *See* AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.8 (1975). The history of the interplay between the ALI and the Court on this issue is recounted in LUCAS A. POWE JR., THE WARREN COURT AND AMERICAN POLITICS 392-94 (2000).

[306] In a very general way, my suggestions are similar to those my colleague Susan Klein makes with respect to prophylactic rules in constitutional criminal procedure. She argues that the Court should refrain from creating such rules unless it clearly identifies the constitutional mandate and explains the necessity for them, should act only after it has given other governmental actors an opportunity to solve the problem, and should be frank about the nature of any rule it makes so other actors can know whether modification is permissible. *See* Klein, *supra* note 200, at 1031.

[307] Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); Fla. Star v. B.J.F., 491 U.S. 524 (1989).

[308] *See* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993) (holding that since the Supreme Court had declined to broadly restrict the tort law of invasion of privacy, the federal court applying state law should assume that the Court's decisions leave some room for such liability and should assume state courts would construe common law sufficiently narrowly to avoid constitutional infirmity).

should so hold.[309] But as long as redeeming the tort remains a realistic possibility, it is better to err on the side of inefficiency to avoid foreclosing constitutionally acceptable solutions.

2. Do Not Invent Solutions

As mentioned above,[310] the Court has sometimes invented solutions that were neither proposed by the litigants nor considered by the state courts. At the very least, the Court should abandon this practice and try to adhere to the judicial convention of choosing among the options presented by the litigants. The wisdom of not considering questions not decided by the courts below is widely accepted because of the obvious desirability of giving the Court the benefit of the advocacy and analysis of the parties and the lower courts. It is no less desirable to have their input in crafting solutions once the decision as to constitutionality is made.

A rather draconian way to enforce this convention would be to insist that the question of solutions be litigated in every case challenging the constitutionality of a tort judgment. The Court could do this by refusing to reverse tort judgments unless the petitioner offers a constitutionally acceptable solution (or persuades the Court that there is no constitutionally permissible alternative). That would force litigants to contest, and the state courts to address, ways of limiting tort law before the case reaches the Supreme Court.[311] But giving defendants the burden of proposing solutions would be impractical and probably unfair. Asking them to think of ways to protect the interests of prospective plaintiffs whose claims might be compatible with the First Amendment does not

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[309] For example, the Court might well determine at the outset that the First Amendment would never permit liability for physical harms resulting from fully protected speech to be imposed on nothing more rigorous than ordinary negligence principles.

[310] *See supra* text accompanying notes 169-71.

[311] The present practice may encourage defendants to claim the broadest possible immunity (e.g., that the First Amendment protects the speech in question no matter what the basis of liability), knowing that if the Court rejects that argument, but believes the judgment is unconstitutional, it is likely to adopt sua sponte some more limited solution that still protects the defendant. This would enable defendants to devote all their attention to showing the tort's impact on speech, leaving to the Court the task of reconciling that with the interests protected by the tort. If plaintiffs do not appreciate the likelihood that the Court will choose a solution sua sponte, they are likely to devote all their energy to opposing the defendant's broad theory, naively supposing that if they persuade the Court to reject the basis on which defendant attacks the judgment they will win the case.

fit comfortably in the adversary model of litigation. And such a requirement could sometimes require affirmance of unconstitutional burdens on speech: Defendants who failed to present an acceptable solution would lose, whatever the merits of their claims in other respects.

A more realistic alternative is to take seriously the opportunities that remand offers. Even when the Court thinks it knows the right solution, it should treat that as only a proposal, remanding the case with an invitation to the litigants and the state courts to react to the Court's proposal. If the Court believes its solution is the only acceptable one, it can make that clear without foreclosing the possibility that there are objections or alternatives that the Court has not considered. The Court's standard practice of remanding even when its decision leaves only one course open to the court below is a pro forma acknowledgement of this possibility; before prescribing a solution to a tort-speech conflict, the Court should treat the possibility as real. It should explicitly invite the consideration of alternatives on remand.

3. Prescribe Only Default Solutions

One way the Court can emphasize that its invitation to offer alternatives is real is to make clear that its prescription is only a default solution. As we have seen, the Court's solutions tend to preempt the field even when they do not explicitly or logically preclude other approaches.[312] If the Court wishes to encourage tort solutions more aggressively, it could specify that whatever First Amendment limitation it announces is required only if the state does not provide some other constitutionally satisfactory limitation as a matter of tort law.

This is really just a way of emphasizing that the Court's solution is not exclusive, of course, and there is plenty of room for skepticism as to whether it would succeed in stimulating state courts to act.[313] But it has the virtue of making the state

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[312] *See supra* text accompanying notes 304-05.

