

# FLEXIBLE REMEDIES IN SPEECH-TORT JURISPRUDENCE

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## ABSTRACT

*Courts generally craft speech-tort jurisprudence as a binary proposition. Save one exception in the libel context, anytime state tort law and the First Amendment come into potential conflict, courts generally hold either that the First Amendment comes into play and the defendant is completely exempt from traditional tort liability, or that it does not come into play and the plaintiff is entitled to the full complement of tort remedies. In other words, courts generally adopt an unspoken assumption that in speech-tort cases, liability and full tort remedies necessarily go hand-in-hand.*

*This rigid approach, however, significantly limits courts' ability to craft a nuanced balance between First Amendment and tort interests, as it forces them to choose only one set of interests to be vindicated at the complete expense of the other. Furthermore, the current approach exacerbates the distributional problem inherent to speech-tort cases: anytime the First Amendment intervenes to completely invalidate a subset of common-law tort liability, plaintiffs left without liability or remedy are forced to bear a disproportionate portion of the costs of free speech, the benefits of which are shared broadly by the public at large.*

*In this Article, I argue that courts should incorporate a greater degree of remedial flexibility into speech-tort doctrine. Rather than simply adhere to an all-or-nothing approach, courts should consider intermediate approaches in which the First Amendment applies not to vitiate a finding of tort liability, but merely to limit or eliminate the damages to which plaintiffs are entitled. These approaches allow courts to shape the complex balance of speech and tort interests with a scalpel rather than a chain saw, both on a case-by-case basis and on the broader level of doctrinal design.*

*In recent years, this remedy-based approach to speech-tort jurisprudence has rarely been discussed by courts and commentators, while the shadow cast by the First Amendment over tort law has expanded well beyond the defamation context. This calcification of a rigid, binary approach to speech-tort cases represents a significant lost opportunity for courts to design more sensible and equitable doctrines. By providing a detailed account of the benefits underlying the use of flexible remedies, evaluating potential critiques to such an approach, and laying out some concrete examples of what a flexible-remedies regime might look like in practice, this Article seeks to rekindle judicial, legislative, and academic interest in adopting such approaches within speech-tort doctrine.*

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## FLEXIBLE REMEDIES IN SPEECH-TORT JURISPRUDENCE

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## INTRODUCTION

After Marine Lance Corporal Matthew Snyder was killed in action in Iraq, the Westboro Baptist Church—a group known for its strong belief that “God hates and punishes the United States for its tolerance of homosexuality”—decided to picket at Snyder’s funeral.<sup>1</sup> As the funeral procession passed, church members held up signs that stated, among other things, “Thank God for IEDs,” “Thank God for Dead Soldiers,” “God Hates Fags,” “You’re Going to Hell,” and “God Hates You.”<sup>2</sup>

Snyder’s father sued Westboro for intentional infliction of emotional distress, among other claims. At trial, the jury found that the church’s actions met all of the common law elements of the tort<sup>3</sup> and awarded him \$2.9 million in compensatory damages, along with punitive damages.<sup>4</sup> Nevertheless, when the case reached the Supreme Court, Chief Justice Roberts, writing for an 8-1 majority, stated that the First Amendment exempted the church from all tort liability, observing that while speech “can . . . inflict great pain[,] . . . [w]e cannot react to that pain by punishing the speaker.”<sup>5</sup> Writing as the sole dissenter, Justice Alito argued that Snyder’s father was entitled to recover fully on his IIED claim, stating that “[Westboro’s] conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered.”<sup>6</sup>

The majority and dissenting opinions in *Snyder v. Phelps* vividly illustrate the traditional, all-or-nothing approach that courts have generally taken to resolve tensions between tort law and the First Amendment’s

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<sup>1</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011).

<sup>2</sup> *Id.*

<sup>3</sup> Throughout the appeal, Westboro did not dispute that this was a reasonable conclusion for the jury to reach in applying Maryland’s IIED standards. *See id.* at 1223 (Alito, J., dissenting) (“Although the elements of the IIED tort are difficult to meet, respondents long ago abandoned any effort to show that those tough standards were not satisfied here.”).

<sup>4</sup> *Id.* at 1214.

<sup>5</sup> *Id.* at 1220.

<sup>6</sup> *Id.* at 1229 (Alito, J., dissenting).

protection of free speech. Ever since *New York Times v. Sullivan*<sup>7</sup>—when the Supreme Court first recognized that the First Amendment may impose constitutional limitations on tort law—courts have largely resolved potential conflicts between speech and tort interests in one of two ways. Like the majority in *Snyder*, they might determine that First Amendment interests trump the normal application of tort law completely, thus exempting the defendant from all liability; courts generally accomplish this by altering the substantive contours of tort law to carve out a set of cases that, under First Amendment principles, are deemed exempt from traditional tort liability.<sup>8</sup> Or, like Justice Alito in dissent, courts might determine that the First Amendment does not come into play at all, leaving tort law to operate undisturbed.<sup>9</sup>

Thus—save one exception in the libel context<sup>10</sup>—courts have crafted speech-tort jurisprudence as a binary proposition. This rigid approach, however, has spawned a jurisprudence that severely limits courts’ ability to craft a nuanced balance between First Amendment interests and tort interests in a given case. Although speech-tort cases, by definition, implicate both speech and tort interests, the current all-or-nothing approach forces courts to vindicate only one set of interests at the expense of the other. Furthermore, the current approach exacerbates a distributional problem that is inherent to speech-tort cases. As Fred Schauer has observed, anytime the First Amendment intervenes to completely invalidate a subset of common-law tort liability, plaintiffs who have been left without liability or remedy are forced to bear a disproportionate portion of the costs of free speech, the benefits of which are shared broadly by the public at large.<sup>11</sup>

These problems stem from courts’ apparent assumption that in speech-tort cases, liability and a full award of tort damages necessarily go hand-in-hand. There is no reason, however, for courts to make this assumption. The Supreme Court’s early decision in *Gertz v. Robert Welch*<sup>12</sup> centered around a basic observation that today’s courts generally ignore: although damages in the speech-tort context obviously cannot be awarded

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<sup>7</sup> 376 U.S. 254 (1964).

<sup>8</sup> See *infra* Part \_\_.

<sup>9</sup> See *infra* Part \_\_.

<sup>10</sup> Cf. Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 994 (2012) (“First Amendment litigation tends to proceed as a winner-take-all affair.”).

<sup>11</sup> See Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322-23 (1992).

<sup>12</sup> 418 U.S. 323 (1974).

without a finding of tort liability, a finding of tort liability need not translate to a full award of tort damages. And as Michael Coenen has observed in a recent article, this sort of “penalty-sensitive” approach to resolving First Amendment issues has a “limited” but “unmistakable” presence throughout First Amendment doctrine.<sup>13</sup>

In this Article, I argue that courts can better calibrate the balance between First Amendment interests and tort interests by recognizing a greater degree of remedial flexibility in crafting speech-tort doctrine. Rather than simply adhere to an all-or-nothing approach, courts should consider intermediate solutions premised on finding tort liability against a defendant but limiting or eliminating the damages to which plaintiffs are entitled.<sup>14</sup> Under these approaches, the First Amendment’s limitation on tort law is manifested not by the purely binary question of whether liability exists, but rather in the more nuanced question of what *remedies* ought to be available to the aggrieved party.<sup>15</sup>

These intermediate approaches allow courts to shape the complex balance of speech and tort interests with a scalpel rather than a chain saw,

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<sup>13</sup> See Coenen, *supra* note \_\_, at 996.

