2009

Rethinking Free Speech and Civil Liability

Daniel J. Solove
George Washington University Law School, dsolove@law.gwu.edu

Neil M. Richards

RETHINKING FREE SPEECH AND CIVIL LIABILITY

*Daniel J. Solove**
*Neil M. Richards***

One of the most important and unresolved quandaries of First Amendment jurisprudence is the issue of when civil liability for speech will trigger First Amendment protections. When speech results in civil liability, two starkly opposing rules are potentially applicable. Since New York Times Co. v. Sullivan, *the First Amendment has required heightened protection against tort liability for speech, such as defamation and invasion of privacy. But in other contexts involving civil liability for speech, the First Amendment provides virtually no protection. According to* Cohen v. Cowles Media Co., *there is no First Amendment scrutiny for speech restricted by promissory estoppel and contract. The First Amendment rarely requires scrutiny when property rules limit speech.*

Both of these rules are widely accepted. However, there is a major problem—in a large range of situations, the rules collide. Tort, contract, and property law overlap significantly, so formalistic distinctions between areas of law will not adequately resolve when the First Amendment should apply to civil liability. Surprisingly, few scholars and jurists have recognized or grappled with this problem.

The law of confidentiality vividly illustrates the conflict between the two rules. People routinely assume express or implied duties not to disclose another's personal information. Does the First Amendment apply to these duties of confidentiality? Should it? More generally, in cases where speech results in civil liability, which rule should apply, and when? The law currently fails to provide a coherent test and rationale for when the Sullivan *or* Cohen *rule should govern. In this Article, Professors Daniel J. Solove and Neil M. Richards contend that the existing doctrine and theories are inadequate to resolve this conflict. They propose a new theory—one that focuses on the nature of the government power involved.*

---

* Professor of Law, The George Washington University Law School.
** Professor of Law, Washington University School of Law. Thanks to the following people who provided very useful comments on earlier drafts: Ed Baker, Jack Balkin, Vince Blasi, Marion Crain, Greg Magarian, Pauline Kim, Raymond Ku, Jacqueline Lipton, Dawn Nunziato, Joel Reidenberg, Wendy Richards, Robert Tuttle, Eugene Volokh, and Tim Zick, and also to the participants in the workshops at Fordham Law School, Georgetown Law Center, George Washington University Law School, Washington University School of Law, and the Privacy Law Scholars Conference at Berkeley Law School for insightful and helpful discussions about the Article. Thanks also to our research assistants: Aaron Block, Laura Crane, Melissa De Jesus, Adam Hilkemann, Ethan Lucarelli, Evan Mayor, Matthew Galati, Jim Stanley, and Ashley Tremain.

Introduction

"What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel," the U.S. Supreme Court declared in 1964 in the watershed case of *New York Times Co. v. Sullivan*.[1] Today, few would quarrel with the notion that the First Amendment protects not only against direct government censorship of speech but also against indirect burdens on speech created by civil liability more generally. For a panoply of torts for harms caused by speech, the well-settled rule is that the First Amendment provides full

1. 376 U.S. 254, 277 (1964).

protection. There are, however, many instances where the Supreme Court applies virtually no First Amendment scrutiny when civil liability implicates speech. In particular, many lawsuits involving the enforcement of contracts or property rights do not trigger any significant First Amendment scrutiny. Thus, there are two radically different ways that the First Amendment addresses civil liability involving speech—either full First Amendment protection or virtually none at all.

Civil liability for speech occurs across vast areas of the legal landscape. There are countless ways in which civil liability implicates free speech, such as the torts of defamation, invasion of privacy,[2] intentional infliction of emotional distress, and the right of publicity. Even tort actions for negligence can be brought in response to a person's speech. Numerous contracts restrict speech, such as employment contracts, settlement arrangements, and confidentiality agreements. Trade secret law can also restrict speech, as can other forms of intellectual property law. There are numerous restrictions in condos, cooperatives, and apartment buildings about when, where, and how residents can display signs or otherwise engage in speech.[3]

Only a few scholars have examined the legal landscape to determine where civil liability implicates free speech. Some have looked at parts of the landscape, but few have examined it as a whole.[4] Stepping back and looking at the big picture, a major problem emerges: The two rules for how the First Amendment applies to civil liability are contradictory, and in a significant number of circumstances, either rule could conceivably apply. Which rule should apply and when? Surprisingly, the law provides no compelling or even coherent answer to this question.

Suppose a newspaper obtains the name of a rape victim from a police report and publishes it. The rape victim sues the newspaper under the privacy tort of public disclosure of private facts. Does the First Amendment protect the newspaper? If the story is newsworthy, then the answer is yes, as the U.S. Supreme Court held in *Florida Star v. B.J.F.*[5] According to the Court, "[i]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not

---

2. The four privacy torts are intrusion into seclusion, public disclosure of private facts, false light, and appropriation of name or likeness. See William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 389 (1960) [hereinafter Prosser, Privacy].

3. Jim Wasserman, Home Sweet Home Can Sour with Homeowners' Conflicts, L.A. Times, July 20, 2003, at B9 (discussing restrictions on political signs). For other examples of restrictive covenants, see Paula A. Franzese, Privatization and Its Discontents: Common Interest Communities and the Rise of Government for "the Nice," 37 Urb. Law. 335, 336–37 (2005).

4. The most complete treatment of this question, arguing that the First Amendment applies to virtually all instances of civil liability, is Robert M. O'Neil, The First Amendment and Civil Liability (2001). A handful of other scholars have addressed the issue, most only briefly or in a small cluster of articles written after *Cohen v. Cowles Media Co.* about journalism and confidentiality. See infra Part I.C.2.

5. 491 U.S. 524, 541 (1989).

constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[6]

Now suppose that a rape victim speaks anonymously to a newspaper, which promises not to publish her name. The newspaper publishes a highly newsworthy story about the rape victim, and it decides to break its promise and reveal her identity. She sues for promissory estoppel and breach of implied contract. Does the First Amendment protect the newspaper? The answer is no. In *Cohen v. Cowles Media Co.*, the Supreme Court held that even for newsworthy information, a promissory estoppel claim by a person promised anonymity by a newspaper warrants little to no First Amendment scrutiny.[7]

Why do these cases have such different outcomes under the First Amendment? Both involve civil liability, free speech, and newsworthy information. Yet in the tort case, under what we call the "*Sullivan* rule," the First Amendment applies in full force with strict scrutiny. In the contract case, under the "*Cohen* rule," the First Amendment provides little to no scrutiny at all. Why such a dramatic difference?

The conflict between the *Sullivan* and *Cohen* rules is made worse by the fact that the realms of tort, contract, and property are overlapping and indistinct. Tort law is often a vehicle to remedy contract violations. Grant Gilmore famously observed that tort was swallowing up contract, and that "contract" as a distinct concept was "being reabsorbed into the mainstream of 'tort.'"[8] Similarly, tort law frequently remedies property law violations, such as with the torts of trespass and conversion. Property law and contract law also converge; for example, covenants impose restrictions on what people can say or do on their land. Thus, formalistic distinctions between tort, contract, and property rights will not work as a way of determining when liability for speech is unconstitutional.

The tension between these two very different First Amendment regimes for civil liability is especially acute in cases involving confidentiality. The law currently protects confidentiality in many ways. The breach of confidentiality tort provides for civil liability when a person owes another a duty of confidentiality and breaches it.[9] Doctors, lawyers, bankers, accountants, and many others have been held liable for disclosing client confidences.[10] Protective orders ensure that information provided in dis-

---

6. Id. at 533 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

7. See 501 U.S. 663, 670 (1991) ("[E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.").

8. Grant Gilmore, The Death of Contract 87 (1st ed. 1974).

9. Neil M. Richards & Daniel J. Solove, Privacy's Other Path: Recovering the Law of Confidentiality, 96 Geo. L.J. 123, 157 (2007).

10. Id. at 157–58; see, e.g., Peterson v. Idaho First Nat'l Bank, 367 P.2d 284, 290 (Idaho 1961) (holding breach of confidentiality tort applies to banks); Alberts v. Devine, 479 N.E.2d 113, 120 (Mass. 1985) (doctors); Rich v. N.Y. Cent. & Hudson River R.R. Co., 87 N.Y. 382, 390 (1882) (lawyers); Wagenheim v. Alexander Grant & Co., 482 N.E.2d 955, 961 (Ohio Ct. App. 1983) (accountants).

covery remains confidential.[11] People (especially celebrities) who hire nannies, servants, personal assistants, real estate agents, and others increasingly use confidentiality agreements to protect their privacy.[12] Employers routinely make employees agree to confidentiality to protect trade secrets and the personal information of their customers.[13] Companies sharing sensitive information with consultants or other outsiders often require them to sign nondisclosure agreements.[14]

Suppose an attorney representing a client in a highly publicized case discloses the client's confidential information. The client sues under the breach of confidentiality tort. The attorney claims that she was engaging in free speech and that the First Amendment protects her right of expression. Does the *Sullivan* or *Cohen* rule apply? One could argue that the *Sullivan* rule applies because breach of confidentiality is a tort. On the other hand, breach of confidentiality remedies a contract-like harm. Even if never expressed orally or in writing, an implicit agreement exists between the attorney and client that the attorney will maintain the confidentiality of the client's information. Perhaps this situation should fall under the *Cohen* rule because the breach of confidentiality claim more closely resembles an action for promissory estoppel rather than an action for public disclosure of private facts. If this were the case, then the First Amendment would not apply.

In this Article, we argue that First Amendment law's handling of civil liability is incoherent. Although courts and scholars have devoted only

---

11. See William G. Childs, When the Bell Can't Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation, 27 Rev. Litig. 565, 565 (2008) ("Protective orders are commonplace in civil litigation, with trade secrets, privileged communications, and the like protected from public disclosure.").

12. See Audrey Davidow, L.A.'s Secret Service, L.A. Times, July 26, 2007, at F1 (discussing how celebrities require "practically everyone working in the home—the housekeeper, the leaf blower, the bathtub installer" to "sign strict don't-tell policies"); Claire Hoffman, Judge OKs Suit by Spelling Alleging Nurse Broke Pact, L.A. Times, Apr. 18, 2006, at C1 ("[S]trict confidentiality agreements . . . are a way of life with celebrities and high-profile entertainment executives."); Del Jones, CEOs Shell Out Nearly 6 Figures to Secure the Perfect Nanny, USA Today, June 30, 2006, at 1B ("Most nannies to CEOs sign confidentiality agreements never to discuss their families in detail."); Prashant Gopal, How the Super-Rich Buy Homes, Bus. Wk. Online, Apr. 14, 2008, at http://www.businessweek.com/lifestyle/content/apr2008/bw20080410_941624.htm (on file with the *Columbia Law Review*) (discussing increasing trend of having real estate agents sign nondisclosure agreements).

13. Thomas J. Rechen, When Loyal Employees Become Traitors, Conn. L. Trib., July 28, 2008, Special Section, at 2 ("The use of non-competes, confidentiality, non-use and non-disclosure agreements, and trade secrets laws, can help counsel provide necessary security for the business clients' most coveted assets . . . .").

14. Robert E. Kellogg, Getting to Know Nondisclosure Agreements, Daily J. Com. (Portland, OR), June 13, 2008, at 4 ("Given the potentially high value of confidential information, business owners are understandably wary about providing such information to unaffiliated entities without well-defined restrictions on the other party's use or disclosure of that information. The nondisclosure agreement is commonly used to establish such guidelines.").

limited and fragmentary attention to the issue, we have attempted to infer from existing cases and scholarship five approaches for determining when and how the First Amendment should apply to civil liability: (1) the *generally applicable law approach*, where the First Amendment does not require scrutiny for civil liability imposed by laws of general applicability; (2) the *consensual waiver approach*, where instances in which people consent to relinquishing their right to free speech define the areas where the First Amendment does not require scrutiny; (3) the *nature of the injury approach*, where cases involving damages for reputational harm trigger full First Amendment protection; (4) the *public concern approach*, in which the First Amendment provides full protection when the information is of public concern; and (5) the *First Amendment balancing approach*, where all civil liability implicating free speech would trigger full First Amendment protection and all cases would be subjected to First Amendment scrutiny. We contend that each of these approaches is flawed and that none of them provides a satisfying explanation for when civil liability should implicate the First Amendment.

We argue that there is an alternative way to navigate this vexing issue—one that courts and scholars have thus far overlooked. Our approach focuses on government power. We contend that the First Amendment should apply to civil liability when government power shapes the content of public discourse, but not when government power merely serves as a backstop to private ordering.

In Part I, we discuss the difficult tension in First Amendment doctrine that exists when the civil liability system is used to enforce torts, contracts, or property rules that implicate speech. The Supreme Court has established two radically different rules—the *Sullivan* rule providing full First Amendment scrutiny and the *Cohen* rule involving virtually no First Amendment protection. We demonstrate that in many circumstances, both rules can potentially apply. In Part II, we examine five existing approaches for distinguishing between instances where the First Amendment applies and where it does not. Although some approaches have their virtues, none provides a coherent way to determine when or why the First Amendment should apply to civil liability. In Part III, we propose a new theory that looks to the nature of government power involved in various uses of the civil liability system. We explain why our theory provides a compelling and coherent way to unscramble the jumbled First Amendment jurisprudence and why this approach works while the alternatives fail. We then illustrate the implications of our approach by applying it to a series of examples.

I. The Free Speech/Civil Liability Contradiction

There is a significant contradiction at the heart of First Amendment law. When private parties restrict speech through a civil lawsuit, two seemingly opposing rules apply. On the one hand, when private parties sue in tort to remedy injuries resulting from speech, the First

Amendment unquestionably provides robust protection to the speaker. On the other hand, when private parties use contract or property law to restrict speech, the First Amendment provides little to no scrutiny. These longstanding and widely accepted rules, however, are not always congruent. In fact, they conflict in a significant number of circumstances. Current First Amendment theory lacks a compelling justification for why we treat tort rules differently from those sounding in property or contract.[15] In this Part, we describe this conflict, explain its origins, and discuss its contradictory elements.

A. *Civil Liability Restricted by the First Amendment*

Today, it is nearly unquestioned—both doctrinally and normatively—that certain kinds of tort liability can violate the First Amendment. Under current law, tort lawsuits by private individuals are subject to First Amendment limitations, even where no government actor is involved in the conduct giving rise to tort liability. For example, the First Amendment mandates that a public figure cannot maintain a defamation suit unless she proves that the defendant acted with "actual malice"—either knowledge of, or reckless indifference to, the falsity of the statements.[16] The First Amendment also requires public figures to establish actual malice to prevail under the tort of intentional infliction of emotional distress.[17] In tort actions under the public disclosure of private facts tort, the First Amendment requires strict scrutiny when information of public concern is involved.[18] These are just a few examples.

But things were not always this way. For most of American history, private lawsuits did not implicate the First Amendment, regardless of whether they sought remedies for tort violations or enforced contracts or property rules. These categories of "private law" were not attributable to the government, and thus did not constitute state action.[19] The landmark case of *New York Times Co. v. Sullivan* ushered in a dramatic

---

15. Commentators note that theories to determine the contexts in which the First Amendment applies are thin or nonexistent. See, e.g., Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1249–50 (1995) ("[C]ontemporary First Amendment doctrine is nevertheless striking chiefly for its superficiality, its internal incoherence, its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech."); Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1786 (2004) ("[I]f there exists a single theory that can explain the First Amendment's coverage, it has not yet been found.").

16. Gertz v. Robert Welch, Inc., 418 U.S. 323, 334–36 (1974).

17. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

18. See, e.g., Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (allowing punishment of such disclosures "only when narrowly tailored to a state interest of the highest order").

19. See, e.g., Cass R. Sunstein, Democracy and the Problem of Free Speech 36–37, 39 (expanded ed. 1995) [hereinafter Sunstein, Democracy and Free Speech] (discussing widely held pre-New Deal understanding that "common law rules simply implement existing rights, or private desires, and do not amount to 'intervention' or 'action' at all").

change to this settled understanding.[20] In *Sullivan,* an Alabama police commissioner sued the *New York Times* and some Alabama clergymen for libel. He claimed that an advertisement in the *Times* by a civil rights group made false statements about him. Sullivan's $500,000 judgment was upheld by the Alabama Supreme Court. The *Times* argued that the lawsuit infringed upon First Amendment rights, but the Alabama Supreme Court dismissed this argument because private lawsuits did not involve state action.[21]

The U.S. Supreme Court reversed, concluding that a defamation lawsuit by a public figure constituted state action. Writing for the Court, Justice William Brennan reasoned that where libel actions had the potential to significantly chill public debate, even "private" actions like defamation could infringe First Amendment rights:

> 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.[22]

Applying this test to the facts of the case, the Court held that the First Amendment limited defamation lawsuits brought by public officials in order to ensure that debate on matters of public concern be "uninhibited, robust, and wide-open."[23] The Court concluded that the First Amendment did not bar defamation tort liability entirely, but required that public officials prove at least "actual malice" to prevail.[24] Actual malice is difficult to prove, thus serving as a significant limitation to the defamation torts of libel and slander.[25] The Court also limited the kinds of damages that public official plaintiffs could obtain.[26]

The *Sullivan* case changed First Amendment law in two major ways. First, the Court declared what leading First Amendment scholar Harry Kalven termed "the central meaning of the First Amendment"—that the First Amendment, at its core, protected criticism of public officials essential for meaningful democratic self-governance.[27] Such linkages between free speech and democratic theory had been suggested in the past by

---

20. 376 U.S. 254 (1964).