[313] The Court explicitly invited legislative alternatives to the *Miranda* rule: "Congress and the States are free to develop their own safeguards for the privilege (against self-incrimination), so long as they are fully as effective as those described above in informing accused persons of their right to silence and in affording a continuous opportunity to exercise it." Miranda v. Arizona, 384 U.S. 436, 490 (1966). None have materialized in nearly forty years, despite widespread complaints about the rule. *See* POWE, *supra* note 305, at 392-94. Congress did respond to *Miranda* by passing 18 U.S.C. § 3501, but that was simply an attempt to legislatively overrule *Miranda*, not an attempt to offer an alternative. *See* U.S. v. Dickerson, 530 U.S. 428, 431 (2000).

court aware of its opportunity to play a role in resolving speech-tort conflicts and of the limitation on its tort law that will result if it chooses not to do so. In addition to providing a rule of decision that controls unless and until the state court acts, the Court's default solution gives the state court an example indicating the degree of protection the Court believes is required.

Unlike a more general statement of openness to alternatives, a declaration that the Court is only prescribing a default solution makes the question of alternatives an explicit issue on remand. Once the Supreme Court holds a judgment unconstitutional, offers a default solution, and remands, the state court has to decide whether to accept the Supreme Court's solution or tackle the issue itself. Under conventional notions of the judicial role, the initial decision is the plaintiff's, not the court's, and this limits the court's ability to respond to the Supreme Court's invitation. The state court will consider alternative solutions only if the plaintiff proposes them, and the plaintiff will be likely to do so only if she can articulate one or more that she believes will allow her to prevail. Plaintiffs cannot be expected to expend much money and effort to advance solutions that might preserve possibilities of liability but only for other potential plaintiffs, and defendants have no incentive to propose such alternatives for the benefit of either current or future plaintiffs. That is an inherent weakness of the common law's reliance on the self-interest of litigants.

When state courts are acting on remand from the Supreme Court, however, in theory they need not be quite so constrained by the parties' choices as they are on the initial appeal. The case before them now includes the Court's invitation to explore alternatives. If the Supreme Court is the keeper of the Constitution, the state courts are the keepers of the common law. Their job is not merely to decide cases, but to do so in ways that serve the societal interests that the common law aims to protect. That is why their opinions aim to maintain the integrity and rationality of the common law, even against the wishes of the parties if that is necessary.[314] Devising solutions not proposed by the parties is not something state

[314] For example, no self-respecting state court would consider itself bound to embed a particular rule in the state's common law just because the parties agreed to do so; the court might accept the parties' agreement for purposes of resolving the case, but it would reserve for itself the right to decide whether the matter agreed upon is really the law.

courts do routinely, but their reluctance to do so may be weakened if the alternative is to accept a Supreme Court solution that also was not proposed by the parties.

The objective is not to replace one court's unlitigated inventions with another's, however. State courts should use the means at their disposal to secure the benefits of advocacy in deciding whether there are tort law alternatives that will satisfy First Amendment demands. These might include specifying issues the court wants the parties to brief and argue, permitting intervention by other parties, and inviting amicus briefs.

For simplicity's sake, I have argued as if the only choice is between First Amendment solutions by the Supreme Court and tort law solutions by state courts. At this point it should be obvious that the choice is not quite that stark. While the Supreme Court lacks power to promulgate tort solutions,[315] the state courts can offer their solutions either as constitutional law or as tort law. They have full power to interpret the federal Constitution, as long as they do so consistently with the Supreme Court's interpretations. Thus, when the Supreme Court invites state courts to offer alternatives, the latter could respond in either tort law or constitutional law. If the state court modifies the tort law so that it no longer violates the First Amendment, the constitutional issue simply disappears. There might be circumstances, however, in which either the Supreme Court or the state court believes that although alternative solutions are possible, all should have constitutional force.[316] Because of the preference for tort law that underlies this entire Article, I would lean toward a presumption that the Supreme Court is inviting tort alternatives and that the solutions offered by the state courts are tort solutions. But that should be left to further exploration by the courts and commentators. The choice implicates many of the competing considerations discussed above: the uniformity and stability of constitutional solutions on the one hand, and the flexibility and adaptability of tort law on the other. One can

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[315] *See supra* text accompanying notes 132-38

[316] The possibilities for more speech-protective state interpretations of the First Amendment are largely unexplored by the states, but there is a significant literature. *See, e.g.*, Lawrence Gene Sager, *State Courts and the Strategic Space Between Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985); Justice Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE WESTERN L. REV. 1 (1984); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

envision that a considerable jurisprudence might develop around the matter of deciding when a solution should be constitutionalized.

VII. CONCLUSION

This is not a propitious moment to advocate a larger role for tort law. The mood of the time is to shrink tort law, not expand it. And there is never a good time to argue for a judicially-implemented reform that is not likely to be embraced by litigants because it does not enhance either side's chances of winning. Abolishing all liability for harms caused by speech is probably a suggestion more congenial to the tastes of the moment; it is certainly one that would have an enthusiastic constituency among tort defendants. As I have suggested, that may even be the right response; it may be impossible to reconcile the loose culture of tort law with the tight demands of First Amendment law.[317] But if that is to be the outcome, it should be arrived at forthrightly, by conscious decisions to sacrifice values like reputation and privacy in the interest of free speech, and not by a progression of decisions that ostensibly preserve tort law while immobilizing it in a straightjacket of constitutional rules, as has happened with the law of defamation.[318]

If tort liability for speech is not to be abolished, there will be tort-speech conflicts that will be resolved by tort-like rules. It seems clear that state courts should have a role in this. I doubt that any one model can produce the right apportionment of responsibility in every situation. Just as there is unlikely to be a single "right" substantive solution to conflicts between the objectives of tort law and those of free speech, so it is unlikely that there is a single best methodology for the Supreme Court to employ when it determines that a tort judgment violates the First Amendment. As in choice of law, the answer may lie not in a single rule, but in developing

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[317] *See supra* Part IV.