<sup>14</sup> I leave to the side the issue of injunctive relief, for several reasons. Although injunctive relief is available in some tort contexts, it is an exceptional remedy to be granted “only when the remedy of compensatory damages will not suffice to restore the status quo ante.” Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 60 (2005); see also David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 15 (2013) (“If a court believes that money damages provide an adequate remedy, it will not consider granting an injunction.”). Thus, it tends to be available only in certain specialized contexts, such as situations involving a continuing course of conduct or those involving property interests. See Ardia, *supra* note \_\_, at 42-48; Shyamkrishna Balganesh, “Hot News”: *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 483-84 (2011) (observing “tort law’s general reluctance to award injunctive relief except when an identifiable property right . . . is involved”). Furthermore, in the speech-tort context, injunctive relief would necessarily raise the specter of an unconstitutional prior restraint on speech. See Ardia, *supra* note \_\_, at 31 (“[I]n the vast majority of cases in which courts have considered granting an injunction directed at defamatory speech, they refuse to do so on the basis that the injunction would be an unconstitutional prior restraint.”). Rather than get bogged down in these complex issues surrounding a remedy of only limited applicability, I limit my discussion here solely to the issue of damages.

<sup>15</sup> My argument here thus builds on Coenen’s recent work advocating for greater consideration of “penalty-sensitive” approaches to solving First Amendment problems. See Coenen, *supra* note \_\_, at 999 (defining penalty-sensitive approaches as those that “ask[] whether a restriction on speech violates the First Amendment in light of the severity of the punishment attached to it”). My focus on speech-tort jurisprudence, however, raises a unique set of doctrinal, analytical, and practical issues that Coenen does not address in his more broadly framed theoretical analysis.

both on a case-by-case basis and on the broader level of doctrinal design. Take, for example, a speech-tort suit in which the plaintiff would be entitled to a finding of tort liability but would be barred from recovering any damages. Allowing for tort liability under such circumstances would still provide a number of potentially significant benefits to tort victims—such as the opportunity for public explanation and public vindication of social wrongs committed against them—while avoiding the speech-chilling effects of large damages judgments against defendants.

This concept of flexible remedies is not new to the realm of speech-tort jurisprudence. Back in the 1980s and early 1990s, a number of scholars and judges discussed these sorts of remedy-based approaches in the specific context of libel reform, although this discussion ultimately led to little meaningful change in the doctrine.<sup>16</sup> Since then, the possibility of adopting flexible remedies within speech-tort jurisprudence has rarely been discussed in depth amongst courts or scholars, even as the shadow cast by the First Amendment over tort law has grown.<sup>17</sup> This calcification of a rigid, binary approach to speech-tort cases represents a significant lost opportunity for courts and legislatures to design more sensible and equitable doctrines.<sup>18</sup>

I am not arguing here that the traditional all-or-nothing approach should be completely abandoned in all cases. But courts appear to assume an artificially restrictive view of the possibilities available to them in crafting speech-tort jurisprudence, which disserves the complex interaction of speech and tort interests presented in such cases. My hope is that by providing a comprehensive and detailed account of the substantial theoretical benefits underlying the use of flexible remedies in speech-tort cases, this Article will help to rekindle judicial, legislative, and academic

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<sup>16</sup> See *infra* Part \_\_ (discussing this literature in detail).

<sup>17</sup> This is not to say that such approaches have been completely ignored in recent years. For example, in a recent article, Nathan Oman and Jason Solomon discussed the possibility of either limiting or eliminating damages in cases like *Snyder*. See Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1162-63 (2013). That article, however, gave only a very brief treatment of the issue, and I'm unaware of any courts or commentators who have undertaken a broad, in-depth analysis of the issue.

<sup>18</sup> Although, for the purposes of this Article, I usually refer to the ways in which *courts* can modify speech-tort doctrine, I do this primarily for the sake of simplicity. Of course, such doctrinal modification need not originate from a court; legislatures can create statutory frameworks that incorporate a remedy-based approach to speech-tort issues, see *infra* TAN \_\_, and one can make arguments on either side as to which approach is preferable. But I am not concerned here with the *means* by which any alterations to current speech-tort law might be accomplished; my focus here is solely on the theoretical pros and cons surrounding the adoption of flexible remedies in speech-tort cases, regardless of how such changes might come to pass.

interest in exploring and adopting such approaches in crafting speech-tort doctrine.

In Part I, I set forth my definition of “speech-tort jurisprudence,” survey the theoretical issues underlying speech-tort cases, and outline the current doctrinal landscape, in which courts largely resolve cases either by completely vitiating tort liability or by allowing tort law to proceed normally without any First Amendment interference. Part II describes previous judicial and academic discussion surrounding remedy-based approaches to libel, then sets forth my arguments in favor of adopting remedy-based approaches broadly to speech-tort cases: such approaches allow courts to vindicate both speech and tort interests in individual cases, provide courts with more precise tools to craft doctrinal boundaries, and mitigate the distributional disparity in which uncompensated speech-tort plaintiffs bear a disproportionate portion of the costs of free speech. Part III addresses a number of potential critiques against the imposition of remedy-based approaches, such as dissonance with the fundamental nature of rights, concerns with excessive judicial discretion, and the creation of heightened chilling effects on speakers. Part IV lays out some practical observations regarding the design of remedy-based approaches and offers examples of what such approaches might look like in practice. Part V concludes.

## I. THE NATURE OF SPEECH-TORT JURISPRUDENCE AND THE CURRENT DOCTRINAL LANDSCAPE

### A. “*Speech-Tort Jurisprudence*” Defined

Although First Amendment doctrine operates under the clear premise that unfettered speech is valuable, it is equally clear that free speech comes at a cost. Speech can inflict significant harm on others; it might, for example, persuade someone to commit violent acts, ruin a person’s reputation, or directly inflict severe emotional distress.<sup>19</sup> The First Amendment has practical meaning only insofar as we are willing to absorb these sorts of speech-related harms to a greater extent than we would with non-speech. In other words, the First Amendment establishes that speech is *different*; when speech causes harm, it is subject to less stringent restrictions than non-speech conduct, even if the associated harmful consequences are identical.<sup>20</sup>

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<sup>19</sup> See Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1106 (1979) (observing that speech can “offend, injure reputation, fan prejudice or passion, and ignite the world”).