21. N.Y. Times Co. v. Sullivan, 144 So. 2d. 25, 40 (Ala. 1962), rev'd 376 U.S. 254.

22. *Sullivan*, 376 U.S. at 265 (citation omitted).

23. Id. at 270.

24. Id. at 279–80.

25. See Randall P. Bezanson, The Developing Law of Editorial Judgment, 78 Neb. L. Rev. 754, 763–64 (1999) (discussing how courts make determinations of actual malice).

26. *Sullivan*, 376 U.S. at 283–84.

27. Harry Kalven, Jr., The *New York Times* Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 208 [hereinafter Kalven, Central Meaning].

James Madison,[28] Alexander Meiklejohn,[29] and Louis Brandeis,[30] among others, but *Sullivan* enshrined this idea as the new lodestone of First Amendment jurisprudence. Many First Amendment scholars celebrated the *Sullivan* decision, including an elderly Meiklejohn, who quipped that it was "an occasion for dancing in the streets."[31]

Sullivan's second major change was to apply the First Amendment to private law. Previously, hardly any scholars had suggested the idea that defamation lawsuits should trigger First Amendment scrutiny.[32] Perhaps recognizing its significant departure from the settled understanding that enforcement of private law rules generally did not implicate the First Amendment, the *Sullivan* Court intentionally crafted a narrow rule. The Court held only "that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct," and that in such cases proof of actual malice by the public official was constitutionally required.[33] Despite the narrowness of this holding, *Sullivan* had profound implications. Although *Sullivan* was not the first time that the Court held that a private law rule could violate the First Amendment,[34] it served as a critical turning point. After *Sullivan,* the Court began to widely apply the First Amendment to private lawsuits.[35]

Over the next few years, the Court expanded the *Sullivan* rule in defamation law. In 1967, for example, the Supreme Court decided *Curtis*

---

28. See James Madison, The Virginia Report of 1799–1800, Touching the Alien and Sedition Laws; Together with the Virginia Resolutions 227 (J.W. Randolph ed., 1850) (arguing right to elect members of government "depends on the knowledge of the comparative merits and demerits of the candidates for public trust; and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively").

29. Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 26–27 (1948).

30. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

31. Quoted in Kalven, Central Meaning, supra note 27, at 221 n.125.

32. See id. at 192 n.4 ("The question of the constitutionality of the law of defamation has occasioned comparatively little commentary."). For the handful of exceptions, see, for example, Edmond Cahn, Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U. L. Rev. 549, 557–58 (1962) (quoting Justice Black as saying that First Amendment as ratified intended that "there should be no libel or defamation law in the United States under the United States Government" and that "the same rule should apply to the states"); Harry Kalven, Jr., The Law of Defamation and the First Amendment, *in* The University of Chicago Law School Conference on the Arts, Publishing, and the Law 3, 3 (1952) ("[T]he challenge of the topic [of defamation] for free speech arises because we are so sure that the core of defamation law is indubitably constitutional.").

33. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

34. See Marsh v. Alabama, 326 U.S. 501, 507–08 (1946) (holding that use of trespass law violates First Amendment when property owner is running privately owned "company town").

35. This invitation to apply the First Amendment more broadly was recognized by contemporary observers. See, e.g., Kalven, Central Meaning, supra note 27, at 221 ("[T]he invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems . . . to be overwhelming.").

Publishing Co. v. Butts and *Associated Press v. Walker*, broadening the *Sullivan* rule beyond public officials to so-called "public figures"—those persons who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[36] Subsequent cases extended the rule to "limited-purpose public figures"—individuals, not of general fame, who have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[37]

The Court also applied the First Amendment beyond defamation to a variety of speech torts.[38] The first significant expansion of the *Sullivan* rule involved the false light privacy tort. False light actions remedy the publication of facts that place the defendant in "a false light" and are "highly offensive to a reasonable person."[39] The tort was popularized by William Prosser in his review of the common law of privacy,[40] and by the mid-1960s was viewed as a potential rival to defamation.[41] In 1967, the Court held in *Time, Inc. v. Hill* that false light actions raised many of the same threats to public discourse as defamation, and therefore the same First Amendment limitations should apply.[42]

A number of other cases extended First Amendment protections (though not always the actual malice requirement) to other privacy actions. For example, in *Cox Broadcasting Corp. v. Cohn,* the Court held that the media could not be held liable under the public disclosure of private facts tort for revealing a rape victim's name obtained from a public court record.[43] In *Florida Star v. B.J.F.*, a newspaper printed a rape victim's

---

36. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 130, 163–64 (1967) (Warren, C.J., concurring in the judgment) (consolidating *Associated Press v. Walker* into same decision).

37. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

38. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, 915 (1982) (holding, relying on *Sullivan*, state could not impose tort liability for malicious interference with business where activities giving rise to tort were merely peaceful protests by civil rights activists calling for boycott).

39. Restatement (Second) of Torts § 652E (1977).

40. Prosser, Privacy, supra note 2, at 398–401.

41. See Harry Kalven, Jr., The Reasonable Man and the First Amendment: *Hill*, *Butts*, and *Walker*, 1967 Sup. Ct. Rev. 267, 271 n.15 ("[O]ne consequence of the *Hill* case will be to retard substantially, if not altogether block, the tendencies of false light privacy to take over the field of defamation."); see also Harry Kalven, Jr., Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 Law & Contemp. Probs. 326, 339–41 (1966) (discussing "current tendency of privacy actions to move into the traditional field of defamation"); John W. Wade, Defamation and the Right of Privacy, 15 Vand. L. Rev. 1093, 1095–96 (1962) (studying relationship between false light and defamation torts). While both torts protect against material false statements, the principal difference between false light and defamation is the theory of damages. False light remedies false statements that cause emotional or psychological injuries, while defamation remedies false statements that cause damage to a person's reputation. Daniel J. Solove & Paul M. Schwartz, Information Privacy Law 197 (3d ed. 2009).

42. 385 U.S. 374, 390–91 (1967).

43. 420 U.S. 469, 495–96 (1975). Two subsequent cases extended the *Cox* rule beyond the civil liability context. See Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 105–06

name that it copied from a police report. A lower court had found the newspaper negligent per se for violating a Florida statute that prohibited the disclosure of rape victims' names.[44] The Supreme Court concluded that the First Amendment barred civil liability for disclosing information of public significance that was lawfully obtained.[45] In *Bartnicki v. Vopper*, the Court held that the First Amendment required heightened scrutiny of a provision in the Electronic Communications Privacy Act creating liability for disclosing information with knowledge that it was obtained by an illegal wiretap when such information was of "public concern."[46] In *Hustler Magazine v. Falwell*, the Court unanimously applied the *Sullivan* actual malice rule to the tort of intentional infliction of emotional distress[47]—engaging in "extreme and outrageous conduct" and "intentionally or recklessly caus[ing] severe emotional distress to another."[48] These cases illustrate that it is now widely accepted and rarely questioned that the First Amendment applies to tort lawsuits when speech is implicated.

B. *Civil Liability Not Restricted by the First Amendment*

Although tort law implicates the First Amendment under modern constitutional jurisprudence, the First Amendment provides little to no restrictions when other private law rules restrict speech. Such is the case with contract law and property law.

1. *Contracts and Promissory Estoppel.* — The litany of cases applying the First Amendment to torts eventually raised the issue of whether the First Amendment should apply to contract law and promissory estoppel lawsuits that implicated speech. The Supreme Court addressed this issue in the 1991 case of *Cohen v. Cowles Media Co.*[49] In *Cohen*, a group of supporters for Wheelock Whitney, a candidate for the governorship of Minnesota, met to discuss how to release their discovery that a rival candidate had been arrested for unlawful assembly and petty theft more than a decade earlier. They agreed that Dan Cohen, who worked for an advertising agency on the Whitney campaign, would disclose the information anonymously to the media. Cohen contacted several journalists, secured promises of confidentiality, and then revealed the information, which consisted of two public court documents showing that the rival candidate had been convicted of numerous minor crimes including theft.[50] The Minneapolis *Star Tribune* decided to report Cohen's identity in order to

---

(1979) (striking down misdemeanor indictment for publishing information about juvenile involved in criminal proceeding); Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 311–12 (1977) (holding state court cannot prohibit media from publishing information gleaned by attending proceeding involving juvenile).

44. 491 U.S. 524, 528–29 (1989).

45. Id. at 541.

46. 532 U.S. 514, 534 (2001).

47. 485 U.S. 46, 56 (1988).

48. Restatement (Second) of Torts § 46 (1965).

49. 501 U.S. 663, 665 (1991).

50. Id.

reveal that the source was connected to the Whitney campaign. Cohen was fired immediately after his name was published. He sued the *Star Tribune* and other newspapers for breach of contract and fraudulent misrepresentation.[51] The Minnesota Supreme Court rejected Cohen's claims on nonconstitutional grounds, but added that promissory estoppel would be a viable cause of action if it were not barred by the First Amendment.[52]

The U.S. Supreme Court reversed. It held that liability for promissory estoppel would not trigger First Amendment restrictions.[53] The Court first noted that under the theory of state action laid out in *Sullivan,* the enforcement of a promissory estoppel claim by the Minnesota courts was sufficient state action to implicate the First Amendment.[54] However, the Court concluded that unlike torts, promissory estoppel actions did not warrant any kind of heightened First Amendment scrutiny.[55]

In a short opinion, the Court offered a number of rationales. First, it reasoned that a newspaper is bound by a variety of generally applicable laws that can restrict its speech, and that it is irrelevant in such cases that speech is restricted or that the defendant is a newspaper:

> There can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.[56]

Second, the Court stated that the "self-imposed" nature of the duty of confidentiality involved in the case was different from tort liability, where duties were imposed by the government. The Court distinguished *Florida Star* and related cases:

> In those cases, the State itself defined the content of publications that would trigger liability. Here, by contrast, Minnesota law simply required those making promises to keep them. The parties themselves, as in this case, determined the scope of their legal obligations, and any restrictions that were placed on the publication of truthful information are self-imposed.[57]

Thus, it was significant that the duty not to speak had been defined (and agreed to) by private parties, rather than by the state itself, and the state role was merely to enforce the private agreements rather than dictating their terms as well.

---

51. Id. at 666.

52. Cohen v. Cowles Media Co., 457 N.W.2d 199, 205 (Minn. 1990), rev'd, 501 U.S. 663.

53. *Cohen*, 501 U.S. at 670.

54. Id. at 668.

55. Id. at 671–72.

56. Id. at 670.

57. Id. at 670–71.

Third, the Court noted that Cohen was not "attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim."[58] In other words, Cohen's use of promissory estoppel was not a mere end run around the First Amendment limitations to torts such as defamation or intentional infliction of emotional distress.

Perhaps because it was not clear which (if any) of these three theories drove the outcome in *Cohen*, Justice White's majority opinion provoked significant commentary. Some viewed *Cohen* as a threat to freedom of speech and press.[59] Others saw the case as enhancing press freedom. For example, Jerome Barron argued that "First Amendment values were served, rather than denied, by enforcing the reporters' promises to Cohen for two reasons—protection of the flow of information and protection of the integrity of journalism."[60] Regardless of the merits of its holding, *Cohen* created a morass of doctrinal confusion. Lower courts applying *Cohen* have struggled to distinguish promissory estoppel and contract from other instances of civil liability, seizing upon one or more of the various rationales offered by the Court to determine when the *Cohen* rule should apply.[61] Noting these developments, Alan Garfield argues that *Cohen* is incoherent and that the First Amendment should apply to both tort and contract actions that restrict speech: "[I]t is not sufficient for courts to blithely enforce contracts of silence based on a notion of freedom of contract while ignoring the consequences of such action

---

58. Id. at 671.

59. See, e.g., David Bogen, Generally Applicable Laws and the First Amendment, 26 Sw. U. L. Rev. 201, 229–30 (1997) (arguing *Cohen* went beyond precedent "to validate, without further analysis, a generally applicable law that resulted in a direct impact on speech"); Alan E. Garfield, The Mischief of *Cohen v. Cowles Media Co.*, 35 Ga. L. Rev. 1087, 1087 (2001) [hereinafter Garfield, The Mischief of *Cohen*] ("*Cohen v. Cowles Media Co.* has had a remarkably insidious influence on First Amendment law.").

60. Jerome A. Barron, *Cohen v. Cowles Media* and Its Significance for First Amendment Law and Journalism, 3 Wm. & Mary Bill Rts. J. 419, 462 (1994); see also Joseph H. Kaufman, Beyond *Cohen v. Cowles Media Co.*: Confidentiality Agreements and Efficiency Within the Marketplace of Ideas, 1993 U. Chi. Legal F. 255, 268–69 (making similar argument from economic perspective); The Supreme Court, 1990 Term—Leading Cases: Damages for a Reporter's Breach of Confidence: *Cohen v. Cowles Media Co.*, 105 Harv. L. Rev. 277, 280 (1991) (same). A survey of newspaper editors undertaken shortly after *Cohen* suggests that editors also did not see the decision as a major intrusion upon press freedom. See Daniel A. Levin & Ellen Blumberg Rupert, Promises of Confidentiality to News Sources After *Cohen v. Cowles Media Company*: A Survey of Newspaper Editors, 24 Golden Gate U. L. Rev. 423, 461 (1994). Levin and Rupert noted that just over one-third of interviewees thought that the *Cohen* case was "not a serious infringement on editors' First Amendment freedom," and a similar percentage acknowledged that it was a "somewhat serious infringement." Id. Fewer than one in four interviewees "thought it was a serious infringement," and "about eight percent thought it was a very serious infringement." Id. Therefore, "despite the potential for a new source of liability, about seventy percent of interviewees accepted the *Cohen* result as fair and not a particularly serious infringement on editors' rights." Id.

61. See infra Part II.

on freedom of speech . . . . Courts must address this conflict directly by weighing the competing interests and determining which one should prevail."[62] Numerous questions about when the *Cohen* rule applies remain: Does it apply to all contracts, express or implied? Can it apply to certain kinds of tort actions? To statutory protections of confidentiality? Rather than clearing up when the First Amendment applies to civil liability, *Cohen* instead left behind more questions than answers.

2. *Property.* — Like contract law, the Supreme Court has rarely subjected property law to First Amendment scrutiny. Despite the Supreme Court's realist admonition in *Sullivan* that common law rules of all sorts are highly regulatory, current law continues to reflect the belief that property, like contract, is in some sense separate from the state and does not implicate constitutional guarantees.[63] Unlike in the *Cohen* contexts of contract and promissory estoppel, where the courts will find state action but then refuse to invoke First Amendment scrutiny, when a private party seeks to enforce property rights, courts often will not even find state action. Private property owners can thus use the enforcement power of the government to exclude speakers from their property merely because they dislike the message being conveyed.[64] By contrast, such a power has long been unthinkable for the government to exercise on its own behalf.[65]

In a few limited contexts, the Supreme Court has departed from the general rule that enforcing property rights against private parties does not implicate the Constitution. For example, in *Marsh v. Alabama*, the Court held that the First Amendment applied to the agents of a company town seeking to exclude religious canvassers from public areas because the owner of the company town had assumed a "public function."[66] And in *Shelley v. Kraemer*, the Court determined that racially restrictive covenants in a private deed violated the Fourteenth Amendment.[67]

---

62. Alan E. Garfield, Promises of Silence: Contract Law and Freedom of Speech, 83 Cornell L. Rev. 261, 363–64 (1998).

63. Sunstein, Democracy and Free Speech, supra note 19, at 39.

64. This is the rule under the federal constitution, although state constitutions may grant licensees of certain kinds of real property rights to speak freely even where the property owners object. Compare Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976) (upholding shopping mall's exclusion of labor picketers from public areas of mall over picketers' First Amendment challenge), with PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (holding state constitutional right to free speech may extend to protect speech in privately owned shopping center).