[318] Only one plaintiff won a libel verdict against a media defendant in 2002 in the entire United States. That award of $225,000 is on appeal. Of the five libel cases that were tried through to a verdict in 2002, four were won by the media defendants. In the twenty years from 1980 through 1999, plaintiffs won awards that survived appeal in only ninety-one cases, an average of fewer than five per year. These figures were compiled by the Media Law Research Center, a media-funded organization that tracks libel litigation for the industry. *See* Press Release, Trial Records Set in 2002: Highest Media Victory Rate, Lowest Number of Trials, at http://www.ldrc.com/Press_Releases/bull2003-2.html (last visited Mar. 14, 2004).

principled methods for choosing a rule. At present the Court uses several different approaches, but articulates virtually nothing about the bases for those choices.[319]

The Court should acknowledge that it has a number of options once it finds a tort judgment unconstitutional, ranging from simply declaring that to be so, to prescribing an elaborate set of constitutional rules that supplant the offending tort rules. It should recognize that the more detailed its response, the less room is left for state courts to contribute to the resolution by modifying tort law. In choosing a response, the Court is weighing the benefits of federalism and the common law process, which are best served through the tort process, against those of uniformity and certainty, which are best served by constitutional solutions. Considerations of efficiency and effective enforcement will usually counsel a more aggressive role for the Court, while considerations of experimentation, adaptation, flexibility, and institutional competence will usually recommend a more cautious role.

If I were making the decisions, I would indulge a slight presumption in favor of tort solutions. People who have less confidence in the tort system might think the preference should go the other way. But whatever the Court's predilection, when it chooses a method of resolving speech-tort conflicts it should evaluate these considerations openly and attempt to articulate its reasons for favoring one set of values over the other.

The Court should recognize that its decisions become relatively immutable in a world in which most everything else mutates rapidly. The world of politics and media in which *Sullivan* was decided – a world in which local politicians and $500,000 judgments were plausibly believed to pose a serious threat to a major newspaper[320] – no longer exists today.[321] Yet the elaborate net of protections that the Court created then, on

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[319] A rare exception is Justice Powell's opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974), in which he briefly discusses the choice between ad hoc resolution and broad rules of general application. He resolves the matter with the conclusory assertion that ad hoc resolution "would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable" – which does little to explain why the Court finds that approach preferable in cases involving invasion of privacy and interference with trade relations. *Id.* at 343.

[320] LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 82-83 (1991).

[321] *See* C. Edwin Baker, *Media Concentration: Giving Up On Democracy*, 54 FLA. L. REV. 839 (2002); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002).

the basis of its assessment of chilling effects in that world, remains unchanged even though that assessment would surely look much different now, when libel defendants are likely to be owned by the most powerful entities in the world[322] and are not easily intimidated by anyone.

The challenge of finding a principled way to reconcile tort liability with the First Amendment arises from the nature of the issue. In the end, the question that must be answered is always: How much chill is too much? When the Court prescribes its own solutions it avoids the need to articulate an answer. The choice of a solution – say, actual malice – implies that the Court knows the answer and that the chosen solution will reduce the chill by the right amount. Of course neither is necessarily true. Actual malice, or any other solution, represents a guess – an intuition, if you prefer – as to what amount of chill will survive and how it will affect speech. The specificity of the Court's response conceals the uncertainty of its premises. But if responsibility is to be shared, the Court has to try to articulate the amount of chill-reduction it wants the state courts to aim for.

Answers to the how-much-is-too-much question can only be conclusory. The ultimate answer, the one that really matters, is the one that comes at the end of the Supreme Court's opinion: "affirmed" or "reversed." That is true even with Court-prescribed solutions like actual malice; the Court cannot always explain convincingly why one judgment chills speech too much and another does not.[323] If the Court left solutions to the state courts, the answer would still be conclusory. The state court would prescribe but the Supreme Court would review, and the acceptability of the state court's judgment as to how much chill is too much would still depend ultimately on the Supreme Court's intuition. But under the present practice, in too many cases no one else's intuition is brought to bear on the matter.

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[322] For example, ABC is owned by Disney, NBC by General Electric, and CBS by Viacom. *See* Anderson, *supra* note 321, at 455.

[323] *Compare, e.g.*, Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) (finding candidate failed to show actual malice), *with* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1984) (finding candidate had shown actual malice).