<sup>20</sup> See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 8 (1982)

Starting in *Sullivan*, the Supreme Court has extended this basic principle of the Free Speech Clause to the realm of tort law. Defamation law, like that of most torts, had developed via state common law, and states generally have free rein to define social wrongs and regulate conduct however they please. But the *Sullivan* Court made clear that because the tort of libel deals specifically with *speech*, the First Amendment requires that state tort law be modified to the extent that it unduly infringes on the interests underlying the Constitution’s protection of unfettered speech.<sup>21</sup>

This basic idea underlies my definition of the term “speech-tort jurisprudence.” In using this term, I refer to all circumstances in which tort law extends liability to speech as opposed to non-speech “conduct”; specifically, I refer to situations in which tort liability attaches based on the *expressive elements* of speech rather than, for instance, its volume or physical form. Of course, one of the enduring issues of First Amendment doctrine is the often fuzzy distinction between speech and conduct;<sup>22</sup> I am not interested in delving into this complicated issue here. But in a post-*Sullivan* world, if speech alone can give rise to tort liability, tort law must necessarily be designed to accommodate the First Amendment’s protection of free speech.

Speech-tort jurisprudence therefore includes entire areas of tort law—such as defamation and “publicizing private facts” privacy claims<sup>23</sup>—that by definition deal solely with speech. But it also covers many other areas of tort law that govern both speech and conduct; in any situation where speech alone is sufficient to trigger tort liability, First Amendment considerations necessarily enter into the equation. Thus, my definition of speech-tort jurisprudence extends to diverse areas of tort law such as intentional infliction of emotional distress,<sup>24</sup> negligence,<sup>25</sup> interference with

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(“Where there is a Free Speech Principle, a limitation of speech requires a stronger justification, or establishes a higher threshold, for limitations of speech than for limitations of other forms of conduct. This is so even if the consequences of the speech are as great as the consequences of other forms of conduct.”).

<sup>21</sup> See *New York Times v. Sullivan*, 376 U.S. 254, 268-80 (1964).

<sup>22</sup> See, e.g., Dan M. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 855-56 (2012) (describing the speech-conduct distinction as “notoriously problematic,” since “we do things with words and say things with actions”).

<sup>23</sup> See RESTATEMENT (SECOND) OF TORTS § 652D (1977).

<sup>24</sup> See, e.g., *Hustler v. Falwell*, 485 U.S. 46 (1988) (establishing First Amendment limitations on IIED as applied to printed satire ridiculing a public figure); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

<sup>25</sup> See, e.g., *McCollum v. CBS, Inc.*, 249 Cal.Rptr. 187 (Cal. App. 1988) (negligence claim based on teenager’s suicide after listening to Ozzy Osbourne’s music).

contract or prospective economic relations,<sup>26</sup> “right of publicity” claims,<sup>27</sup> and even products liability.<sup>28</sup>

I should make clear that I am not defining speech-tort jurisprudence as encompassing only areas in which courts have *modified* common law tort doctrine to accommodate First Amendment interests.<sup>29</sup> While all of these areas would of course fall within the definition outlined above, the definition also includes cases in which speech alone can trigger tort liability, but the existing common law design of the particular tort is sufficiently protective of First Amendment interests as to avoid any constitutional issues.

In other words, while in certain areas of speech-tort jurisprudence courts have found that the First Amendment requires modification of the contours of common law tort doctrine, in other areas the common law has already designed tort doctrine to be sufficiently protective of First Amendment interests. A straightforward example of this is common law fraud. Courts generally have not found any First Amendment issues arising from the common law’s design of this tort,<sup>30</sup> but since speech alone can trigger fraud liability, First Amendment considerations continue to lurk in the background. One could imagine a different design of the fraud tort that might infringe on First Amendment interests such that doctrinal modification would be necessary (if, for example, falsity of the statement were presumed based on a mere showing of reliance and damages).<sup>31</sup>

Thus, my definition of “speech-tort jurisprudence” extends beyond

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<sup>26</sup> See, e.g., *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody’s Investor’s Servs.*, 175 F.3d 848, 856-58 (10th Cir. 1999); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990).

<sup>27</sup> See, e.g., *Winter v. DC Comics*, 69 P.3d 473, 477-79 (Cal. 2003) (describing the First Amendment limitations imposed on right of publicity claims).

<sup>28</sup> See, e.g., *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991) (rejecting a claim that strict products liability applies to erroneous information found in “The Encyclopedia of Mushrooms”).

<sup>29</sup> See, e.g., *Sullivan*, 376 U.S. at 268-80 (1964) (libel); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (false light); *Snyder*, 131 S. Ct. 1207 (IIED); *McCullum*, 249 Cal.Rptr. 187 (negligence).

<sup>30</sup> Fraudulent speech is typically cited as a clear exception to the First Amendment’s general protection of speech. See, e.g., *United States v. Stevens*, 559 U.S. 460, 468 (2010). In order to prove fraud under the common law, plaintiffs must prove an intentional misrepresentation of fact or opinion, an intent to induce reliance, actual and justifiable reliance, and pecuniary harm. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* § 470, at 1345 (2000).

<sup>31</sup> Cf. *United States v. Alvarez*, 132 S. Ct. 2537, 2544-45 (2012) (plurality opinion) (distinguishing common-law fraud from the less-speech protective elements of the Stolen Valor Act, which criminalized lying about having received military medals).

the particular areas of tort most commonly associated with the term, such as libel and IIED.<sup>32</sup> In any situation where tort liability may be premised solely on the basis of speech, First Amendment interests are necessarily implicated and must be accounted for. Sometimes—like in the context of common law fraud—these interests are already sufficiently protected under existing tort doctrine, and thus no ex post “fix” is necessary. Other times—like in the context of libel and IIED—courts have deemed the common law’s design of the tort insufficiently protective of First Amendment interests such that ex post modification of tort doctrine is constitutionally mandated.

### *B. The Conflicting Interests Underlying Speech-Tort Jurisprudence*

Speech-tort jurisprudence, by definition, involves an inherent conflict between two distinct sets of interests. On the one hand, speech-tort cases implicate the rationales underlying the First Amendment’s protection of speech. On the other hand, they implicate the state’s interests in imposing tort liability. On a conceptual level, speech-tort jurisprudence represents courts’ attempt to craft the appropriate balance between these two sets of interests.

*I. Speech Interests.* — Although the Supreme Court has not adopted a single, unified theory of free expression,<sup>33</sup> it has, at various times, recognized different rationales underlying the protection of speech. Three such rationales are most commonly offered.<sup>34</sup> The first is the idea that protecting speech is necessary to promote the discovery of truth.<sup>35</sup> This idea is commonly associated with John Stuart Mill—who argued that the free exchange of ideas provides society with “the opportunity of exchanging

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<sup>32</sup> Cf. David A. Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 72 (1990) (counting “at least twenty distinct communications torts”).

<sup>33</sup> See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 591 (1982) (“There seems to be general agreement that the Supreme Court has failed in its attempts to devise a coherent theory of free expression.”); Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 559-60 (2011) (“No theory has dominated the Court’s complex accommodations.”).

<sup>34</sup> These are not the only rationales offered to justify the First Amendment’s protection of speech; other rationales include checking government abuse, encouraging tolerance, and functioning as a “safety valve.” See GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 15-16 (2d ed. 2003).