65. See, e.g., Martin v. City of Struthers, 319 U.S. 141, 146–47 (1943) (holding unconstitutional city ordinance banning door-to-door solicitation used to convict proselytizing Jehovah's Witness); Schneider v. New Jersey, 308 U.S. 147, 165 (1939) (voiding city ordinance used to prosecute Jehovah's Witnesses for door-to-door proselytizing); Hague v. CIO, 307 U.S. 496, 516 (1939) (voiding city ordinance used to prevent labor organization and pamphleteering).

66. 326 U.S. 501, 506 (1946).

67. 334 U.S. 1, 19–20 (1948).

Ultimately, however, the Court narrowed and constrained *Marsh* and *Shelley*. Subsequent cases essentially limited *Shelley* to its facts, perhaps to prevent state action from being implicated whenever a court enforced a private law rule.[68] Likewise, although the Court flirted with expanding *Marsh*,[69] it ultimately limited that case to its facts as well.[70] In *Hudgens v. NLRB,* the Court held that a shopping center could exclude protestors without implicating the First Amendment because "the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only."[71]

Under current doctrine, when private parties seek to use the courts to exclude speakers from their property under a trespass theory, the First Amendment is generally inapplicable for want of state action.[72] The First Amendment applies to trespass law only where a property owner is found to be "performing the full spectrum of municipal powers and [stands] in the shoes of the State."[73] Homeowners can use trespass law to exclude unwanted speakers from their residences without implicating the First Amendment.[74] Similarly, a company can enforce property laws against protestors trespassing in its lobby without triggering First Amendment scrutiny.[75]

The Court's First Amendment treatment of property rules restricting speech has not escaped criticism. For example, Cass Sunstein has argued that although we tend to think of property rules as somehow separate from the state, in reality property law itself is a form of government regulation which is deeply entangled with state action and state power.[76] Tak-

---

68. See Mark D. Rosen, Exporting the Constitution, 53 Emory L.J. 171, 193 (2004) (collecting cases and noting, "with virtually no exceptions, courts have concluded that the judicial enforcement of private agreements inhibiting speech does not trigger constitutional review").

69. See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 309 (1968), overruled by *Hudgens*, 424 U.S. 507 (holding owner of shopping center cannot prohibit "peaceful picketing of a business enterprise located within [the] shopping center").

70. See *Hudgens*, 424 U.S. at 518 (overruling *Logan Valley Plaza*); Lloyd Corp. v. Tanner, 407 U.S. 551, 556–63, 570 (1972) ("*Marsh* was never intended to apply to this kind of situation. *Marsh* dealt with the very special situation of a company-owned town . . . ." (quoting *Logan Valley Plaza*, 391 U.S. at 330–31 (Black, J., dissenting))).

71. 424 U.S. at 519 (emphasis omitted) (internal quotation marks omitted) (quoting *Lloyd Corp.*, 407 U.S. at 567).

72. See id.

73. Id. (quoting *Lloyd Corp.*, 407 U.S. at 568–69 (footnote omitted)).

74. See, e.g., Martin v. City of Struthers, 319 U.S. 141, 147 (1943) ("[T]raditional legal methods [leave] to each householder the full right to decide whether he will receive strangers as visitors . . . .").

75. See, e.g., *Hudgens*, 424 U.S. at 519 (holding picketers had no First Amendment right to enter shopping center to advertise strike); Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 519 (4th Cir. 1999) (holding employees trespassed by intruding into and secretly videotaping area of store not open to public).

76. Sunstein, Democracy and Free Speech, supra note 19, at 39.

ing a cue from the implications of *Shelley v. Kraemer*,[77] Sunstein also argues that in the case of shopping centers, the "owners of the shopping center are able to exclude the protesters only because the government has conferred upon them a legal right to do so. The conferral of that right is an exercise of state power."[78]

Therefore, despite a few very narrow exceptions, the general rule remains clear that the First Amendment is inapplicable to civil actions to enforce property rules in ways that restrict speech.

C. *Free Speech and Civil Liability: A Collision Course*

As the preceding discussion makes clear, two diametrically opposing rules govern the intersection of civil liability and free speech. Certain forms of civil liability are subject to full First Amendment scrutiny while other forms are not. These two rules—the rule in *Sullivan*, which often applies in tort cases, and the rule in *Cohen*, which often applies in contract and property cases—are both widely accepted today. These conflicting rules would not present a problem if there were a clear and coherent way to determine which rule should apply to any given situation. Unfortunately, the boundaries between tort, contract, and property law are quite fuzzy, and these areas of law overlap in significant ways. Thus, there is a wide range of circumstances where both rules would seemingly apply.

1. *The Fuzzy Lines Between Forms of Civil Liability.* — At a very general level, it appears that the First Amendment applies to civil liability under tort but not under contract or property. Making the distinction of First Amendment applicability on the basis of these categories of law would seem to be the most simple and direct approach. However, in both doctrine and theory, the lines between tort, contract, and property are indistinct, and these categories often overlap.

Consider first the line between tort and property. Torts like trespass and conversion are often used to enforce property rights.[79] Other torts exist in the fuzzy area between tort and property as well. For example, the right to publicity tort protects against appropriating "the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade."[80] Should this tort be classified as a tort or a property right? In *Zacchini v. Scripps-Howard*

77. 334 U.S. 1 (1948).

78. Cass R. Sunstein, The Partial Constitution 208 (1993).

79. See Restatement (Second) of Torts § 158 (1965) (defining trespass); § 222A (1964) (defining conversion).

80. The Restatement of Unfair Competition defines the right of publicity as follows: "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability . . . ." Restatement (Third) of Unfair Competition § 46 (1995). The "right of publicity" was first explicitly recognized by Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

Broadcasting Co.,[81] the Court refused to apply the *Sullivan* rule to the tort, noting that while torts such as defamation and false light involve protection against reputational harm and mental distress, the right of publicity protects "the proprietary interest of the individual" and "is closely analogous to the goals of patent and copyright law."[82]

Zacchini, however, involved a unique factual situation where a performer's entire act was filmed and rebroadcast on a television news program. The Court focused heavily on the fact that his "entire act" was involved and that the broadcast of it "poses a substantial threat to the economic value of that performance."[83] Several federal courts have distinguished *Zacchini*, concluding that the First Amendment can be violated when the right of publicity restricts speech of public concern.[84] In such cases, courts seem to treat the right of publicity as a privacy tort rather than as a species of property.[85] The fact that the right of publicity is a tort is of little help in determining how the First Amendment should apply. Currently, where this tort fits between tort and property remains unclear, as does whether the *Sullivan* or *Cohen* rule should apply.

The line between tort and contract is also quite nebulous. The classic hornbook definitions of the two cast torts as civil wrongs or breaches of legally imposed duties,[86] and contracts as agreements between two or more parties that lead to legally enforceable duties.[87] Unlike tort duties, which apply against the whole world,[88] contractual obligations extend only to the parties to a transaction.[89] The Restatement defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[90] From this perspective, then, tort and contract are two distinct and theoretically separate sources of liability. Under the traditional view,

---

81. 433 U.S. 562, 573 (1977).

82. Id.

83. Id. at 575.

84. See, e.g., CBC Distribution & Mktg., Inc. v. Major League Baseball, 505 F.3d 818, 823–24 (8th Cir. 2007) (holding names, statistics, and biographical information of professional baseball players are matters of public interest protected by First Amendment); CBS Interactive Inc. v. Nat'l Football League Players Ass'n, No. 08-5097, 2009 WL 1151982, at *21 (D. Minn. Apr. 28, 2009) (holding same with respect to NFL football players). In the interest of full disclosure, we should note that one of the authors represented the First Amendment claimants in both of these cases.

85. See Richards & Solove, supra note 9, at 153 (identifying right of publicity as offshoot of privacy torts).

86. Victor E. Schwartz et al., Prosser, Wade and Schwartz's Torts: Cases and Materials 1 (11th ed. 2005).

87. Restatement (Second) of Contracts § 1 (1981).

88. Restatement (Second) of Torts § 1 cmt. d (1965).

89. William Prosser, Handbook of the Law of Torts § 92, at 613 (4th ed. 1971) [hereinafter Prosser, Handbook].

90. Restatement (Second) of Contracts § 1; see also E. Allan Farnsworth, Contracts § 1.1, at 4 (4th ed. 2004) ("[A] limitation suggested by this definition is that the law of contracts is confined to *promises*. It is therefore concerned with exchanges that relate to the *future* because a 'promise' is a commitment as to future behavior.").

breach of contract remedies the breaking of a promise undertaken voluntarily by the parties, and is a species of strict liability. Tort law, by contrast, involves duties mandated by law, and rests primarily on fault rather than strict liability.[91]

Yet both in practice and theory, the distinction between tort and contract is not as neat as it may at first appear. In his classic work *The Death of Contract*, Grant Gilmore argued that tort and contract bleed into each other.[92] Gilmore contended that contract law was an intellectual construct of the nineteenth century that came to be absorbed by tort law over the course of the next hundred years.[93] Despite the efforts of contract theorists like Holmes and Williston to cast contract as a form of absolute rather than fault-based liability, the death of contract occurred with the rise of the twentieth century welfare state and the introduction of fault-based doctrines such as excuse and mistake, as well as mandatory duties such as promissory estoppel, into contract law. As Jody Kraus puts it, "Gilmore's assault on contracts was double-edged: Contracts as a distinctive and unified body of law did not exist prior to the successful efforts of Langdell, Holmes, and Williston to manufacture it out of whole cloth, and it was eroded by tort law after its creation."[94]

Gilmore's arguments have been influential among judges and legal scholars.[95] Although the law continues to retain a formal distinction between tort and contract, a number of important legal doctrines fall in the gray area between the two. For example, consider torts that arise in the context of relationships, such as the duties of care, loyalty, and confidentiality imposed on lawyers and clients, agents and principals, or buyers and sellers.[96] Such torts seemingly fit both under contract law and tort law. They could be viewed as torts because they remedy a civil wrong, but they could also be viewed as contracts because they arise from express or implied duties agreed to by parties to a private transaction.

The indistinct boundaries between tort on the one hand, and contracts and property on the other, means that even if one were inclined to use the formal categories of private law to separate the *Sullivan* rule from the *Cohen* rule, such an approach would be indeterminate and ultimately fruitless. Indeed, lower courts have avoided a formalistic approach in applying *Cohen* to tort, contract, and property. For example, in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, the Fourth Circuit concluded that *Cohen* applied to breach of duty of loyalty and trespass, despite the fact that both

---

91. Dan B. Dobbs, The Law of Torts § 3, at 5 (2001).

92. Gilmore, supra note 8, at 87.

93. Id. at 6–9.

94. Jody S. Kraus, From Langdell to Law and Economics: Two Conceptions of Stare Decisis in Contract Law and Theory, 94 Va. L. Rev. 157, 179–80 (2008).

95. See Robert Hillman, The Triumph of Gilmore's *The Death of Contract*, 90 Nw. U. L. Rev. 32, 32 (1995).

96. Dobbs, supra note 91, at 6.

are torts.[97] Conversely, some courts have applied the *Sullivan* rule to contract cases. In *Compuware Corp. v. Moody's Investors Services, Inc.*, for example, Compuware contended that Moody's violated an implied contractual term to perform a credit rating assessment diligently.[98] The court concluded: "While ostensibly presenting a breach of contract claim, this argument is grounded in negligence, and amounts to nothing more than a backdoor attempt to recover damages for the harm allegedly caused by Moody's protected expression of its opinion of Compuware's financial condition."[99] The court therefore imposed the First Amendment requirements for defamation, which mandated that Compuware prove actual malice.[100]

Moreover, making rigid distinctions between tort, contract, and property is contrary to the basic philosophical insight about the nature of state power articulated in *Sullivan*. If First Amendment law is centrally concerned with state censorship, it is important to note that sometimes the state can censor just as effectively through legal forms that are private as it can through ones that are public.[101] In *Sullivan*, the state used a private tort action to impose liability, but in other cases it could use property law: for example, by marking out "free speech zones"[102] or by creating intellectual property rights in certain kinds of information (like presidential speeches).[103] As Eugene Volokh notes, "[c]alling a speech restriction a 'property right' . . . doesn't make it any less a speech restriction, and it doesn't make it constitutionally permissible. Broad, pre-*New York Times Co. v. Sullivan* libel laws can be characterized as protecting a property right in reputation; in fact, some states consider reputation a property interest."[104] A state could also use contract law to achieve similar goals.

There is nothing magical about the invocation of tort that somehow differentiates it from property and contract when it comes to threatening First Amendment values. Justice Brennan made this point in *Sullivan* by noting that the First Amendment was threatened not by "the form in

---

97. 194 F.3d 505, 522 (4th Cir. 1999). We should note by way of full disclosure that one of the authors worked on this case while clerking for the Fourth Circuit.

98. 499 F.3d 520, 531 (6th Cir. 2007).

99. Id.

100. Id.

101. Sunstein, Democracy and Free Speech, supra note 19, at 42–43.

102. See Timothy Zick, Speech Out of Doors: Preserving First Amendment Liberties in Public Places 61–62 (2009) (discussing recent phenomenon of expressive zoning).

103. See Comment, What Is a "Publication of the United States of Government"? A Search for a Meaningful Solution, 17 Rutgers L. Rev. 579, 579–80 (1963) (suggesting government employees have personal copyrights on works not created explicitly in exercise of official duties but which nonetheless exist as result of their employment).

104. Eugene Volokh, Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You, 52 Stan. L. Rev. 1049, 1063 (2000) [hereinafter Volokh, Freedom of Speech].

which state power has been applied but, whatever the form, whether such power has in fact been exercised."[105]

Therefore, the realist critique of the distinctions between tort, contract, and property suggests that the formalist approach is not as clear-cut as it might at first seem. Legal categories have a way of bleeding into each other. A clear formalist distinction between forms of civil liability is elusive, if not impossible.

2. *The Problem of Confidentiality.* — Within the rather large area where tort and contract overlap sits the law of confidentiality. The problem of how to treat confidentiality rules under the First Amendment illustrates not only the blurriness of the tort/contract distinction, but also the practical consequences at stake. Confidentiality rules involve instances where one party has a legal duty not to disclose certain information it has acquired from another party. These rules include: (1) the breach of confidentiality tort, which imposes liability for disclosing another person's confidential information if in breach of a duty of confidentiality; (2) the breach of an express or implied contract of confidentiality; (3) statutory provisions restricting the disclosure of confidential information; (4) protective orders preventing the disclosure of confidential information obtained during discovery; and (5) trade secret law restricting the disclosure of confidential information maintained by businesses. There are also other confidentiality rules not involving civil liability, such as criminal prohibitions on divulging certain kinds of confidential information, evidentiary privileges restricting testimony about confidential data, and statutory protections that limit the release of confidential information by certain companies or government agencies.[106]

How should the First Amendment deal with such rules? Suppose the personal physician to the CEO of a major corporation discloses to the public that the CEO has dementia and that it will compromise the CEO's ability to perform his duties. The company plays a major role in the U.S. economy, and thus the information is highly newsworthy. Hundreds of thousands of jobs are at stake, as are the fortunes of millions of investors. The doctor is about to retire, so she is not concerned with any professional consequences for breaching physician ethics. After the doctor discloses the information, the CEO sues for breach of an implied contract of confidentiality and for violating the breach of confidentiality tort. The doctor claims that the First Amendment bars liability. Should a court restrict liability for the implied contract action? The breach of confidentiality tort action? This hypothetical demonstrates the similarity between

---

105. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1963).

106. See, e.g., Jaffee v. Redmond, 518 U.S. 1, 8–10 (1996) (discussing evidentiary privileges recognized by common law); Snepp v. United States, 444 U.S. 507, 517 n.3 (1980) (Stevens, J., dissenting) (providing examples of statutory protections of confidential government information); N.Y. Times Co. v. United States (Pentagon Papers), 403 U.S. 713, 735–39 (1971) (White, J., concurring) (same); see also Daniel J. Solove, Understanding Privacy 136–40 (2008) (discussing confidentiality rules).

certain contract and tort actions. The breach of confidentiality tort is a private cause of action that has both tort-like and contract-like elements. Duties of confidentiality can be created by express contracts or implied as a matter of law from the circumstances of a relationship.[107] In many instances, the breach of confidentiality tort remedies a harm akin to those protected by contract law or promissory estoppel. One party voluntarily assumes a duty, either through an express or implied contract or promise. Breach of confidentiality differs from other torts such as defamation and public disclosure of private facts because the duty of confidentiality is understood as arising from a consensual relationship. Beyond a formalistic distinction between tort and contract, why should such different First Amendment consequences follow from the CEO's breach of confidentiality tort and implied contract actions? For the purposes of the First Amendment, the nature of the information involved is the same regardless of whether contract or tort liability is involved. Moreover, the basic theory upon which liability is premised is also largely the same—an express or implied assumption of a duty of confidentiality.