<sup>35</sup> See, e.g., *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.”).

error for truth”<sup>36</sup>—and is perhaps most famously encapsulated in Justice Holmes’s statement that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>37</sup>

The second rationale is that free expression is necessary for democratic self-government to function properly.<sup>38</sup> This view, most commonly associated with Alexander Meiklejohn, is premised on the idea that because the citizens in a democracy act as sovereigns, they must have the opportunity to freely propose and debate public issues in order to govern effectively. As Meiklejohn notes, this means that “unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American.”<sup>39</sup>

The third rationale is that freedom of expression is a good in itself, as it is an essential aspect of individual autonomy and personhood.<sup>40</sup> Under this view, “expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self”; as a result, “suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man’s essential nature.”<sup>41</sup> Although autonomy can often be a “slippery concept with many potential meanings,”<sup>42</sup> this view is built on the general idea that “[o]ur ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons.”<sup>43</sup>

2. *Tort Interests.* — On the other hand, speech-tort cases also necessarily implicate the state’s interests in imposing tort liability. The

<sup>36</sup> JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kate eds., Yale Univ. Press 2003) (1959).

<sup>37</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>38</sup> *See, e.g., Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”).

<sup>39</sup> ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

<sup>40</sup> *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984) (“The First Amendment presupposes that the freedom to speak one’s mind is . . . an aspect of individual liberty—and thus a good unto itself.”).

<sup>41</sup> Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

<sup>42</sup> David S. Han, *Autobiographical Lies and the First Amendment’s Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 92 (2012) (discussing several possible meanings of “autonomy”).

<sup>43</sup> Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992).

imposition of tort law might be premised on corrective justice principles—the “simple and elegant” idea that “when one person has been wrongfully injured by another, the injurer must make the injured party whole.”<sup>44</sup> Under this view, tort law represents “a mechanism through which defendants who have wrongfully injured plaintiffs are required to compensate those plaintiffs for their injuries, and thereby make them whole insofar as this is practically possible.”<sup>45</sup> Similarly, tort law might be premised on a concept of civil recourse—“the principle that plaintiffs who have been wronged are entitled to some avenue of civil recourse against the tortfeasor who wronged them.”<sup>46</sup>

Tort liability can also be imposed for purely instrumental purposes.<sup>47</sup>

That is, tort law may be used as a means of incentivizing actors to behave in socially optimal ways—by, for example, encouraging them to take precautions against accidents when they can do so more efficiently than others; deterring them from acting when those actions are excessively risky; or allocating liability to those actors most capable of distributing such losses among others.<sup>48</sup> Under this view, tort law is a mechanism for state regulation—a way for the state to shape behavior to meet certain social goals, such as minimizing the costs associated with accidents.<sup>49</sup>

Despite longstanding scholarly debate as to which set of rationales drives (or ought to drive) the imposition of tort law,<sup>50</sup> different courts, in different contexts, have been driven both by moral concerns and utilitarian considerations in crafting tort law. It is this collective set of tort interests that stands in opposition to the collective set of free speech interests in every speech-tort case. Of course, the conflict between these sets of interests might be easy to resolve in a particular case; perhaps the speech

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<sup>44</sup> Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 695 (2003). Under this view, tort law represents “a mechanism through which defendants who have wrongfully injured plaintiffs are required to compensate those plaintiffs for their injuries, and thereby make them whole insofar as this is practically possible.” *Id.*; see, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* (1992); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

<sup>45</sup> Zipursky, *supra* note \_\_\_, at 695.

<sup>46</sup> *Id.* at 699.

<sup>47</sup> See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

<sup>48</sup> See KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 18-20 (4th ed. 2012).

<sup>49</sup> See, e.g., GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970).

<sup>50</sup> See, e.g., Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802-11 (1997) (describing this conflict amongst tort theorists).

interests are so overwhelming that they clearly trump any sort of countervailing tort interests. But this conflict between speech and tort interests is fundamental to speech-tort jurisprudence, since in these cases, the elevation of one set of interests comes at the expense of the other.

### *C. Speech Tort Jurisprudence and Low-Value Speech*

Before proceeding further, it is important to clarify a few relevant aspects of First Amendment doctrine. Under the Court’s First Amendment jurisprudence, speech is generally deemed “protected” unless it falls into one of the designated subcategories of low-value speech—the sort of speech described in *Chaplinsky v. New Hampshire* as playing “no essential part of any exposition of ideas” and having “such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>51</sup> The Court has, on several occasions, listed these categories of low-value speech, typically including areas such as obscenity, defamation, fraud, incitement, true threats, and fighting words.<sup>52</sup> Protected speech is subject to all of the familiar limitations on government speech regulation—most notably, the strong presumption that any content-based speech regulation is invalid—whereas the government generally has free rein to regulate unprotected low-value speech.<sup>53</sup>

This doctrinal background is significant because liability in speech-tort jurisprudence, as defined above,<sup>54</sup> is premised largely on content-based distinctions. Tort law sanctions speech as, say, defamation, fraud, IED, negligence, or an invasion of privacy based on its content. Thus, under traditional First Amendment principles—including the longstanding

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<sup>51</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). I am here defining “low-value” speech as those categories of speech to which the Court has given little to no protection under the First Amendment. This does not include what I would classify as “partially protected” speech, such as commercial speech or speech in public schools. See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561-64 (1980) (commercial speech); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969) (speech in public schools).

<sup>52</sup> See, e.g., *Alvarez*, 132 S. Ct. at 2544 (plurality opinion); *Stevens*, 559 U.S. at 468-69; *Chaplinsky*, 315 U.S. at 571-72.

<sup>53</sup> See *Chaplinsky*, 315 U.S. at 571-72 (describing low value speech as “limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem”). The Supreme Court later clarified that some constitutional limits still apply to state regulation of low-value speech; for example, the government cannot discriminate amongst low-value speech based on its viewpoint. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-86 (1992).

<sup>54</sup> See *supra* Part \_\_.

assumption that the imposition of private tort liability represents state action subject to First Amendment limitation<sup>55</sup>—states’ establishment of speech-tort liability is constitutional only insofar as the speech in question is deemed “low-value.” For example, the torts of defamation and fraud—which are premised on the content of speech—are constitutional only because they sanction recognized categories of “low-value” speech to which traditional First Amendment protections do not apply.

Recently, in *United States v. Stevens*,<sup>56</sup> the Court clarified the basis by which low-value speech categories are identified and defined. Rejecting the government’s argument that the protected status of a category of speech “depends upon a categorical balancing of the value of the speech against its societal costs,”<sup>57</sup> the Court adopted a purely historical test in which speech is deemed low-value only if it “ha[s] been historically unprotected.”<sup>58</sup> Thus, the Court has found that neither depictions of animal cruelty<sup>59</sup> nor highly violent media<sup>60</sup> constituted a historically recognized category of low-value speech.