Although breach of confidence has long been neglected in American law, it is increasing in importance. The breach of confidentiality tort has been the primary tort protecting privacy in England, and it has its foundations in the same cases as the American version of the tort.[108] The English tort is quite robust in its application—friends, spouses, lovers, and nearly anybody else can be liable for breaching a duty of confidentiality.[109] In the United States, the breach of confidentiality tort has developed more slowly and narrowly than the English version, and it applies primarily to certain professionals such as attorneys and doctors, and to institutions like banks and hospitals.[110] During the past few decades, however, the breach of confidentiality tort has undergone a tremendous expansion in America, and it continues to grow.[111] If the American tort develops to resemble its English cousin, then it could play a potent role in the protection of information privacy.

At the doctrinal level, the breach of confidentiality tort lacks many of the limitations of the public disclosure of private facts tort. The public disclosure tort creates liability when a person widely discloses "a matter concerning the private life of another" that is "highly offensive to a reasonable person" and "not of legitimate concern to the public."[112] In con-

---

107. Richards & Solove, supra note 9, at 157; see also Susan M. Gilles, Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy, 43 Buff. L. Rev. 1, 20–25 (1995) (discussing "efforts to use contract to remedy . . . breaches of confidence"); Alan B. Vickery, Note, Breach of Confidence: An Emerging Tort, 82 Colum. L. Rev. 1426, 1426 (1982) (discussing development of breach of confidence tort).

108. See Richards & Solove, supra note 9, at 124–33 (discussing development of American and English privacy law).

109. Id. at 124–27, 158–73.

110. Id. at 157–58.

111. Id.

112. Restatement (Second) of Torts § 652D (1977).

trast, the breach of confidentiality tort contains no requirement that the information disclosed be "highly offensive" or not of legitimate public concern.[113] Under the breach of confidence tort, a "defendant is not released from an obligation of confidentiality merely because the information learned constitutes a matter of legitimate public interest."[114] Although much information gleaned in connection with a person's relationships with lawyers, doctors, bankers, or others might be of legitimate public concern, the breach of confidentiality tort lacks a newsworthiness requirement because the law recognizes the importance of ensuring trust and candor in these relationships.

Current legal theory provides no coherent way to determine whether rules of this sort implicate or violate the First Amendment. Despite the fact that the breach of confidentiality tort is now recognized in a majority of jurisdictions,[115] hardly any courts have looked at the First Amendment issues. Our research produced only one case, a 1991 trial court decision from New York. In *Anderson v. Strong Memorial Hospital*, a patient sued a hospital and doctor for breach of confidentiality.[116] The defendants raised a First Amendment defense, but the court concluded that *Cohen* governed and thus that the First Amendment did not bar liability.[117]

The handful of commentators who have examined the issue have come to differing conclusions. Susan Gilles contends that the breach of confidentiality tort, because it "targets only speech," is not sufficiently neutral to fall under *Cohen*.[118] She argues that the breach of confidentiality tort can create a chilling effect on speech because it is too unclear about when a speaker is under a duty of confidentiality, and thus it "greatly increases the speaker's fear of speaking."[119] Therefore, she concludes, "the tortious action for breach of confidence faces either automatic unconstitutionality or a scrutiny so strict that no plaintiff can recover."[120] Andrew McClurg agrees with Gilles, contending that "a breach of confidence tort directly targets speech,"[121] and that implied contract should be the appropriate remedy for victims of confidentiality

---

113. See Vassiliades v. Garfinckel's, Brooks Bros., Miller & Rhoades, Inc., 492 A.2d 580, 591 (D.C. 1985) ("The tort of breach of confidential relationship is generally described as consisting of the 'unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a confidential relationship.'" (quoting Vickery, supra note 107, at 1455)).

114. Id.

115. David A. Elder, Privacy Torts § 5:2, at 5-6 to -8 (2006) (stating that "clear modern consensus of the case law" is to recognize breach of confidentiality tort in context of physician-patient confidentiality).

116. 573 N.Y.S.2d 828, 829–30 (Sup. Ct. 1991).

117. Id. at 830.

118. Gilles, supra note 107, at 72–73.

119. Id. at 82.

120. Id. at 75.

121. Andrew J. McClurg, Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality, 74 U. Cin. L. Rev. 887, 906 n.126 (2006) (citing Gilles, supra note 107, at 72–73).

breaches.[122] Alan Vickery, whose Note on the breach of confidentiality tort has become one of the most influential pieces written on the topic, contends that the First Amendment applies to the tort and would mandate a newsworthiness test—that the information not be of legitimate public concern.[123] In contrast to Gilles, McClurg, and Vickery, Peter Winn notes that the First Amendment does not appear to prohibit liability based on a "contractual or professional duty" and that the "Supreme Court has shown itself to be extremely deferential in the constitutional review of legal enforcement of nondisclosure agreements when such agreements are in the context of an independent and legitimately established relationship of confidentiality."[124]

The scholars contending that First Amendment scrutiny applies to the breach of confidentiality tort do not analyze why the free speech interests involved in contract and promissory estoppel are different from those involved with the tort. McClurg, for example, advocates the implied contract action as a near functional equivalent to the breach of confidentiality tort, yet he does not address why the First Amendment should apply differently to each beyond the formalistic difference that one is an action in tort and the other is an action in contract.[125] Gilles's critique that a lack of clarity exists in identifying duties of confidentiality could just as readily be applied when such duties are found via implied contract or promissory estoppel.[126] In their defense, however, these scholars are not focusing primarily on this issue in their works and thus do not devote extensive analysis to it.

Therefore, although the law of confidentiality is quite large and growing, it currently remains in First Amendment limbo. And confidentiality is just one example of the areas of civil liability that inhabit the vortex in which the conflicting *Sullivan* and *Cohen* rules could both purportedly apply. A coherent theory is sorely needed to define the respective domains of the *Sullivan* and *Cohen* rules and determine when civil liability should trigger First Amendment scrutiny.

II. Theories of First Amendment Applicability

Given the profound overlap among tort, contract, and property, the two opposing rules for determining when the First Amendment applies to civil liability are on a collision course. As we have illustrated above, the law of confidentiality brings the issue to the fore.

---

122. Id. at 908–17.

123. See Vickery, supra note 107, at 1466–68 (discussing "situations in which first amendment considerations prohibit imposition of civil liability for breaches of confidence").

124. Peter A. Winn, Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law, 33 Rutgers L.J. 617, 679 (2002).

125. McClurg, supra note 121, at 916–17.

126. Gilles, supra note 107, at 23–24.

Is there a theory that can coherently determine when civil liability implicates the First Amendment? Although the free speech and civil liability conundrum has received less attention than many other problems of constitutional theory, a number of possible approaches have been proffered or hinted at by courts and commentators. We contend that such a theory should produce relatively determinate outcomes, as this issue implicates countless tort, contract, and property rules.

In this Part, we assess the descriptive and normative appeal of these theories. Although many of these theoretical approaches have their virtues, we conclude that none represents a compelling or a complete solution to the problem of civil liability for speech. Our analysis sets the stage for a new solution to the problem that we will articulate in Part III.

A. *The Generally Applicable Law Approach*

A leading method used by courts to resolve when civil liability implicates the First Amendment is what we will call the "generally applicable law approach." This theory holds that the First Amendment is only threatened by legal rules that single out speech for unfavorable treatment. Laws affecting speech and non-speech activity in a neutral way do not require First Amendment protection.

The leading example of the generally applicable law approach is *Cohen*.[127] As Justice White reasoned in his majority opinion, "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[128] The opinion in *Cohen* was unclear about much of its holding,[129] including precisely what it meant by a law being "generally applicable." For example, it is unclear whether "a generally applicable law" is one that applies to both speakers and non-speakers equally, or merely to all media and non-media defendants equally.[130]

Since our purpose here is to consider whether the general applicability approach can serve as a guide to the problem of free speech and civil liability, we are examining whether this approach can work without limiting our analysis to what the Supreme Court has specifically articulated.

---

127. Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991).

128. Id. at 669.

129. See supra notes 59–62 and accompanying text.

130. Eugene Volokh contends that *Cohen* is best understood more narrowly as a freedom of press case. Under his interpretation, *Cohen* concluded that the First Amendment does not require heightened scrutiny for generally applicable laws that do not single out the press. See Eugene Volokh, Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones, 90 Cornell L. Rev. 1277, 1294–97 (2005). According to Volokh, the Supreme Court's general applicability rationale was focused only on freedom of the press, and its holding that promissory estoppel does not violate free speech was based on consensual waiver: "[T]he Court rejected the free speech argument based on the principle that free speech rights, like most other rights, are waivable, rather than on an assertion that speech-neutral laws are per se constitutional." Id. at 1297.

Thus, under the general applicability approach as we will use it, if a law treats speech and non-speech equally, then it is generally applicable and does not trigger First Amendment scrutiny.

Several lower courts following *Cohen* have used the generally applicable law approach to assess whether civil liability rules were invalid under the First Amendment. For example, in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, the Fourth Circuit concluded that *Cohen* applied to the torts of breach of duty of loyalty and trespass committed by two ABC employees who fraudulently procured employment at a supermarket in order to conduct an investigative report.[131] The court reasoned that "the tort laws (breach of duty of loyalty and trespass) do not single out the press or have more than an incidental effect upon its work."[132] The First Circuit, in *Veilleux v. NBC*, grappled extensively with how to resolve "the relevant constitutional implications of a common law misrepresentation action against a media defendant."[133] One factor the court focused on was that "misrepresentation under Maine common law is a cause of general applicability. Applying it to journalists subjects them to the same consequences as all others."[134]

Under the generally applicable law approach, then, liability for publication in violation of express contract, implied contract, and promissory estoppel would presumably create no First Amendment problem, and such liability would be permitted. On the other hand, the First Amendment would apply (and frequently bar) liability under the public disclosure of private facts tort because it expressly targets only the act of speaking.

Although it purports to provide clear boundaries for the applicability of the First Amendment, the generally applicable law approach suffers from a fatal analytical problem: The level of generality with which one defines a particular area of law will control whether it is generally applicable. For example, in *Bartnicki v. Vopper*, the Supreme Court examined a provision of the Electronic Communication Privacy Act (ECPA) that created a private right of action to remedy the collection, use, or disclosure of information obtained via an illegal wiretap.[135] In concluding that the provision violated the First Amendment, the Court appeared to have assumed the law was not one of general applicability, for the Court never discussed *Cohen*.[136] The Court, however, focused only on this one provi-

131. 194 F.3d 505, 521 (4th Cir. 1999).

132. Id. at 522.

133. 206 F.3d 92, 126–29 (1st Cir. 2000).

134. Id. at 128.

135. 532 U.S. 514, 520–21 (2001).

136. Id. at 534–35. The Third Circuit had discussed *Cohen* extensively in its opinion below, coming to a rather tenuous distinction by reasoning that the "*Cohen* opinion thus instructs that a law of general applicability, which neither targets nor imposes disproportionate burdens upon the press, is enforceable against the press to the same extent that it is enforceable against individuals or organizations." Bartnicki v. Vopper, 200 F.3d 109, 119 (3d Cir. 1999), aff'd 532 U.S. 514 (2001). The court concluded that "a

sion of ECPA rather than on the statute as a whole. Examined as a whole, ECPA may be viewed as generally applicable: It prohibits not only speech involving the disclosure of wiretapped communications, but also the activity of engaging in wiretapping and other forms of electronic surveillance.[137] Neither the Court's opinion in *Bartnicki* nor the generally applicable law approach provides any principle for determining the proper level of generality with which laws should be assessed.

The generality problem extends beyond *Bartnicki* to virtually every area of law where the generally applicable inquiry can be made. For instance, courts applying the generally applicable law approach to contracts consider contract law very broadly, as including all types of contracts, and therefore hold that contract laws are generally applicable. In contrast, courts frame tort law more narrowly by focusing on specific torts, and thus conclude that tort laws are not generally applicable.[138] Thus, defamation law is not generally applicable because it involves torts that apply only to speech, whereas contracts apply to a wide array of situations, only some of which involve speech. But why view contract law so broadly? Specific kinds of contracts—such as confidentiality agreements—apply only to speech. Tort law encompasses many kinds of torts, only some of which primarily implicate speech. Negligence, for example, can involve speech or actions. The same is true for intentional infliction of emotional distress. In short, the generally applicable law approach does not explain the difference in treatment between tort and contract, because the approach provides no explanation why some bodies of law are defined at a greater level of generality than others. Since the level of generality drives the outcomes under the generally applicable law approach, and there is no coherent explanation for how to define the level of generality, the generally applicable law approach ultimately tells us nothing.

B. *The Consensual Waiver Approach*

One of the most widely accepted approaches for determining when civil liability triggers the First Amendment is to look to whether a person has consented to the waiver of her First Amendment rights. Under this approach, civil liability for speech implicates the First Amendment unless

---

prohibition on disclosure falls more heavily on the press." Id. at 118. But nearly all prohibitions on disclosure impact the press in the same way if the information is newsworthy, as it was in *Cohen*.

137. ECPA regulates both speech and non-speech activities. Consider, for example, the provision at issue in *Bartnicki*, which punishes as a felony and a civil tort any person who "(a) intentionally intercepts . . . (b) intentionally uses . . . or (c) intentionally discloses . . . the contents of any wire, oral, or electronic communication." 18 USC § 2511(1) (2006).

138. Compare Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 515–19 (4th Cir. 1999) (employing separate First Amendment analyses for the individual torts of breach of loyalty and trespass), with Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (discussing applicability of First Amendment to all contract and promissory estoppel remedies generally).

it originated in consensual agreement, such as a contract. Like the generally applicable law approach, this theory seems to have done some of the theoretical work in *Cohen*. In that case, the Supreme Court noted that in the contractual context, the "parties themselves . . . determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed."[139] According to this view, because self-imposed restrictions on free speech are consensual waivers of the right to free speech, they do not implicate the First Amendment.

Some lower courts have seized on the above language in *Cohen*, concluding that First Amendment rights are alienable. On this view, civil liability does not trigger the First Amendment if a person has consented to relinquishing their free speech rights. As one circuit court has noted, generally, "constitutional rights, like rights and privileges of lesser importance, may be contractually waived where the facts and circumstances surrounding the waiver make it clear that the party forgoing its rights has done so of its own volition, with full understanding of the consequences of its waiver."[140]

Leading scholars have also embraced the consensual waiver approach to the problem of speech liability. For example, Eugene Volokh argues that the "free speech right must turn on the rights of the speakers, and . . . it's proper to let speakers contract away their rights."[141] Volokh concludes that implied contracts of confidentiality escape the restrictions of the First Amendment because customs of confidentiality within certain relationships are well established.[142] He notes that laws implying "contracts from transactions in which there's no social convention of confidentiality are somewhat more troublesome."[143] However, since it is "hard to determine exactly what most people expect," statutory default rules of implied contract "clarify people's obligations instead of leaving courts to guess what people likely assumed."[144] Accordingly, Volokh concludes that legislatures have the power to enact laws requiring implied promises of confidentiality, at least as long as the parties have the ability to explicitly opt out of the obligation of confidentiality.[145]

Volokh justifies his approach by arguing that contract liability is not an unconstitutional way to "stop people from speaking about me" but is instead a permissible right to "stop people from violating their promises to me."[146] He notes that enforcement of contract would "pose[ ] little risk of setting a broad precedent for further restrictions [on free speech],

139. *Cohen*, 501 U.S. at 670.