As I’ve written elsewhere, however, the flexibility inherent to the Court’s “historical” analysis renders it largely illusory.<sup>61</sup> In establishing this test, the Court clearly did not intend to hold that no new categories of low-value speech could ever be established.<sup>62</sup> But if this is the case, then the Court’s historical analysis must necessarily operate by analogy, based on whether the speech in question is sufficiently similar to other historically recognized categories of speech to warrant similar treatment.<sup>63</sup> In drawing such analogies, the Court must decide how broadly to define the speech in question, identify the analytically significant characteristics of the historically excluded speech, and determine whether the speech in question shares those key characteristics.<sup>64</sup> It must also determine the level of

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<sup>55</sup> See *Sullivan*, 376 U.S. at 277 (“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.”).

<sup>56</sup> 559 U.S. 460 (2010).

<sup>57</sup> *Id.* at 470.

<sup>58</sup> *Id.* at 472.

<sup>59</sup> *Id.*

<sup>60</sup> See *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2733-38 (2011).

<sup>61</sup> See Han, *supra* note \_\_, at 84-89.

<sup>62</sup> See, e.g., *Stevens*, 559 U.S. at \_\_\_ (recognizing the possibility of “categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law”); *Brown*, 131 S. Ct. at 2734 (recognizing the possibility of a “long (if heretofore unrecognized) tradition of proscription”).

<sup>63</sup> Han, *supra* note \_\_, at 87.

<sup>64</sup> *Id.* at 86-87.

generality at which it will draw any analogies.<sup>65</sup> The necessity of these sorts of judgments renders the analysis open-ended and highly manipulable based on the court’s judgment of the relative value and harm of the speech in question.<sup>66</sup>

Of course, some subsets of speech that are subject to tort liability—such as defamation and fraud—have already been identified as discrete categories of low-value speech.<sup>67</sup> Other subsets of speech potentially subject to tort liability—such as speech causing severe emotional distress, media speech causing imitative or instructive harm, or speech publicizing embarrassing private facts—have yet to be identified as such. I do not focus on this distinction in my present analysis, however, since the open-ended nature of the Court’s “historical” test would allow the Court to classify any of these categories of speech as low-value speech if it so chooses.<sup>68</sup> For instance, in *Snyder*, neither Justice Breyer in his concurrence nor Justice Alito in his dissent evinced any sort of hesitation in upholding speech-based IIED liability under an appropriate set of facts;<sup>69</sup> indeed, even Chief Justice Roberts’s majority opinion did not close the door to this possibility,<sup>70</sup> despite the fact that such speech does not obviously fall into any of the presently recognized categories of low-value speech.

#### *D. The Current Landscape of Speech-Tort Jurisprudence*

Since *New York Times v. Sullivan*, courts have generally decided speech-tort cases in one of two ways (save one limited exception, which I will discuss below). The court might find that First Amendment interests

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 88.

<sup>67</sup> See *supra* note \_\_\_\_.

<sup>68</sup> If, for example, the Court were inclined to count certain types of speech causing severe emotional distress as “low-value” speech, it could easily characterize such speech at a broad level as “verbal assaults” similar to historically unprotected “fighting words.” Indeed, presumably *any* speech that has traditionally been subject to tort liability—even if it had never been tested by a First Amendment challenge—could be characterized as a “historically recognized” category of low-value speech.

<sup>69</sup> See *Snyder*, 131 S. Ct. at 1221 (Breyer, J., concurring) (observing that the Court “does not hold or imply that the State is always powerless to provide private individuals with necessary protection” in speech-based IIED cases); *id.* at 1223 (Alito, J., dissenting) (“[A]lthough this Court has not decided the question, I think it is clear that the First Amendment does not entirely preclude liability for the intentional infliction of emotional distress by means of speech.”).

<sup>70</sup> *Id.* at 1220 (“Our holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us.”).

trump tort interests completely, thereby vitiating tort liability (and the associated tort damages) even where liability would have been available under established tort principles. On the other hand, the court might find that the First Amendment simply does not come into play, and tort law operates normally—that is, tort liability attaches, along with the normal measure of tort damages.

*I. No Liability, No Damages.* — In deciding speech-tort cases, courts often hold that the First Amendment completely vitiates the normal operation of tort liability within certain delineated doctrinal boundaries. In other words, when First Amendment interests come into play, they modify the normal dimensions of established tort law by carving out a subset of cases in which defendants are completely exempt from liability (and therefore from all damages).

The original model for this approach is *Sullivan*. Under Alabama libel law at the time, a publication was deemed “libelous per se” if it tended to damage the plaintiff’s reputation or bring him into public contempt.<sup>71</sup> Once a publication was deemed libelous per se, both falsity and general damages were presumed, with the defendant bearing the burden of proving the truth of the statement as a defense.<sup>72</sup> The Supreme Court, however, found that Alabama’s design of its libel law violated the First Amendment. Focusing primarily on the idea that unfettered speech regarding public officials is necessary to effectuate proper democratic governance, the Court stated that Alabama’s libel law failed to give such speech the “breathing space” that it needs.<sup>73</sup>

Given this excessive chilling of speech, the Court resolved the conflict between the First Amendment and Alabama tort law by effectively redrawing the boundaries of state libel law: it held that a public official cannot constitutionally recover damages for defamation relating to official conduct “unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>74</sup> In other words, the Court carved out a particular subset of cases that—although covered by Alabama’s expansive libel law—posed a conflict with First Amendment interests such that no tort liability could attach.

Courts would repeat this pattern in a number of cases dealing with different areas of tort law. The Supreme Court adopted this approach in

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<sup>71</sup> See *Sullivan*, 376 U.S. at 263.

<sup>72</sup> *Id.* at 262-63.

<sup>73</sup> *Id.* at 271-80.

<sup>74</sup> *Id.* at 279-80.

cases dealing with “false light” invasion of privacy<sup>75</sup> and intentional infliction of emotional distress.<sup>76</sup> Other courts have adopted this approach in additional tort contexts, such as in cases dealing with the right of publicity,<sup>77</sup> intentional interference with contract or prospective economic advantage,<sup>78</sup> and products liability.<sup>79</sup>

Take, for example, so-called “media harm” negligence cases, in which the plaintiff alleges negligence based on the defendant’s dissemination of a book, movie, or song that serves as a harmful basis of imitation or instruction.<sup>80</sup> In these cases, most courts have not applied normal negligence standards in determining liability;<sup>81</sup> rather, they have overlaid such standards with the highly stringent *Brandenburg* test, finding liability only if the speech in question “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>82</sup> So again, despite the fact that, under normal tort principles, liability might attach, courts have carved out a subset of negligence liability in which the First Amendment completely exempts defendants from all liability.

2. *Liability and Full Tort Damages.* — The second approach that courts generally take in speech-tort cases is to simply allow tort law to apply normally, with the full complement of tort damages. In some cases, courts explicitly reject the proposition that the First Amendment plays a meaningful role in the case. For example, in *Weirum v. RKO General, Inc.*,<sup>83</sup> a radio station was sued for wrongful death after a driver was killed as a result of one of the station’s promotions. Under this promotion, the station—whose target demographic was teenagers—awarded money to

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<sup>75</sup> See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (applying the *Sullivan* standard in a false-light privacy case).

<sup>76</sup> See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

<sup>77</sup> See, e.g., *Winter v. DC Comics*, 69 P.3d 473, 477-79 (Cal. 2003).

<sup>78</sup> See, e.g., *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody’s Investor’s Servs.*, 175 F.3d 848, 856-58 (10th Cir. 1999).

<sup>79</sup> See, e.g., *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991).

<sup>80</sup> For example, Ozzy Osbourne releases a song that encourages a listener to commit suicide, see *McCullum v. CBS, Inc.*, 249 Cal.Rptr. 187 (1988); a television film depicting a rape causes young viewers to imitate the rape in real life, see *Olivia N. v. National Broadcasting Co.*, 178 Cal.Rptr. 888 (Cal. App. 1981); or *Hustler Magazine’s* feature on autoerotic asphyxiation causes a reader to choke himself to death, see *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987).

<sup>81</sup> The elements of negligence are a duty of care, breach of that duty, cause-in-fact, proximate cause, and damages. See DOBBS, *supra* note \_\_, at 269.

<sup>82</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); see, e.g., *McCullum*, 249 Cal.Rptr. at 999-1002; *Olivia N.*, 178 Cal.Rptr. at 892-93; *Herceg*, 814 F.2d at 1022-23.

<sup>83</sup> 539 P.2d 36 (Cal. 1975).

listeners who were the first to physically locate the station vehicle (the location of which was continuously teased by the station’s disc jockey).<sup>84</sup> The California Supreme Court affirmed the trial court’s award of damages to the family of a driver killed by teens recklessly chasing after the vehicle. In doing so, the court responded tersely to the defendant’s argument that the First Amendment barred liability, stating: “The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.”<sup>85</sup>

In other speech-tort cases, however, the First Amendment recedes completely into the background. For example, although run-of-the-mill fraud cases are clearly speech-tort cases as defined above, First Amendment considerations are rarely discussed by either the litigants or the court. As I observed above, however, this does not mean that First Amendment considerations are completely irrelevant—they are clearly in play, since fraud liability is premised on speech. It simply means that the traditional requirements of common law fraud incorporate sufficient speech-protective elements such that imposing tort liability for fraud is commonly understood to pose no conflict with the First Amendment.<sup>86</sup> Thus, even in speech-tort cases where the First Amendment does not appear to “show up” at all, courts’ awards of full tort damages are premised on an implicit judgment that the tort in question was designed to adequately account for any countervailing speech interests.

## II. THE ARGUMENT FOR FLEXIBLE REMEDIES IN SPEECH-TORT JURISPRUDENCE

### A. *Gertz v. Robert Welch and the Path Not Taken*

Although the binary approach outlined above now represents standard operating procedure in courts’ treatment of speech-tort cases, this was not always the case. In fact, in *Sullivan* itself, the attorneys for the New York Times (including Herbert Wechsler, who argued the case) suggested a remedy-based approach as one possible means of resolving the case. Noting the significant damages available under Alabama’s law governing libel per se, the attorneys stated that “[i]f there is room for the protection of official reputation against criticism of official conduct, measures of liability far less destructive of the freedom of expression are available and adequate to serve

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<sup>84</sup> *Id.* at 38.

<sup>85</sup> *Id.* at 41.

<sup>86</sup> See *supra* TAN \_\_\_.

that end.”<sup>87</sup> The *Sullivan* Court, of course, ended up adopting the “actual malice” standard<sup>88</sup> (which was also proposed by the New York Times). But from the very outset, approaches focused on adjusting the remedies to which tort plaintiffs are entitled represented an alternative means of balancing the conflicting interests inherent to speech-tort cases.

In fact, in *Gertz v. Robert Welch*<sup>89</sup>—an early libel case—the Supreme Court adopted a remedy-based approach in crafting the constitutional boundaries applicable to libel suits brought by private figures.<sup>90</sup> The *Gertz* Court held that although private defamation plaintiffs can recover actual damages under a negligence standard,<sup>91</sup> they cannot recover presumed or punitive damages unless they prove actual malice under the *Sullivan* standard.<sup>92</sup> Thus, rather than simply drawing a stark line between full tort liability and no liability as it had in *Sullivan*, the *Gertz* Court drew a more nuanced line that superimposed the additional dimension of remedies over the basic liability framework.

In doing so, the Court recognized that speech and tort interests can be balanced by adjusting the *remedies* to which plaintiffs are entitled: private figure plaintiffs that can prove the defendant’s negligence may recover actual damages for libel, but they cannot recover presumed or punitive damages. *Gertz* therefore signaled that courts are not confined to resolving speech-tort issues by carving out absolute exemptions to tort liability; rather, the First Amendment can manifest itself in a tort context by simply limiting damages awards.

*Gertz*, however, represented the only instance in which the Supreme Court adopted such an approach in crafting speech-tort jurisprudence. But in the following years, judges and scholars advocated for broader incorporation of such an approach into defamation law. Probably the most

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<sup>87</sup> Brief for the Petitioner at 52, *Sullivan*, 376 U.S. 254 (No. 39).

<sup>88</sup> *Sullivan*, 376 U.S. at 279-80.

<sup>89</sup> 418 U.S. 323 (1974).

<sup>90</sup> The Court’s decision in *Gertz* was likely influenced by Justice Marshall’s dissent in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Justice Marshall proposed restricting damages in libel cases involving private figure plaintiffs to actual damages, noting that such a solution would reduce “self-censorship” by the media while compensating victims “for their real injuries.” *Id.* at 84 (Marshall, J., dissenting).

<sup>91</sup> *Gertz*, 418 U.S. at 347.

<sup>92</sup> *Id.* at 349. The Court later clarified that the *Gertz* standards applied specifically to private figure defamation cases involving matters of public concern. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756-57 (1985) (plurality opinion). In cases involving matters of *private concern*, the Court held that the *Gertz* standards do not fully apply. See *id.* at 763 (holding that “permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern”).

notable example of this was Justice White’s concurring opinion in *Dun & Bradstreet v. Greenmoss Builders*.<sup>93</sup> In an interesting change of heart—since he had joined the majority opinion in *Sullivan*—Justice White bemoaned the liability-based approach that the Court had introduced in that case.<sup>94</sup> In his view, *Sullivan* would have been better decided simply through an adjustment of remedies rather than through redrawing the boundaries of libel doctrine. He stated: “[I]nstead of escalating the plaintiff’s burden of proof to an almost impossible level, we could have achieved our stated goal by *limiting the recoverable damages* to a level that would not unduly threaten the press.”<sup>95</sup>

Numerous scholars also began to agitate for a significant overhaul of American libel law, borne out of frustration rooted in the constitutionalized libel regime crafted by the Court in *Sullivan* and its progeny.<sup>96</sup> Commentators argued that the Court’s imposition of an “actual malice” requirement into libel law, which was meant to benefit defendants, in fact imposed significant litigation costs on them and forced them to disclose their internal practices.<sup>97</sup> On the other side, plaintiffs were often left without any meaningful remedy even if the statement in question was false and damaged their reputation.<sup>98</sup>

Many of these reform proposals centered around some form of no-damages suit in which the sole relief would be a declaration of the statement’s falsity.<sup>99</sup> Such a suit would allow plaintiffs to restore their

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<sup>93</sup> 472 U.S. 749, 765-74 (1985) (White, J., concurring in the judgment).