140. Erie Telecomms., Inc. v. City of Erie, 853 F.2d 1084, 1096 (3d Cir. 1988).

141. Volokh, Freedom of Speech, supra note 104, at 1057.

142. Id. at 1057–58.

143. Id. at 1058.

144. Id. at 1059–60.

145. Id. at 1060.

146. Id. at 1061.

precisely because it is founded only on the consent of the would-be speaker."[147] In such a case, "the government is simply enforcing obligations that the would-be speaker has himself assumed."[148]

The consensual waiver approach views a person's consent to the waiver of her First Amendment rights as dispositive for First Amendment purposes.[149] Contract and promissory estoppel thus do not trigger First Amendment protection, because people voluntarily agree to speech restrictions. As Charles Fried notes, "[t]he moral force behind contract as promise is autonomy: the parties are bound to their contract because they have chosen to be."[150] Since First Amendment rights are alienable (in contrast, for example, to the constitutional ban on slavery), consensual waiver will invariably play a part in any approach to First Amendment applicability. Moreover, consensual waiver resonates with the important strand of First Amendment theory that justifies free speech protection based on the autonomy of individual speakers,[151] and with the body of theory and commentary recognizing a First Amendment "right not to speak."[152]

The consensual waiver approach has a great deal of merit. Ultimately, however, it cannot serve as a complete solution to the problem of speech liability because it is underinclusive. By focusing entirely on the rights of *speakers*, the consensual waiver approach ignores the important social interest of free speech that protects the rights of *listeners*. Free speech is not justified solely based on the autonomy of speakers, but also

---

147. Id.

148. Id.

149. Although a person can waive her free speech rights, such waiver can be invalid if made under duress or without being knowing and informed. Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 858 P.2d 245, 258 (Wash. 1993) ("[C]ourts have indicated that the criminal law standard of a waiver voluntarily, knowingly, and intelligently made might be applicable, and have required that, at the very least, the waiver of a First Amendment right be knowing."). Courts generally scrutinize waivers of constitutional rights more stringently than waivers of other interests. According to the Supreme Court, waivers of constitutional rights must be "clear and compelling." Curtis Publ'g Co. v. Butts, 388 U.S. 130, 145 (1967). Some courts "closely scrutinize waivers of constitutional rights, and indulge every reasonable presumption against a waiver." E.g., City of Glendale v. George, 256 Cal. Rptr. 742, 744 (Ct. App. 1989) (citations omitted) (internal quotation marks omitted).

150. Charles Fried, Contract as Promise 57 (1981).

151. See generally, e.g., C. Edwin Baker, Human Liberty and Freedom of Speech (1989) (articulating theory of First Amendment protection grounded in individual liberty).

152. See, e.g., Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."); Talley v. California, 362 U.S. 60, 65 (1960) ("[T]here are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified."); NAACP v. Alabama, 357 U.S. 449, 462 (1958) (finding unconstitutional compelled disclosure of affiliation with groups); Haig Bosmajian, The Freedom Not to Speak 167–205 (1999) (collecting and discussing cases, articles, and other materials).

on how it safeguards the vibrant public discourse essential to self-governance or the search for truth. Most famously, the Supreme Court in *Sullivan* described this interest as ensuring "uninhibited, robust, and wide-open" public debate.[153] When individuals agree not to speak, even where each individual choice might be made freely and autonomously, such agreements can produce outcomes that are threatening to vigorous public discourse. A theory built exclusively around the waiver of constitutional rights fails to account for this kind of threat to First Amendment values.

At the doctrinal level, the consensual waiver approach's focus on autonomy fails to explain the problem of unconstitutional conditions. For instance, suppose the government offered to pay citizens $100 in exchange for not criticizing government policies. From a pure autonomy approach, those who accepted such a deal would have freely bargained away their First Amendment rights to criticize the government. But from the perspective of the social interest in free speech, a valuable source of potential criticism of the government would have been bought up by the government in such a way as to skew, distort, and stifle public discourse. Recognizing this problem, the Supreme Court has held in a series of cases that the government may not condition certain waivers of constitutional rights on the receipt of benefits.[154] The unconstitutional conditions doctrine has been criticized for being inconsistent and incoherent,[155] but it clearly reflects that even "consensual" waivers of constitutional rights can threaten the First Amendment and trigger heightened scrutiny.

Additionally, in the context of government employment, the Court has applied the First Amendment to speech restrictions in the public sector workplace. In *Pickering v. Board of Education*, the Court applied a First Amendment balancing test because the employee's speech was of public concern.[156] As the Court declared in *Connick v. Myers*, "a State cannot

153. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

154. See, e.g., Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001) (striking down condition on use of federal funds for legal services that restricted challenges to welfare laws); FCC v. League of Women Voters, 468 U.S. 364, 402 (1984) (striking down condition on receipt of public broadcasting funds that required recipients to refrain from editorializing). But see Rust v. Sullivan, 500 U.S. 173, 200 (1991) (upholding regulation prohibiting federal funds from being used by those who provide abortion counseling).

155. For example, Jason Mazzone notes that the Court has treated waiver of constitutional rights quite inconsistently. While the Court is highly protective of certain waivers of First Amendment and other constitutional rights, it has provided hardly any limitations on highly coercive waivers of rights in the criminal justice context. In a plea bargain, a criminal defendant relinquishes numerous constitutional rights in exchange for fewer charges or a lighter sentence. Courts have treated plea bargains akin to regular contracts rather than applying the unconstitutional conditions doctrine, which limits the nature of what constitutional rights can be waived in agreements with the government. Jason Mazzone, The Waiver Paradox, 97 Nw. U. L. Rev. 801, 801–04, 833–34 (2003).

156. 391 U.S. 563, 568 (1968).

condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression."[157]

One might claim that the cases involving unconstitutional conditions and speech by government employees are wrongly decided. Since First Amendment rights are alienable, the argument goes, any consensual waiver should be the end of the constitutional inquiry. However, the unconstitutional conditions doctrine addresses a serious threat to constitutional rights that should not be ignored. Treating the government and private parties as equivalent overlooks the danger that the government could use its vast resources to buy up constitutional rights.[158] As Kathleen Sullivan observes, unconstitutional conditions "can alter the balance of power between government and rightholders" and can "skew the distribution of constitutional rights among rightholders because it necessarily discriminates facially between those who do and those who do not comply with the condition."[159]

Consensual waiver thus provides only a partial and incomplete solution to the problem because it focuses exclusively on the individual interests promoted by free speech to the exclusion of any social interests. It thus fails to account for the potentially problematic imposition of government power in certain forms of civil liability, even when parties consent to speech restrictions. Volokh himself acknowledges that "*Cohen v. Cowles Media* does not decide to what extent the government, acting as contractor, may require people to sign speech-restrictive contracts as a condition of getting data from the government itself."[160] He notes that the "question raises thorny issues of unconstitutional conditions" and that the Court has provided little guidance about how it should be resolved, but Volokh then sets the issue aside without addressing it.[161] For the consensual waiver approach to work, however, this issue must be resolved. Thus, whether a party consents to waiving free speech rights, in and of itself, cannot determine in all instances when civil liability should trigger the First Amendment. There are circumstances in which the enforcement of formally consensual speech bargains might nevertheless threaten or corrode the robust public discourse upon which a vibrant First Amendment culture depends.

---

157. 461 U.S. 138, 142 (1983); see also Rankin v. McPherson, 483 U.S. 378, 383 (1987) ("[I]t is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.").

158. See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1413–21, 1451 (1989) (offering vigorous defense of doctrine of unconstitutional conditions and arguing that government, because of its powerful and pervasive influence, "poses greater danger than private parties of coercion, however defined").

159. Id. at 1490 (emphasis omitted).

160. Volokh, Freedom of Speech, supra note 104, at 1062.

161. Id.

C. *The Nature of the Injury Approach*

Some courts have attempted to look to the nature of the injury being remedied by civil liability in order to determine whether to apply the *Cohen* or *Sullivan* rules in a given case. Under this approach, damages for certain kinds of injuries are consistent with the First Amendment, while others are not. In *Sullivan,* the injury rectified by defamation law was reputational. By contrast, the Court in *Cohen* argued that Cohen was not "attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim."[162] The Court observed that "Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages in excess of $50,000 for breach of a promise that caused him to lose his job and lowered his earning capacity."[163]

Several courts have looked to this passage in *Cohen* to conclude that the nature of the injury sought to be remedied should determine whether the First Amendment applies. Under this theory, lawsuits seeking remedies for certain kinds of harm create dangers to free speech akin to those in *Sullivan*, and should thereby invoke First Amendment scrutiny. For example, in *Veilleux v. NBC*, a misrepresentation case, the First Circuit focused on the nature of the damages caused by defendant's speech, concluding that they were "pecuniary, not reputational."[164] Therefore, the *Cohen* rule rather than the *Sullivan* rule governed. In *Compuware Corp. v. Moody's Investors Services*, Compuware contended that Moody's violated an implied contractual term to perform a credit rating assessment diligently.[165] The court concluded: "While ostensibly presenting a breach of contract claim, this argument is grounded in negligence, and amounts to nothing more than a backdoor attempt to recover damages for the harm allegedly caused by Moody's protected expression of its opinion of Compuware's financial condition."[166] The court therefore imposed the First Amendment requirements for defamation, which mandated that Compuware prove actual malice.[167] In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, the court rejected an attempt by the plaintiff to recover "defamation-type" damages for the torts of breach of loyalty and trespass.[168] Although the court concluded that these torts should fall under the *Cohen* rule, only non-defamation-like damages were recoverable without triggering the First Amendment.[169] As a district court articulated the approach:

---

162. Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991).

163. Id.

164. 206 F.3d 92, 128 (1st Cir. 2000).

165. 499 F.3d 520, 531 (6th Cir. 2007).

166. Id.

167. Id.

168. 194 F.3d 505, 522 (4th Cir. 1999).

169. Id.

> Viewed in tandem, *Hustler* and *Cohen* divide claims against the news media by categorizing the damages sought. If a party seeks damages for harm to reputation or state of mind, the suit can only proceed if that party meets the constitutional requirements of a defamation claim. If a party seeks damages for non-reputational harms, which include lost jobs and diminished employment prospects, then the First Amendment does not bar suit as long as the claims are brought under generally applicable laws.[170]

In determining whether the First Amendment applies to civil liability, the nature of the injury approach has the undeniable virtue of attempting to avoid simplistic formalist solutions. Instead, it draws on the powerful realist insight of *Sullivan* that the risks of government censorship should be assessed regardless of the precise form the censorship might take. It also helpfully suggests that different forms of liability might produce different kinds of threats to free speech.

But, at least in its current form, the nature of the injury approach is an incomplete solution to the problem of civil liability for speech. This is the case for at least two reasons. First, although purporting to avoid formalism, attempts to distinguish cases on the basis of the nature of the injury can, nevertheless, require a different kind of formalism that can produce indeterminate outcomes. Alan Garfield argues: "This distinction between economic versus reputational damages . . . is unfortunately specious. Neither [*Sullivan*] nor its progeny make a distinction between 'economic' and 'reputational' damages, and such a distinction cannot be reasonably sustained."[171] Garfield goes on to note that "[o]ne of the obvious ways in which a defamatory remark can harm someone, particularly a business, is by causing economic losses" and "the common law has long recognized that economic losses are part and parcel of defamation injury."[172] The nature of the injury approach relies on a dubious distinction between different kinds of injuries and does not provide a principled or coherent way to determine when the First Amendment should apply to civil liability.

Second, as currently articulated, the nature of the injury approach does not tell us which kinds of injuries count and which do not for First Amendment purposes. Even if one could accurately identify different theories of damages that different forms of civil liability remedy (for example, economic, reputational, hedonic), the nature of the injury approach fails to explain why certain kinds of damages threaten the First Amendment while others do not, other than to point back to *Sullivan* and *Cohen*. This merely begs the question.

---

170. Steele v. Isikoff, 130 F. Supp. 2d 23, 29 (D.D.C. 2000).

171. Garfield, The Mischief of *Cohen*, supra note 59, at 1123.

172. Id. at 1123–24.

D. *The Public Concern Approach*

Another approach to determining when civil liability for speaking should invoke First Amendment scrutiny is to look to the nature of the speech for which liability is sought. The rule would be that the First Amendment applies to civil liability when the speech involves matters of public concern. Such an approach has foundations in current constitutional jurisprudence. For example, with regard to restrictions on speech in the government employment context, speech "on a matter of public concern" will trigger First Amendment scrutiny.[173] In a different context, in *Bartnicki v. Vopper*, the Court held that the First Amendment applied to a federal law creating liability for disclosing information with knowledge that it was obtained by an illegal wiretap.[174] The Court held that First Amendment scrutiny applies when the information is of "public concern."[175] The public concern approach is based on the rationale that speech on matters of public concern is at the core of the First Amendment because it relates to processes of self-governance.[176]

A focus solely on the type of information at issue, however, is flatly inconsistent with current law. The information involved in *Cohen* was of great public concern, and *Cohen* would be wrongly decided under such an approach. The public concern approach would essentially resolve the conflicting *Sullivan* and *Cohen* rules by privileging the former over the latter.

More generally, a public concern approach provides too much First Amendment protection at the cost of confidential relationships. All contracts between private parties involving any newsworthy information would be subject to heightened First Amendment scrutiny. Public figures would be dramatically restricted in their ability to establish contractual arrangements, much more so than private figures. Additionally, public figures would find it more difficult to enforce confidential relationships with doctors, lawyers, or other professionals. Should the doctor of every celebrity, public figure, or person of importance be protected by the First

---

173. Connick v. Myers, 461 U.S. 138, 146 (1983).

174. 532 U.S. 514, 517–18 (2001) (invalidating as applied to facts of case provision of Electronic Communications Privacy Act of 1986, codified as amended at 18 U.S.C. § 2511 (2006)).

175. Id. at 534.

176. As discussed above, this inquiry was at the heart of the Court's reasoning in *Sullivan*. See supra note 27 and accompanying text. Moreover, prominent speech theorists across the ideological spectrum have long endorsed the importance of speech on matters of public concern as critically important to the democracy-reinforcing value of the First Amendment. See, e.g., Sunstein, Democracy and Free Speech, supra note 19, at 34–38 ("The issue of constitutional validity [under the First Amendment] should be assessed in Madisonian terms: Do the rules promote greater attention to public issues? Do they ensure greater diversity of view?"); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 20 (1971) (noting First Amendment's "central place in our society" is attributable to "the importance of speech to democratic organization"); supra notes 27–30 and accompanying text.

Amendment when she discloses confidential information? Should banks and lawyers have First Amendment exceptions to their duties of confidentiality whenever the information is of public concern? This would mean that in any prominent case, a lawyer might be able to disclose newsworthy confidential information about her client. Moreover, should the thief who stole a public figure's diary have a First Amendment right to speak about it? Clearly we recognize that even information of public concern can be restricted from disclosure depending upon the context in which it was obtained. The problem with the public concern approach, then, is that it provides too broad a scope of First Amendment protection.

E. *The First Amendment Balancing Approach*

A final approach that is sometimes advocated is that the First Amendment should apply to all instances of civil liability. Cases would be resolved via balancing, though several different balancing approaches have been proposed. Courts could apply constitutional scrutiny on a case-by-case basis, they could do so categorically across areas of law, or they could apply the content-neutral balancing scheme of *United States v. O'Brien*[177] to all instances of civil liability. We will address each of these variants in turn.

Robert O'Neil calls for a form of categorical balancing in which the First Amendment should apply to all forms of liability for speech, with different rules applying for different areas of law.[178] Under this approach, all libel cases would warrant one rule, while *Cohen*-style disclosures of private information would warrant a different rule. In each category of law, however, O'Neil seems to argue that the balance be struck with a firm thumb on the side of speech.[179] O'Neil's approach, however, does not provide for nuanced balancing. All contract and promissory estoppel situations are difficult to lump into a one-size-fits-all categorical balance, especially since they come in a seemingly endless number of forms and types.[180]

Other scholars have called for case-by-case balancing, in which each instance of civil liability imposed for speech would be assessed on its own merits under the First Amendment. For instance, Lili Levi argues that courts should analyze confidentiality contracts under the First Amendment on a case-by-case basis, with a multi-factored test: "(1) the character of the source's substantive information; (2) the source's reasons for leaking; (3) the relevance of the source's identity; (4) the press' reasons for disclosure; and (5) the nature of the relationship between the

177. 391 U.S. 367, 376–77 (1968).

178. See generally O'Neil, supra note 4.

179. See id. at 90, 119 (arguing for strong First Amendment protection of images obtained in public place, and for media that inspires violent acts).

180. See T. Alexander Aleinikoff, Constitutional Law in an Age of Balancing, 96 Yale L.J. 943, 972–95 (1987) (cataloguing problems with balancing, especially where substantive metric with which to strike balance is lacking).

reporter and the source."[181] Although she develops this approach in the context of confidentiality contracts involving the press, her logic could plausibly extend to confidentiality contracts more broadly.

Subjecting all civil liability that implicates speech to case-by-case balancing would constitutionalize an extensive domain of private ordering. Is it really feasible for courts to engage in constitutional balancing for every contract, tort, and property right that has some impact on speech? Clearly not. Such a rule would be unworkable, because so much of what we do, say, write, and agree to involves expression of one sort or another. Moreover, balancing tests such as the one Levi proposes are quite contextual, which can be effective for resolving many issues but comes at a cost of creating indeterminacy. Although contextual analysis might be worth this cost in a number of circumstances, it might not be worth it in all situations. Since civil liability that implicates speech involves such an enormous domain of social and economic activity, especially based on the current broad conception of speech, a case-by-case balancing approach would run the significant risk of creating too much indeterminacy and uncertainty, making it hard for people to know if their basic agreements, transactions, and property rights will be enforceable.