<sup>94</sup> *Id.* at 767.

<sup>95</sup> *Id.* at 771.

<sup>96</sup> See, e.g., Pierre Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287 (1988); Rodney A. Smolla & Michael J. Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25 (1989); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809 (1986); David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847 (1986); Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to “The Central Meaning of the First Amendment,”* 83 COLUM. L. REV. 603 (1983).

<sup>97</sup> See, e.g., Leval, *supra* note \_\_, at 1287; Smolla & Gaertner, *supra* note \_\_, at 31.

<sup>98</sup> See Leval, *supra* note \_\_, at 1292-93; Smolla & Gaertner, *supra* note \_\_, at 31.

<sup>99</sup> See, e.g., Leval, *supra* note \_\_, at 1288 (“I suggest that recognition of a no-damages libel suit, free of *Sullivan*’s actual malice requirement, would improve the efficiency of the cause of action, and reduce its costs and burdens for both defendants and plaintiffs.”); Smolla & Gaertner, *supra* note \_\_, at 33-34 (proposing a system that allows either the libel plaintiff or defendant to “elect to try the suit as an action for declaratory judgment”); Franklin, *supra* note \_\_, at 812 (outlining proposal permitting a libel plaintiff to seek a declaratory judgment that the published statement was false and defamatory); Barrett, *supra* note \_\_, at 847 (observing that “the most promising solution to the libel crisis is legislative creation of a declaratory judgment remedy”).

reputations via findings of falsity without having to meet *Sullivan*'s onerous “actual malice” requirement.<sup>100</sup> Other proposals suggested limiting defamation damages in some manner: for example, constitutionally limiting compensatory damages to damages for “tangible” injury,<sup>101</sup> eliminating punitive damages,<sup>102</sup> or even setting hard caps on libel damages.<sup>103</sup> Although this reform movement garnered a significant amount of publicity and was supported by a number of prominent figures—including Judge Pierre Leval<sup>104</sup> and then-Congressman Charles Schumer<sup>105</sup>—these proposals ultimately did not find much of a foothold within courts or legislatures.<sup>106</sup>

Since the libel reform movement died down in the early 1990s, the binary, liability-based approach established by the Court in *Sullivan* has effectively hardened into standard operating procedure in speech-tort cases. At the same time, the First Amendment's shadow over tort law has continued to expand well beyond the realm of defamation, into areas such as negligence, IIED, right of publicity, and interference with contractual and prospective economic relations.<sup>107</sup> In these areas, courts and commentators have rarely considered the possibility of remedy-based approaches as a

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<sup>100</sup> See, e.g., Leval, *supra* note \_\_, at 1288. The Supreme Court has made clear that actual malice under *Sullivan* must be proved by clear and convincing evidence. See *Gertz*, 418 U.S. at 342.

<sup>101</sup> Lewis, *supra* note \_\_, at 615-16; see also Clay Calvert, *Harm to Reputation: An Interdisciplinary Approach to the Impact of Denial of Defamatory Allegations*, 216 PAC. L.J. 933, 943-44 (1995) (describing the Uniform Correction or Clarification of Defamation Act (UCCDA), a model law adopted by the National Conference of Commissioners on Uniform State Law and approved by the American Bar Association that limits plaintiffs to “damages for provable economic loss” if they “fail[] to ask for a correction or clarification within ninety days after knowledge of publication or if the publisher prints such a correction or clarification”).

<sup>102</sup> See, e.g., Lewis, *supra* note \_\_, at 616-17.

<sup>103</sup> See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 815 (1986) (suggesting the imposition of a \$1,000,000 statutory maximum as a “fixed maximum on recovery in all libel cases”).

<sup>104</sup> See Leval, *supra* note \_\_.

<sup>105</sup> See H.R. 2846, 99th Cong. (1985) (bill that would establish federal declaratory judgment remedy for libel).

<sup>106</sup> See, e.g., Leslie Yarof Garfield, *The Death of Slander*, 35 COLUM. J.L. & ARTS 17, 20 n.15 (2011) (observing that the Annenberg Libel Reform Proposal, despite “widespread national attention,” was never adopted); Hannes Rösler, *Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law*, 26 BERKELEY J. INT'L L. 153, 202 (2008) (observing that the UCCDA has been adopted only by North Dakota); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 490-91 (1991) (“Many [libel reform] proposals have been offered over the past decade, but so far all have been stillborn because of opposition by the media bar and the absence of any organized support.”).

<sup>107</sup> See *supra* TAN \_\_\_\_.

means of resolving speech-tort issues.<sup>108</sup> Thus, although remedy-based approaches to speech-tort doctrine had once been the subject of significant discussion—at least in the libel context—this discussion has largely died down for reasons that are not entirely clear.

### *B. Shortcomings of the Present Approach*

The present all-or-nothing approach that courts generally take to speech-tort cases brings with it two potential problems. First, and most significant, the current approach severely compromises courts' ability to craft a nuanced balance between First Amendment interests and tort interests, both on a case-by-case basis and within the doctrinal framework as a whole. Second, it exacerbates the broad distributional problem that underlies all of speech-tort jurisprudence, in which tort plaintiffs who are denied any remedy due solely to the operation of the First Amendment bear a disproportionate portion of the costs of free speech. I will explore each of these issues in turn.

*1. Inability to Balance Speech and Tort Interests on a Case-By-Case Level.* — As noted above, every speech-tort case, by definition, involves a conflict of two sets of interests.<sup>109</sup> If, in a given case, the defendant's conduct meets all of the elements of a tort as defined by common law, society has determined that such conduct should be subject to civil liability, either because it constitutes a social wrong for which compensation must be provided or because imposing liability in such situations would influence people to behave in a socially optimal manner. In speech-tort cases, however, these tort interests run up against the interests underlying the Free Speech Clause. Although allowing for tort liability in such cases would advance the interests underlying tort law, it might also undermine speech interests by deterring speakers from contributing to the marketplace of ideas, limiting the public debate that is necessary for democratic self-governance, or eroding people's inherent freedom to express themselves as autonomous individuals.

If the only options available to a court in a speech-tort case are no tort liability whatsoever and tort liability with the full complement of tort damages, then, by nature, only one set of these conflicting interests can prevail. Allowing tort liability with full tort remedies would of course advance all of the moral and/or instrumental interests underlying the state's

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<sup>108</sup> As noted above, although some scholars have discussed such approaches in passing, *see, e.g.*, Oman & Solomon, *supra* note \_\_, at 1162-63, no courts or commentators have, to my knowledge, addressed the issue in significant depth in recent years.