A third form of balancing would be to apply intermediate scrutiny under *United States v. O'Brien*[182] to all instances of civil liability for speaking. In *O'Brien*, the Supreme Court upheld a criminal conviction for the burning of a draft card against a symbolic speech challenge by applying a three-part test that required a (1) valid and important government interest that was (2) unrelated to the suppression of speech and was (3) sufficiently tailored so as not to unduly infringe upon First Amendment interests.[183] At least one scholar has advocated applying *O'Brien*-style scrutiny across the board to all civil liability for speech.[184]

But like other forms of balancing, the application of the *O'Brien* framework to the speech-liability problem would prove unsatisfying. First, *O'Brien*-style balancing would suffer from the same level of generality problem that we discussed earlier in connection with the general applicability approach: If we are to balance the First Amendment interest against a private law speech restriction, we would need to know at what level of generality we should assess the private law rule.[185] Using the example of a confidentiality agreement, would we look at each individual agreement (recognizing that some agreements might create special dangers to free speech), or all such agreements as a whole? Like the generally applicable law approach, *O'Brien* (like existing balancing theories

181. Lili Levi, Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations, 43 Rutgers L. Rev. 609, 715 (1991).

182. 391 U.S. 367, 376 (1968).

183. Id. at 377.

184. Bogen, supra note 59, at 205.

185. Cf. supra notes 138–138 and accompanying text.

generally) does not provide any guidance about how to proceed with the inquiry.

Second, and more fundamentally, an *O'Brien* approach would ask the wrong questions about the problem of civil liability. The *O'Brien* approach asks courts to balance a government interest that is unrelated to the suppression of speech against a burdened speaker's First Amendment rights. The *O'Brien* test is designed for situations (like draft card burning) where the government's prosecution of a content-neutral law has the incidental effect of restricting speech, not where individuals seek to enforce rights and duties against other individuals. It is unclear how this approach would translate to the civil liability context. In the civil liability context, the idea of balancing a government interest unrelated to the suppression of speech against the burden on the speaker makes no sense, because the government generally has no interest in any particular case. The government is generally not a party to either the agreement being enforced or any litigation challenging it on First Amendment grounds. The speech-restrictive motivation of the enforcement thus typically comes not from the government but from private parties. Moreover, civil liability rules themselves are often not directly related to the suppression of speech; rather, it is how particular private parties choose to use civil liability rules that is.

As a result, the *O'Brien* standard contains no theory of which sorts of civil liability are threatening to the First Amendment. It does not tell us anything about which sorts of private rules are "related to the suppression of speech," nor does it contain any theory about how and why such rules should be classified. *O'Brien* would tell us to balance, but would give us no terms or standards with which to balance. An additional theory external to the *O'Brien* model would be needed, and no such theory currently exists.

Thus, like other forms of balancing, the *O'Brien* approach lacks nuance and is poorly suited to situations where private parties use the law to pursue their own ends.

III. A New Approach

When should civil liability trigger First Amendment protections? Despite the array of approaches discussed in Part II, none provides a complete or convincing answer to this question. The generally applicable law approach fails because it provides no metric to judge the level of generality of a body of law, a question that drives the entire inquiry. The consensual waiver approach has considerable merit, but it cannot account for the unconstitutional conditions doctrine and leaves the potential for underprotection of free speech. The nature of the injury approach fails because it makes an untenable distinction between types of damages. The public concern approach is limited by its focus on the nature of the information and its failure to take into account other considerations, such as how the information is obtained. The First Amendment balanc-

ing approach would leave behind a morass of uncertainty and constitutionalize an enormous domain of activity between private parties. Is there a better approach? We contend that there is.

A. *The Government Power Approach*

When it comes to free speech and civil liability, we contend the key issue is government power. Of course, government power is involved to some extent every time a legal rule is enforced. The issue is thus not whether any form of government power is being exercised, but which kinds of government power are particularly dangerous and should be curtailed as abridgements of free expression. In the discussion that follows, we specify the types of government power that should trigger First Amendment protection and those that should not. We suggest that when government power is used to dictate the terms of civil duties not to speak (what we call the "duty-defining power"), the special dangers of this power warrant application of the First Amendment. In contrast, when private parties create the content of speech-restrictive rules, the First Amendment should not apply. In this Section, we describe these two kinds of government power, explain why the duty-defining power is especially threatening to the First Amendment, show how to distinguish between duty-defining and non-duty-defining rules, and discuss how our approach relates to current notions of the state action doctrine.

1. *Two Forms of Government Power Through Civil Liability.* — The civil liability system uses government power to enforce duties people owe to each other. Enforcement power is certainly significant in all its forms, for it employs the government's vast strength, resources, officials, and machinery. Nevertheless, not all enforcement of duties is the same. Some forms of duty enforcement employ government power to shape social conduct in ways defined by the state. Other forms of duty enforcement serve to lend government power to private parties to enforce aims they have designed on their own accord.

One form of government power involved in the civil liability system is what we call "duty-defining." By this, we mean the use of government power to specify the content of duties that private actors owe to each other. When the government uses tort law to establish substantive rules of social conduct that all members of society must follow, it is defining the content of the duties owed. The person subject to such a duty cannot voluntarily escape from it unless she is released by another. For example, under the law of tort, Alice has a duty not to negligently injure Bill. Alice cannot escape this duty unless Bill waives it. Likewise, Alice has a duty not to defame Bill, a duty from which Alice cannot escape unless Bill allows Alice to defame him. The government, through statute or the civil liability system, defines the nature and content of these duties. In this way, the civil liability system becomes a way for the government to regulate social conduct by defining the duties and having private parties serve as civil "prosecutors" to enforce them.

The other form of government power, which we call "non-duty-defining," merely establishes a machinery to facilitate relationships and commerce between parties who wish to create and enforce duties with each other. In such cases, the duties of relationships are established by private parties between themselves, and the government merely stands behind such agreements to give them binding force. In these cases, the government does not set the terms of the duties, but rather supports social interactions by ensuring that transactions and agreements can be made and enforced. By creating a forum for people to resolve disputes with each other, non-duty-defining power enables people to enforce promises and agreements that would be weak and ineffectual without an enforcement mechanism. Private parties, to a large extent, define the content and substance of the duties owed to each other—not the government. The government uses its power to enforce the duties that private parties have created.

When civil liability rules restrict speech, we contend that duty-defining power should trigger the First Amendment, but non-duty-defining power should not. Civil liability implicates the First Amendment when the government is mandating the duties not to speak that private parties owe to each other. If the government directly imposes a duty on a party that others can sue the party for breaching and that the party cannot escape from, then this is an imposition on that party's First Amendment rights.

a. *Non-Duty-Defining Power.* — Why should non-duty-defining power be beyond the First Amendment? One might contend that the government should never use its power to facilitate people in alienating their First Amendment rights, even when they do so freely. To address this objection, we must examine the justifications for free speech. Although many reasons behind the protection of free speech have been proposed, they can be roughly divided into two types: (1) "speaker-based," in which the value of the First Amendment is in protecting the speaker's autonomy; and (2) "listener-based," in which the First Amendment ensures that ideas and viewpoints are expressed in public discourse.[186]

The classic statement of a listener-based regime is that of Alexander Meiklejohn, who argued that "[w]hat is essential is not that everyone shall speak, but that everything worth saying be said."[187] Meiklejohn's concern (like Madison's before him) was to ensure that a sovereign people had access to the ideas and information necessary for effective democratic

---

186. Prominent examples of speaker-based theories include Baker, supra note 151; Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591, 594 (1982); David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 62 (1974); Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 215 (1972). Examples of listener-based theories include Madison, supra note 28, at 227; Meiklejohn, supra note 29, at 26; Sunstein, Democracy and Free Speech, supra note 19, at 34–35.

187. Meiklejohn, supra note 29, at 25.

self-governance.[188] Justice Souter's dissent in *Cohen* makes similar listener-based arguments against the *Cohen* rule: "[F]reedom of the press is ultimately founded on the value of enhancing [public] discourse for the sake of a citizenry better informed and thus more prudently self-governed."[189]

Although they are often mutually reinforcing, the speaker-based and listener-based models come into conflict when a person voluntarily desires to waive her free speech rights. The speaker's autonomy and freedom to trade away her right to speak clashes with society's interest in having the speech be part of public discourse.

The speaker-based model dominates First Amendment jurisprudence. Under current law, First Amendment rights are not merely alienable by individual speakers; the decision not to speak is also a First Amendment right. Rooted in notions of the autonomy of individual speakers, this right acts to prevent the government from coercing individuals into saying more than they would prefer, or professing any idea or belief with which they may disagree.[190] In a pure listener-based model, First Amendment rights would not be alienable, as this could deprive society of speech that is of public concern. Moreover, a pure listener-based model would conceivably require the First Amendment to apply even in the absence of state action. This would be a radical shift in current First Amendment law.

Although First Amendment jurisprudence is predominantly speaker-based, it is not purely speaker-based. Collective listener-based justifications often play an important role in First Amendment cases. As we discuss in Part II.B when examining consensual waiver, significant constitutional problems are likely to arise when the government uses its largesse to induce citizens to voluntarily refrain from expressing certain viewpoints or disseminating various forms of information. Beyond such cases, however, people retain a significant amount of freedom to determine when and whether to speak. For the most part, free speech rights are alienable, and it is only when the government is inducing or unduly influencing their alienation that the First Amendment comes into play. To

---

188. Madison, supra note 28, at 227; Meiklejohn, supra note 29, at 25.

189. Cohen v. Cowles Media Co., 501 U.S. 663, 678 (1991) (Souter, J., dissenting).

190. The Supreme Court has long held that the First Amendment is generally violated where the state defines the content of a message and requires a speaker to utter it. See, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (suggesting First Amendment violation where "specific message is dictated by the state"); Wooley v. Maynard, 430 U.S. 705, 715, 717 (1977) (holding state mandated license plates reading "Live Free or Die" violated First Amendment); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding compelled flag salute by children violates First Amendment rights not to speak). See generally, Leslie Gielow Jacobs, Pledges, Parades, and Mandatory Payments, 52 Rutgers L. Rev. 123, 183 (1999) ("Where the government acts to manipulate the marketplace of ideas, strict scrutiny applies unless the compelled expression falls into the narrow category of factual disclosures imposed to enhance consumer information . . . .").

the limited extent First Amendment jurisprudence protects the rights of listeners, it does so only when the government is causing the alienation of free speech rights, not when it is merely enforcing an alienation created through private ordering.

With non-duty-defining power, the exercise of government power is only possible if the speaker has voluntarily assumed a duty. Dealings between private parties, not the government, establish the scope and contours of the duty.[191] The government's role in shaping the speaker's expression is thus secondary to that of the private parties, who have the lion's share of control over what can be said.

The First Amendment is primarily a limitation on government power when it inhibits or tries to direct public discourse. The First Amendment certainly serves the goal of promoting public discourse, but it does so primarily by protecting speakers against problematic exercises of government power. In other words, people are free to agree to be bound to duties that limit their freedom of speech. Because of this freedom, non-duty-defining power differs fundamentally from duty-defining power. In the case of non-duty-defining power, the government is only using its power to enforce a person's own choice to alienate her free speech rights. Moreover, the government is not playing a significant role in inducing a person to alienate her rights; it is merely providing a mechanism to enforce the alienation. Private parties, through their own dealings, relationships, and agreements, create duties to each other. Non-duty-defining power involves enforcing activities of private ordering.

b. *Duty-Defining Power.* — In contrast, in the case of duty-defining power, the government is using its power to define when or how a person can speak. It is directing the shape and form of discourse. This is the kind of government power that is most pernicious, since the First Amendment provides rights against government speech restrictions; its goal is to keep the government from interfering in public discourse.

Duty-defining power identifies the real danger in the context of civil liability for speech. As the Supreme Court noted in *Sullivan,* the First Amendment is principally concerned with restraining the government from dictating, distorting, or suppressing the terms or content of public discourse.[192] As the court noted, what matters is whether the government is seeking to coercively influence the debate, and not whether it is doing so by putting its critics in jail or subjecting them to civil liability. As Justice Brennan observed in his majority opinion, "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."[193]

---

191. An exception arises when the government is a party to the confidentiality agreement or establishes a condition on information it divulges. For a discussion of how these situations fit into our theory, see infra Part III.A.3.

192. 376 U.S. 254, 269–70 (1964).

193. Id. at 277.

When the government uses its power to create civil liability for speech, it can silence those with whom it disagrees in a number of different ways. The First Amendment has principally been concerned with the use of prior restraints or subsequent criminal punishments to silence dissent, but a creative government can use civil liability to produce an analogous result. For example, critics can be silenced by subjecting them to tort liability,[194] by bribing them into contractual silence,[195] or by using property law to create "free speech zones" and areas where public discussion is not allowed.[196] Tort, contract, and property rules negotiated by private parties can certainly restrict speech, but the First Amendment is particularly threatened when the sovereign itself is using these sources of law to stifle public debate. These are instances where the government has defined civil duties, and it is for this reason that exercises of the duty-defining power are especially dangerous to First Amendment values.

The duty-defining power's threat to First Amendment values is apparent under any of the traditional justifications for why free speech should receive special protection. From a listener-based perspective, this is relatively straightforward. If we are concerned with the public debate necessary to support self-governance or the search for truth, then the government's use of civil liability to influence these processes is problematic. From a speaker-based perspective, duty-defining power interferes with speaker autonomy by forcing a speaker to face potential liability for her speech.

2. *Why Power Is the Key Concept Rather than Consent.* — The distinction between duty-defining and non-duty-defining power overlaps to some degree with the consensual waiver approach. In many instances, duty-defining power involves duties that are not waivable and non-duty-defining power involves duties that are waivable. Our approach differs in a very important respect from the consensual waiver approach. With consensual waiver, the operative concept is consent, and the approach focuses exclusively on speaker autonomy. If a speaker consents to waiving her right to speak, and the consent is voluntary, then under the consensual waiver approach, the First Amendment does not apply. Although consent is a key component in our government power approach, it is not the governing concept. We contend that the First Amendment must limit problematic exercises of government power, and, in some instances, the use of such power can occur with people's consent. For example, in our critique of the consensual waiver approach, we discussed the hypothetical situation of the government offering to pay people $100 not to criticize government policies. Such an arrangement would not be subject to the First Amendment under the consensual waiver approach, as a payment of

194. E.g., id. at 301–02 (Goldberg, J., concurring in the judgment) (discussing liability for defamation).

195. See discussion of unconstitutional conditions doctrine infra Part III.A.2.

196. For a comprehensive discussion of how the government can use property law to suppress public discourse and political dissent, see Zick, supra note 102, at 117.

$100 is likely not coercive enough to render a person's decision to avoid criticizing the government involuntary. Under the government power approach, however, the arrangement would be subject to First Amendment scrutiny. The arrangement is problematic not because of a lack of consent but because of the way the government is exercising its power. The government commands tremendous resources, and it must be limited in using these resources to skew public discourse.

The government power approach explains most coherently how speaker-based and listener-based considerations are configured under the First Amendment. Although the First Amendment is predominantly speaker-based, it is not exclusively so. In certain instances, listener-based considerations must be taken into account. Existing theories of the First Amendment often focus exclusively on speaker or listener interests, or they fail to explain how to address situations where such interests conflict. A purely listener-based First Amendment would override speaker autonomy in favor of mandating robust public discourse. The First Amendment is not a broad mandate forcing society to engage in public discourse; rather, it is a protection against government power that impedes such discourse. A purely speaker-based First Amendment would allow the government to use its nearly infinite resources to create powerful incentives to shape public discourse to suit its aims. Such action by the government would be immensely troublesome, even if speakers voluntarily bargained away their right to speak. The unconstitutional conditions doctrine recognizes the need for limitations on the government's ability to induce people to surrender rights.

One could try to mold the consensual waiver approach to address the problems of undue government influence over speech by concluding that such influence is coercive and therefore makes such waivers of free speech rights nonconsensual. But this strategy would dramatically alter current legal notions of consent, which typically require a high level of coerciveness to deem an agreement involuntary. The reason why the First Amendment should require scrutiny when the government offers people $100 not to say certain things is not because people lack the ability to consent to this arrangement. It is because the government is meddling too extensively with public discourse. This might not be a menace to free speech from the speaker-based perspective, but it does threaten free speech from the hybrid speaker-listener model that we (along with the bulk of contemporary theory and doctrine) adopt.[197] Although the First Amendment should not prevent people from waiving their right to speak in transactions with each other, it should be implicated when they are waiving such rights at the instigation of the government.

Therefore, we propose that the key issue is one of government power, and that the First Amendment should apply to civil liability when-

197. See supra notes 153–161 and accompanying text; supra text accompanying notes 186–191.

ever it involves duty-defining power. Focusing on government power is the only coherent way to account for all of the various factors involved when free speech is implicated by civil liability.

3. *Distinguishing the Forms of Power.* — If the exercise of a duty-defining power is the problem, how should it be identified? We propose the following approach: *First Amendment scrutiny applies to civil liability restricting speech when (1) the government defines the content of the civil duty; and (2) the speaker cannot avoid accepting the duty, or the government exercises undue power in procuring the speaker's acceptance. Conversely, when either of these factors is not present, the First Amendment would not apply to civil liability.*

It is important to note that this rule only determines whether First Amendment scrutiny should be applied. Even if First Amendment scrutiny is applied, civil liability for speech can still pass constitutional muster if it withstands the scrutiny.

Mandatory civil duties defined and imposed by the government should generally trigger First Amendment scrutiny when they restrict speech, because the government can create such duties as a way to harness the civil liability system to expose speakers to liability risks. By forcing people to face massive litigation costs and dangers, the government can inhibit speech. *Sullivan* presents the paradigmatic example. That case involved a government plaintiff (a public official) using civil liability to punish people for speaking. The speech in question was critical of the public conduct of government officials. The facts of the case demonstrate (as the Court recognized) that libel law was being used as a tool of censorship.[198]

By contrast, the First Amendment should not apply to civil liability cases where the government does not define the duty. If the duty is defined in a contract between private parties, then this is a matter of dispute between those private parties. There is insufficient government involvement in this situation to justify First Amendment scrutiny. The government power is just a tool being used by the private parties to carry out their own self-defined ends. The parties themselves have created and agreed upon the duties, making the risks to First Amendment values remote. Private agreements can certainly affect public discourse in problematic ways, but the First Amendment is focused on the state and on particularly threatening instances of state power over public discourse.

Where the government defines the content of the duties, there is a greater exercise of government power. But the government's definition of the duty alone is not dispositive. The second prong of our approach looks to whether the speaker can avoid being subjected to the duty. If the speaker can, then the ultimate control is in the speaker's hands, not the government's.

An example of duties that speakers can voluntarily avoid is contractual default rules. This exercise of government power is ameliorated by

198. See supra notes 22–24 and accompanying text.

the fact that the speaker can change the way that the government has defined the duties imposed upon her. The government may enforce bargains, but those bargains are the product of the expectations that individuals have in their social relationships. For suits involving civil liability where private agreements of this kind are involved, government power does not rise to a sufficiently problematic level to trigger First Amendment scrutiny.

Of course, the government can certainly influence the shape of duties private parties establish amongst each other by setting default rules. Many default rules are relatively easy to bargain around, and these do not rise to the level of duty-defining. If, however, a default rule is particularly onerous to change, then it might rise to the level of duty-defining. The line between duty-defining and non-duty-defining rules may not be perfect, but we contend that it is not only clearer than the alternative approaches we discussed above, but also more directly related to the critical First Amendment values at stake in the civil liability context.

A key form of non-duty-defining power is the enforcement of express or implied conditions on speaking about information gleaned from others. People share information with each other with the understanding that it will not be further disseminated. A person could readily avoid the duty by not accepting the information. One might object that without learning about the information, the speaker would not be able to then speak about that information. The speaker's speech is thus dependent upon hearing the information, and to do so, the speaker must accept a duty not to disclose it. This puts the speaker in a Catch-22 situation.

To respond to this objection, it is useful to draw upon the concept of unjust enrichment. Speakers whose speech is only possible by violating express or implied promises not to disclose information are taking advantage of a form of unjust enrichment. Some speech is based upon information gleaned from others, and it would not be possible to speak about certain things without obtaining this information. According to the Restatement of Restitution and Unjust Enrichment: "A person who is unjustly enriched at the expense of another is liable in restitution to the other."[199] The Restatement commentary explains:

> The source of a liability in restitution is the receipt of an economic benefit under circumstances such that its retention without payment would result in the unjust enrichment of the defendant at the expense of the plaintiff. The consequence of a liability in restitution is that the defendant must either restore the benefit in question (or its traceable product), or else pay money in the amount necessary to eliminate unjust enrichment.[200]

---

199. Restatement (Third) of Restitution and Unjust Enrichment § 1 (Discussion Draft, 2000).

200. Id. at § 1 cmt. a.

Speech that would not be possible without obtaining information from another is akin to unjust enrichment.[201] Enforcing promises not to disclose information provided by others only limits the speaker from saying things she would not be able to say without making the promise of confidentiality. For example, suppose Bob wants to hear Alice's secret story about her life. Bob promises Alice that he will never disclose her story to others. Alice then tells Bob the story. Bob then breaks his promise and publishes Alice's story. Alice sues Bob for violating his promise. In this example, a duty of confidentiality has arisen from Alice and Bob's dealings. Bob could have avoided the duty by not listening to Alice's secret. He made a voluntary choice to learn the information. Alice told him her story because of his promise not to speak about it. Bob could not write about Alice's story unless he learned it from Alice, and he had to promise Alice confidentiality in order to hear it. Bob's speech is the product of unjust enrichment. Enforcing the promise does not stop Bob from saying anything except what he would have been unable to say without the promise. Enforcing the promise, therefore, is not restricting Bob's right to speak beyond what he could have said before making the promise in the first place.

It is important not to read this exception too broadly. The unjust enrichment approach does not apply to *every* condition that the government might place on the exchange of the information. It merely applies to conditions that restrict only the use of the specific information the parties have exchanged. Any government-imposed condition that extends beyond the use of the specific information that the parties have exchanged (e.g., a condition not to criticize the government or to vote a certain way) would be a duty-defining rule and thus subject to First Amendment scrutiny.

Therefore, when analyzing whether the speaker can avoid accepting the duty or whether the government exercises undue power in procuring the speaker's acceptance, it is important to consider whether the duty is restricting what the speaker could have said prior to accepting the duty. In other words, some speech is only possible because the speaker either expressly or impliedly accepts a duty. In these cases, the speaker suffers no net loss in the right to speak, for the duty only extends to speech that involves information procured by the assumption of the duty itself.

4. *State Action.* — At this point, one might wonder how our approach differs from the state action doctrine, for one could understand the state action doctrine as also turning on government power. State action and the imposition of First Amendment scrutiny, however, involve different issues. The state action doctrine establishes whether a sufficient involvement of government power exists to provide standing for parties to bring

201. Of course, it follows that, if the matter being spoken about is learned independently from the promise of confidentiality, then no unjust enrichment from speaking of or disclosing the information exists.

constitutional claims.[202] The government power approach that we develop in this Article seeks to identify those instances where government power triggers First Amendment scrutiny. This is a more narrowly circumscribed area than that delineated by the state action doctrine. There are many instances of state action that do not involve an exercise of government power that should concern the First Amendment.

State action doctrine reflects the idea that because the Constitution binds only the state—and not private parties—only actions by the government (or those acting at its direction) can give rise to constitutional claims. Cases finding state action tend to fall into three groups: (1) cases where private actors have assumed a "public function;" (2) fact-specific cases where the state is entangled with or participating in actions of a private actor; and (3) cases where the state has encouraged private action.[203] State action doctrine is famously indeterminate—as Charles Black put it, "a conceptual disaster area."[204] For example, the operation of company towns involves a private party assuming a "public function" and thus triggers state action, but company-owned public utilities do not.[205]

Our approach differs from state action doctrine because it is necessarily narrower and avoids much of the indeterminacy of current state action doctrine. State action seeks to identify all instances where power is attributable to the government. It thus encompasses a wide range of instances of government power, including both duty-defining and non-duty-defining power. Our approach is focused not merely on whether power is attributable to the government, but on the nature of that power. Only the exercise of the duty-defining power triggers the First Amendment.

It is noteworthy that, in *Cohen,* the Court held that there was state action. The Court concluded that whenever "legal obligations would be enforced through the official power of . . . courts," this "is enough to constitute 'state action' for purposes of the Fourteenth Amendment."[206] Such a broad statement of the state action doctrine would render the judicial enforcement of every legal rule to be state action.[207] What mat-

---

202. Geoffrey R. Stone et al., Constitutional Law 1543 (6th ed. 2009).

203. See Stephen Gardbaum, The "Horizontal Effect" of Constitutional Rights, 102 Mich. L. Rev. 387, 412–13 (2003) (discussing various strands of state action doctrine as delineated by Supreme Court cases).

204. Charles Black, Jr., Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 95 (1967).

205. Compare Marsh v. Alabama, 326 U.S. 501, 509 (1946) (company town), with Jackson v. Metro. Edison Co., 419 U.S. 345, 358 (1974) (public utility).

206. Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991).

207. Cf. Shelley v. Kraemer, 334 U.S. 1, 22–23 (1948) (holding enforcement of private racially restrictive covenant to be state action in violation of Fourteenth Amendment). Such a broad statement of the law can be inferred from some of the cases, but is not borne out by the results of most state action doctrine cases. See, e.g., Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978) (noting "[m]ere acquiescence" of state to private action does not

ters for the purposes of First Amendment applicability, however, is not whether there is state action, but whether the state action that is present every time a court enforces a judgment infringes upon rights protected by the First Amendment. State action doctrine does not tell us the answer to this question.

In any given case, we contend there are three distinct considerations when analyzing whether a particular instance of civil liability constitutes a First Amendment violation. First, there must be state action, at least in the broadest sense. The purpose of this inquiry is to distinguish between purely private conduct and conduct with government involvement. The holdings in *Sullivan*, *Cohen*, and dozens of other cases demonstrate the most coherent and intellectually honest approach: Every time the civil liability system is used for enforcement, the power of the state is invoked, and state action exists. This inquiry should be a fairly easy hurdle to surmount. Treating state action in this way clears away the conceptual undergrowth to reveal the real question of whether the First Amendment applies to the enforcement of civil liability judgments by courts.

The second (and more difficult) question is whether the First Amendment applies to the state action in question. In contrast to the question of whether state action exists, the question of First Amendment applicability asks whether the state action that is always present in the civil liability system has been exercised in a way that threatens or implicates the First Amendment. Our approach in distinguishing between duty-defining power and non-duty-defining power aims to add clarity and coherence to this determination.

If the First Amendment applies, then a third question arises: Does the type of civil liability in question survive First Amendment scrutiny? To answer this question, the Supreme Court undertakes what is often referred to as "balancing"—analyzing a particular exercise of government power with strict or intermediate scrutiny, and, if necessary, crafting special limiting rules such as the actual malice rule for public figures in defamation actions.[208] In this Article, we do not address how various types of civil liability should fare under First Amendment scrutiny, as the results will often vary depending upon the circumstances.

For the reasons given above, we think the distinction between duty-defining and non-duty-defining rules does helpful work in the context of the problem of free speech and civil liability. By focusing on the First Amendment's special protections against the use of government power to structure public debate, our approach is both faithful to orthodox under-

---

create state action). But see Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 (1982) (holding that "invoking the aid of state officials to take advantage of state-created attachment procedures" constitutes state action). Ultimately, all of these cases suggest the rampant indeterminacy and theoretical confusion in state action doctrine and its unsuitability as the basis for any principled line articulating the contours of First Amendment applicability to civil liability.

208. E.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

standings of the core of what the First Amendment protects, and allows us to identify and separate the cases where the government is using the civil liability system in ways that are especially dangerous.

B. *Civil Liability and First Amendment Scrutiny*

Having stated the general rule, it is helpful to set forth some examples of its application. We envision that our test would generally (though not always) lead to First Amendment scrutiny for tort and property law rules that restrict speech, and would generally (though not always) avoid First Amendment scrutiny of contract rules. Because, as we note above, the boundaries between these areas of the law are indistinct, an examination of each of them helps illustrate the outcomes that we anticipate our test would produce.

1. *The Defamation Torts.* — The government power approach would generally (though not always) impose First Amendment scrutiny on tort law rules that restrict speech because the government defines the duty for most torts. For example, defamation law contains state-mandated duties not to speak falsehoods that harm people's reputations. The government has defined the duty, and the speaker cannot avoid being subjected to it. By creating a liability rule for speech, the government has created the same risk of indirect censorship of debate as in *Sullivan*. The First Amendment should therefore apply to scrutinize (though not necessarily invalidate) the rule.

2. *The Breach of Confidentiality Tort.* — Although the government power approach generally would impose First Amendment scrutiny for tort rules that restrict speech, there are notable exceptions. In tort law, speakers can often avoid being subjected to tort duties. In some cases, for example, tort law provides only de facto default rules, which speakers can very readily bargain around. This is the case with the breach of confidentiality tort. Confidentiality is a default duty. Speakers can avoid liability under the tort by simply disavowing any duty of confidentiality at the time they are about to learn the information.[209] In other words, if John is about to tell Jane a secret, and Jane says that she will not keep it confidential, but John tells her the secret anyway, Jane would not incur any liability for breach of confidentiality if she disclosed it. John can no longer expect confidentiality when Jane has explicitly disavowed any assumed or expected duties to maintain the confidence.

Of course, not all default duties are easy to bargain around. If a default duty is very difficult to change, the government is exercising undue power in procuring a speaker's acceptance, and the power is duty-defining. The key question is the extent to which the government is us-

209. See Vickery, supra note 107, at 1456–58 (discussing elements of breach of confidentiality tort and noting that "general duty" of confidentiality exists either when reasonable person would have understood information received to be confidential or when recipient expressly or impliedly consented to keep information confidential).

ing its power to define what the speaker can and cannot say. How much of a role is the government playing in defining the speaker's speech, and how much of a role is the speaker playing in subjecting herself to limitations and duties to others? With the breach of confidentiality tort, the speaker still retains a large degree of control. Moreover, the speaker's disclosure of confidential information is akin to an unjust enrichment insofar as the speaker falsely promised confidentiality in order to learn the information.[210]

There are instances, though, where the duty of confidentiality is implied rather than express. Suppose a patient tells her doctor that she has a disease. The doctor never expressly promises to keep it confidential, and the doctor then blogs about the patient's disease. The patient sues under the breach of confidentiality tort. Under one theory, a promise of confidentiality is implicit. If the doctor knew the patient divulged the information about her disease because the patient believed the doctor would keep it confidential, then the doctor could have readily corrected the patient's misunderstanding before learning the secret. Under another theory, the doctor's duty of confidentiality might be based on professional ethical rules. To the extent that these rules are established by the state, the government is defining the nature of the duty. Yet the concept of unjust enrichment still applies because the doctor would not be able to disclose the patient's disease without the patient first telling the doctor about it, and the patient only disclosed her disease on the premise that the doctor had a duty of confidentiality. In other words, the duty only restricts speech that is made possible in large part because of the duty itself.

If civil liability extends to speech that does not involve the specific facts divulged under a duty of confidentiality, then the situation is different. But liability for speech that involves only facts obtained because of the acceptance of a duty does not involve a pernicious exercise of government power. Imposition of the duty does not deprive the speaker of the ability to say anything beyond the information the speaker obtained because his confidant relied on the assumption that the speaker was under a duty of confidentiality.

3. *Trespass.* — Our theory differs from the way current case law addresses property rights and free speech.[211] Suppose a homeowner seeks to enforce a trespass law to prevent people from protesting on her lawn because she does not like the content of their message. Under our approach, the duty not to trespass is defined by the government, and the speaker cannot avoid the imposition of the duty. Therefore, the First Amendment should apply to trespass actions that implicate speech.

The applicability of the First Amendment, however, does not mean that it must bar the enforcement of trespass by a homeowner. In this

210. See supra Part III.A.3.

211. See supra Part I.B.2.

context, a categorical balancing could readily be performed to conclude that all instances where a homeowner seeks to enforce trespass against a speaker would pass First Amendment scrutiny. First, the state has a compelling government interest in protecting the sanctity and privacy of people's homes, even from protected First Amendment speech. This interest has been characterized as one of "comfort and convenience,"[212] but it can have a First Amendment magnitude as well. At a minimum, enforcement of the norm of residential privacy implicates the right not to listen,[213] but it also allows the generation of new ideas and potentially new speech through the protection of a zone of intellectual privacy.[214] Second, in most cases, speakers will have alternative channels for expression, such as places nearby the homeowner's property. Whereas the defamation torts, privacy torts, and other torts apply to speakers wherever they are, the enforcement of private property rights only applies within a very small area—the geographical boundaries of the property at issue.

The outcome would be radically different if the government were to pass a law prohibiting door-to-door solicitations,[215] use zoning law to create "free speech zones,"[216] or use the police power to ban residential signage or other expressive uses of private property. As in the above case of a run-of-the-mill trespass action, the First Amendment would apply, but in these latter cases there would be no countervailing interest justifying the speech restriction, as the Supreme Court itself pointed out in the case of *City of Ladue v. Gilleo*.[217] These situations would therefore likely not survive First Amendment scrutiny.

We thus diverge from the current jurisprudence, which finds no state action in cases enforcing private trespass laws. It is incoherent to claim that state action exists when the civil liability system is used to enforce most torts and contracts yet does not exist when the system is used to

---

212. E.g., Kovacs v. Cooper, 336 U.S. 77, 88 (1949).

213. Id. at 86–87.

214. See Neil M. Richards, Intellectual Privacy, 87 Tex. L. Rev. 387, 387 (2008) (arguing that generation of new ideas requires meaningful privacy protections for prespeaking activities of thinking, reading, and consultation with intimates).

215. See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 165–66 (2002) (finding village ordinance restricting noncommercial door-to-door canvassing insufficiently narrowly tailored to protection of residents' privacy interest); Martin v. City of Struthers, 319 U.S. 141, 147 (1943) ("The dangers of distribution can so easily be controlled by traditional methods . . . that stringent prohibition can serve no purpose but that forbidden by the Constitution . . . ."); Murdock v. Pennsylvania, 319 U.S. 105, 115–17 (1943) (finding municipal ordinance requiring commercial door-to-door canvassers to obtain license or pay tax insufficiently narrowly tailored).

216. See Zick, supra note 102, at 105 (noting increased use of expressive zoning but referring to Supreme Court's observation that one cannot "have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place" (quoting Schneider v. New Jersey, 308 U.S. 147, 163 (1939))).

217. 512 U.S. 43, 58 (1994); accord Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 519–20 (1981) (finding no strong government interest in aesthetics or traffic safety to justify prohibiting most noncommercial billboards).

enforce torts protecting property. The problem is that courts often conflate the question of the existence of state action with later steps in the analysis such as whether the First Amendment applies and whether it is violated. There is state action in these cases, and the First Amendment applies and provides protection. Our approach is more intellectually honest. Rather than hiding behind the incoherent determination that state action does not exist, our approach acknowledges that the use of property law to exclude speakers implicates the First Amendment, but that the First Amendment and other social interests on the part of the homeowner outweigh the interests of the trespasser. This could be a categorical determination for all instances where these values are opposed. In contexts where different values are involved, different outcomes might apply. Thus, in the case of shopping malls, the interests in residential convenience and intellectual privacy would be less robust or missing altogether. Although we do not insist that the shopping mall cases are necessarily incorrect, our approach would focus on the First Amendment and other social values present on either side of the equation.

4. *Restrictive Covenants.* — What, then, about *Shelley v. Kraemer*?[218] In that case, the Supreme Court held that imposing a private restrictive covenant (a property rule enforceable through trespass) that limits ownership of property based on race both implicates and violates the Fourteenth Amendment.[219] *Shelley* is best understood not as a state action case but rather as a Fourteenth Amendment case. Every judicial decree might be state action, but only judicial decrees creating special Fourteenth Amendment dangers violate the Fourteenth Amendment. Looking at the question from the perspective of substantive Equal Protection law, the Court correctly determined that a system of judicially enforceable property rules restricting houses to members of certain races is threatening to the guarantee of Equal Protection. The key to the case is not that there was state action because a judge enforced an order, but that the Fourteenth Amendment was violated because a judge enforced an order that enmeshed the state in a system of racial segregation in housing. Put in this context, the covenants in *Shelley* are revealed as a direct threat to a core Equal Protection interest.

In the free speech/civil liability context, our government power approach would make an analogous inquiry. As with *Shelley*, the fact of judicial enforcement would be irrelevant; the relevant question would be whether the system of rules being enforced was threatening to First Amendment values. In the context of civil liability rules, we argue that the relevant question is whether the government is defining the duty not to speak, because it is this form of government power that implicates core First Amendment values. Because the government does not dictate the substantive content of typical restrictive covenants, enforcement of such a

218. 334 U.S. 1 (1948).

219. Id. at 19–20.

private agreement would be a use of the non-duty-defining power and therefore would not implicate the First Amendment.

From a broader perspective, we can see why state enforcement of racially restrictive covenants threatens the Fourteenth Amendment but state enforcement of speech-restrictive covenants does not threaten the First. It is hard to imagine racial equality without equal access to housing. State enforcement of private agreements to discriminate thus cuts much closer to the core of the Fourteenth Amendment than state enforcement of private agreements not to speak cuts to the core of the First. As noted above, when used by homeowners, trespass law does not threaten the First Amendment, because it has limited geographic scope, leaves ample alternative grounds for expression, is enforced without reference to speech, and actually supports the First Amendment right of the homeowner not to listen. A First Amendment analogue to *Shelley* would instead be Alabama's system of defamation in *Sullivan*, which allowed the state to punish opinions and trivial falsehoods merely because it disagreed with their message.

5. *Nondisclosure Agreements Between Private Parties.* — When private parties enforce nondisclosure agreements, the non-duty-defining power is being exercised. As William Prosser famously put it:

> The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . . Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract.[220]

Any government enforcement of these rules is incidental to the private speech restriction, and would not normally create *Sullivan*-style risks of censorship. First Amendment scrutiny in the ordinary contract case would thus be unnecessary.

We should be clear at this stage that many contracts between private parties can be highly coercive or unconscionable. Nothing in our approach would prevent courts from invalidating such contracts based on duress, unconscionability, or contravention of public policy. The free speech effects of contracts could certainly be a valid public policy reason to render them unenforceable. This would be an issue for contract law, not the First Amendment. But by marking a clearer boundary between First Amendment law and contract law for private-sector speech restrictions, our approach would focus the First Amendment on government-defined civil duties, and make clear that it would be inapplicable to privately defined duties. And where such duties would be threatening to

220. Prosser, Handbook, supra note 89, § 92, at 613.

free discussion, our approach would represent an invitation to contract law to fix the problem itself. First Amendment law should focus on resolving problems between the individual and the state. Contract law is better at resolving conflicts between individuals, even when they involve speech.

6. *Contracts Between the Government and Private Parties.* — Contract and promissory estoppel, while generally not triggering First Amendment scrutiny, will sometimes do so. The unconstitutional conditions doctrine—as well as contracts by government employers that involve speech[221]—presents vexing issues that have long confounded constitutional law jurisprudence. How should the government power approach deal with situations involving the government enforcing contracts?

Under our approach, when the government seeks to enforce a nondisclosure agreement, it is directly exercising its power, not just providing the system by which other parties enforce their agreements. However, government employees or recipients of government benefits can avoid the duty by not accepting such employment or benefits. Although the duty can be avoided by the speaker, the government's direct involvement in the process is a much more problematic exercise of government power than when a private party is enforcing the duty. Although private sector employers can contract with individuals to forgo rights in exchange for benefits or employment without triggering First Amendment scrutiny, the government stands in different shoes than private sector employers. The government has vast resources and can use its largesse to buy up individual rights. It can often exercise undue power in procuring the speaker's acceptance of the duty. This power is not necessarily undue because it is too coercive, but because it has the potential to be so widespread and threatening to free discourse given the government's immense resources. We therefore conclude that under the government power approach, the enforcement of government contracts limiting the free speech of individuals should generally be subject to First Amendment scrutiny.

There should be one exception, however, when the enforcement of contracts made by the government affecting free speech rights should not trigger First Amendment scrutiny: when the government is seeking to control the use of resources or information it provides. Government agencies handling personal data or classified information often need to ensure that employees maintain confidentiality. The government may also provide data or funding for specific purposes and may want to prevent it from being used for other purposes. We propose that, in these cases, concepts from the unjust enrichment law can be borrowed. If the restriction requires forgoing the use of a benefit or information that an

---

221. See, e.g., Heidi Kitrosser, Classified Information Leaks and Free Speech, 2008 U. Ill. L. Rev. 881, 925 (discussing whether leaks by government officials implicate First Amendment or are "simply contractual breaches"); Gia B. Lee, The President's Secrets, 76 Geo. Wash. L. Rev. 197, 201–02 (2008) (questioning strength of President's confidentiality interest in communications with his advisors).

individual would not have but for the government's providing it, then First Amendment scrutiny should not be triggered. First Amendment scrutiny should apply if the government demands, in exchange for employment or benefits, that a party forgo speaking on matters that he could have spoken about even without receiving any information or benefit from the government.

Applied to government confidentiality rules, the concept of unjust enrichment views information procured by a promise subsequently violated as a good that was improperly obtained. Since the individual's speech is based upon information that the individual would not possess without making the promise, the speech is created at the expense of this breach of promise. In *Cohen*, the Court hinted at this justification by contending: "Unlike the situation in *Florida Star*, where the rape victim's name was obtained through lawful access to a police report, respondents obtained Cohen's name only by making a promise that they did not honor."[222]

This can be viewed as a situation of unjust enrichment: It would be unjust to allow a person to spread information that she would not have obtained without an express or implied assumption of a duty of confidentiality. If we do not protect confidentiality, the speaker is unjustly enriched. The speech that violates confidentiality often would not have been possible without breaching an implicit or explicit promise of confidentiality.

For example, our approach would not impose First Amendment scrutiny in cases where the government seeks to enforce a confidentiality agreement with a government employee. Suppose the CIA sought to enforce a confidentiality agreement against an employee who wanted to reveal classified information. Enforcing this agreement should not involve First Amendment scrutiny. The facts of this hypothetical are somewhat similar to *Snepp v. United States*, where the CIA sought to enforce a confidentiality agreement that required employees to obtain the CIA's consent before revealing classified information or certain other information.[223] In particular, the agreement provided that an employee "not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency."[224] Frank Snepp, a former CIA agent, published a book about his experiences at the CIA without submitting it for prepublication review. The Court enforced the agreement, addressing the First Amendment issues in a footnote. The Court concluded that Snepp "voluntarily signed the agreement" and that even under First Amendment scrutiny, the "[g]overnment has a compelling interest in protecting both the secrecy

222. Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991).

223. 444 U.S. 507, 507–08 (1980).

224. Id. at 508 (quoting confidentiality agreement).

of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service," and the agreement "is a reasonable means for protecting this vital interest."[225]

Snepp's manuscript, however, did not contain any classified information—a fact the government conceded.[226] It is not clear from the case whether Snepp would have known the information in the book without his signing the confidentiality agreement. The dissent noted that not only did the government concede that the information was not classified, the government also appeared to concede that it was not confidential and was in fact already available to the public.[227] If the book discussed information Snepp learned while at the CIA that would not otherwise have been available to him, then under our approach, there should be no First Amendment scrutiny. The contract, however, was far too broad, as it purportedly applied to anything an employee or former employee published that "related to" the CIA rather than confidential or classified information obtained while working at the CIA. Our approach would apply First Amendment scrutiny to the enforcement of the contract when it related to information Snepp published about the CIA that was not confidential or classified.

7. *Government Benefits with Speech-Restrictive Conditions.* — The government also releases information subject to speech-restrictive conditions in cases unrelated to government employment. When would the enforcement of such conditions trigger First Amendment protection? The key factor in these cases should be whether the speaker is losing any rights that she would have had prior to the employment or receipt of a benefit.

For example, in *LAPD v. United Reporting Publishing Co.*, the Court upheld a California statute that required individuals seeking to access arrestee and victim records to declare under penalty of perjury that the information "shall not be used directly or indirectly to sell a product or service to any individual or group of individuals."[228] The Court concluded that the law was not "prohibiting a speaker from conveying information that the speaker already possesses" but was merely "a governmental denial of access to information in its possession."[229] Since the government had no duty to disclose the information, it was merely imposing a condition in order for people to access it. Such conditions would not trigger First Amendment scrutiny under our approach. The only limitations on their speech that recipients of the data were agreeing to were limitations on their use of the government data.

---

225. Id. at 509 n.3.

226. Id. at 510.

227. Id. at 516 n.2 (Stevens, J., dissenting).

228. Cal. Gov't Code § 6254(f)(3) (West 2008); LAPD v. United Reporting Publ'g Co., 528 U.S. 32, 35 (1999).

229. *LAPD*, 528 U.S. at 40.

An example of where our approach would find the First Amendment to be implicated is *Rust v. Sullivan*.[230] In *Rust*, family planning service counselors in clinics receiving federal funds were restricted from counseling about abortion as a way of family planning.[231] The Court rejected a First Amendment challenge, concluding that the government was merely "selectively fund[ing] a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[232] Under our approach, *Rust* should trigger First Amendment scrutiny. This is one of only a few cases where we diverge from existing Supreme Court doctrine. In *Rust*, the government, as a condition of accepting its funds, was making recipients forgo speaking about matters they could have spoken about prior to the receipt of the funds. This is different from confidentiality agreements, which restrict parties from speaking about information that they would not be able to speak about without first gaining access to that data. Moreover, the situation in *Rust* involves more than merely selective funding of a program. The government can put limits on the use of the funds it gives out, so if counseling about abortion would not have been possible without the funding, then such a limitation would not trigger First Amendment scrutiny under our approach. But if counseling about abortion were something that a program could already engage in but would have to forgo in order to get the funds, then the government would be using the funds to deprive the program of existing rights.

Our approach allows government some room to function similarly to private sector employers without invoking First Amendment scrutiny, such as by using confidentiality agreements. But it prevents government from acting in its capacity as employer, benefit giver, or user of the civil liability system to impact the preexisting way that people exercise their First Amendment rights. The situations where we conclude no First Amendment scrutiny should apply involve instances where people are merely limited in speaking about something they would not be able to speak about but for the government's sharing information with them. It is when government uses its power to require people to sacrifice their current ability to speak that such power becomes problematic enough to warrant First Amendment scrutiny.

8. *Federal Trade Commission Fines for Privacy Policy Violations.* — Most major companies, especially those that do business on the Internet, have a privacy policy in which they specify how they use personal information, and under what circumstances they share that information with third parties. In a number of cases, the Federal Trade Commission (FTC) has brought actions against companies for violating their stated privacy poli-

230. 500 U.S. 173, 177 (1991).

231. Id. at 177–78.

232. Id. at 193.

cies.[233] All the FTC cases have settled thus far, and there has not been a First Amendment challenge to FTC enforcement actions for privacy policy violations.

Suppose the FTC seeks a fine against a company that breached confidentiality by leaking information in violation of its privacy policy. Does this trigger First Amendment scrutiny? The answer would depend upon whether the provision of the privacy policy was voluntarily established by the company or was a provision mandated by law. If the provision was the company's own statement, then even though the government is the plaintiff, the content of the duty was defined and voluntarily assumed by the company. The First Amendment would not apply under our approach.

Conclusion

In this Article, we have attempted to resolve the conceptual tension resulting from the application of the First Amendment to civil liability. Current First Amendment law and theory has failed to articulate in a systematic and compelling way why the First Amendment should apply to certain kinds of civil liability but not to others. To remedy this confusion, we offer a new theory of the First Amendment and civil liability: one focusing on the First Amendment dangers of government power to prescribe liability rules. We think that this approach makes two significant contributions—one theoretical and one practical.

At the level of theory, we think our approach provides a better explanation of when and why the First Amendment should apply to civil liability, and of when and why it should not. Although our solution explains the bulk of the current cases, it is not offered as merely a descriptive explanation for the status quo, but rather as a normative theory that explains and justifies a range of case outcomes that we think are consistent with traditional scholarly understandings of why we should protect free speech.

Our solution will likely not be perfect. Every legal rule faces hard cases, and we harbor no illusions that our approach to civil liability under the First Amendment will produce perfectly determinate outcomes, or that it will produce the "right" outcome every time. But by focusing on exercises of government power that threaten free speech values, we think our theory at a minimum directs the law's attention to the substantive issues at stake in the free speech/civil liability context, rather than asking us to engage in metaphysical inquiries into the nature of state action or general applicability. Moreover, we believe that our theory fulfills the three necessary criteria of any workable theory of the First Amendment: producing relatively determinate outcomes, coherence, and fidelity to First Amendment values. We think we have shown that it satisfies these criteria on its own terms and especially as compared to the existing approaches to this issue we discussed in Part II.

---

233. Solove & Schwartz, supra note 41, at 776–87.

At the level of practice, our theory has the benefit of resolving the contested status of confidentiality rules under the conceptual confusion of current law. Under our approach, confidentiality rules to which the government is not a party should in most cases be beyond First Amendment scrutiny.

Current doctrine on free speech and civil liability is governed by two opposing rules that are on a collision course. Both the doctrine and its underlying theory must be resolved to avoid a crash. We hope we have provided guidance regarding how to rethink free speech and civil liability to place the issue on a more coherent conceptual foundation.