<sup>109</sup> *See supra* Part \_\_.

imposition of tort law, yet none of the First Amendment interests at stake would be vindicated. Completely eliminating tort liability by operation of the First Amendment would shift things to the other extreme: First Amendment interests would be fully vindicated, while the tort interests in question would be trumped completely.

The majority and dissenting opinions in *Snyder* neatly encapsulate this “winner-take-all” aspect of current speech-tort jurisprudence. Chief Justice Roberts ended his majority opinion by characterizing the First Amendment’s protection of free speech as, in essence, a complete trump over tort interests. After acknowledging the significant harm that speech is capable of causing, he observed: “As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.”<sup>110</sup> Justice Alito, by contrast, argued that pure tort principles should govern the case, ending his opinion by observing, “Respondent’s outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered. In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner.”<sup>111</sup> Each opinion adopts the implicit assumption that only one set of interests can necessarily prevail over the other, and thus stakes out a position that completely elevates either First Amendment or tort interests to the complete exclusion of the other.

I should pause here to emphasize the difference between the *standards* that courts construct to determine whether speech is protected and the *outcomes* produced by those standards. Courts can certainly incorporate a nuanced balance between speech and tort interests in formulating the standards for determining whether speech is protected or not: the Court’s complex libel jurisprudence clearly exemplifies an attempt to capture such a balance.<sup>112</sup> But if the only available outcomes of these

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<sup>110</sup> *Snyder*, 131 S. Ct. at 1220.

<sup>111</sup> *Id.* at 1229 (Alito, J., dissenting).

<sup>112</sup> For example, different liability standards apply based on whether the speaker is a public figure or a private figure, and whether the speech in question is of public or private concern. See *Sullivan*, 376 U.S. 254 (public official and matter of public concern); *Gertz*, 418 U.S. 323 (private figure and matter of public concern); *Greenmoss*, 472 U.S. 749 (private figure and matter of private concern). The Court has also held that at least some libel plaintiffs must prove falsity, see *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (holding that both public and private figure plaintiffs must prove falsity in defamation suits involving speech on a matter of public concern), and that actual malice must be proved by clear and convincing evidence, *Gertz*, 418 U.S. at 342.

nuanced tests are full tort damages or no tort liability whatsoever, then courts nevertheless have only the bluntest possible set of *remedial* tools to tailor the balance of speech and tort interests in a given case. One set of interests must necessarily prevail to the complete exclusion of the other; there is no room for a court to “split the difference” between the two sets of interests in a given case. Some might argue that the mere concept of “splitting the difference” in a speech-tort case is fundamentally inconsistent with the underlying nature of First Amendment rights—an argument that I will address in detail below<sup>113</sup>—but at least as a purely descriptive matter, courts are limited by their present approach to choosing one set of interests to vindicate to the complete exclusion of the other.

2. *Inability to Craft a Nuanced Balance on a Broader Doctrinal Level.* — The current all-or-nothing approach to speech-tort cases also blunts courts’ ability to craft, on a macro level, a nuanced body of speech-tort jurisprudence that recognizes the complex balance between speech and tort interests. Under the present binary approach, courts generally do not recognize the tort interests posed in a case at all unless they are willing to institute tort liability with the full complement of tort remedies. As a result, when courts modify the contours of tort law to recognize complete First Amendment exemptions from tort liability, they tend to draw lines that are highly favorable to speech interests; since the deterrent effect of full tort liability and damages on unfettered speech is so high, courts must take an aggressive posture in carving out First Amendment exemptions to tort liability.

Justice White recognized this phenomenon in his concurring opinion in *Greenmoss*. He argued that the approach to libel law adopted in *Sullivan* “escalat[ed] the plaintiff’s burden of proof to an almost impossible level.”<sup>114</sup> He attributed this result to the “breathing room” rationale adopted by the Court in *Sullivan* and *Gertz* as the basis for protecting false statements of fact<sup>115</sup>—which, at the time, the Court had characterized as having no constitutional value.<sup>116</sup> Under the Court’s rationale, the risk of chilling effects on speech mandates a doctrinal “buffer zone” such that even constitutionally worthless speech may be subject to First Amendment

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<sup>113</sup> See *infra* Part \_\_\_\_.

<sup>114</sup> *Greenmoss*, 472 U.S. at 771 (White, J., concurring in the judgment).

<sup>115</sup> *Id.* at 770-71.

<sup>116</sup> The Court recently retreated from this position in *United States v. Alvarez*. See 132 S. Ct. 2537, 2545 (2012) (plurality opinion) (“The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.”); *id.* at 2553 (Breyer, J., concurring in the judgment) (“False factual statements can serve useful human objectives.”).

protection.<sup>117</sup>

Fred Schauer explained this concept in greater depth in his seminal article describing the mechanics of First Amendment chilling effects.<sup>118</sup> As Schauer notes, the Court, in defining the doctrinal scope of First Amendment protection, generally installs buffer zones that extend beyond the technical constitutional reach of such protection. One way to conceptualize this structure is via the distinction between what Mitchell Berman has called “constitutional operative propositions (judicial statements of what the Constitution means)” and “constitutional decision rules (judicial statements of how courts should decide whether the operative propositions have been complied with).”<sup>119</sup> This distinction recognizes that the technical meaning of the Constitution is not coextensive with the means by which courts *implement* the Constitution; in crafting constitutional doctrine, courts, for a wide variety of practical reasons, must institute tests that are overinclusive or underinclusive compared to actual constitutional meaning.<sup>120</sup>

In the First Amendment context, courts craft overprotective decision rules in order to counteract any speech-chilling effects associated with, say, the vagueness of a particular standard, imperfections in the judicial process (such as errors by judges and juries), or proof difficulties that may be faced by speakers (for example, proving truth as an affirmative defense to libel).<sup>121</sup> If a court were to draw the doctrinal line of protection at the exact

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<sup>117</sup> See *Sullivan*, 376 U.S. at 721 (“[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they need to survive.”); *Gertz*, 418 U.S. at 340 (“[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.”).

<sup>118</sup> Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. REV. 685 (1978).

<sup>119</sup> Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 15 (2004).

<sup>120</sup> See, e.g., Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) (“[T]he Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely.”).

<sup>121</sup> Schauer, *supra* note \_\_, at 694-701. For example, on its face, the *Gertz* Court’s statement that “there is no constitutional value in false statements of fact” can be viewed as a judgment of constitutional meaning—a statement that the “speech” referred to in the Free Speech Clause does not include false statements of fact. *But see supra* note \_\_ (describing the Court’s recent retreat from this position in *Alvarez*). The doctrinal tests created in cases like *Sullivan* and *Gertz*, however, are “decision rules”: although premised on the technical meaning of the First Amendment as delineated by the Court, their coverage is overinclusive in that certain false statements of fact would remain protected in order to account for the chilling effects discussed above.

technical boundary between constitutionally protected and unprotected speech, the sorts of chilling effects outlined above would likely deter risk-averse speakers from engaging in protected speech; for example, speakers might be scared off by the vagueness of the standard, courts might make mistakes in classifying the speech in question, or speakers may worry about their ability to marshal proof regarding the proper classification of their speech.<sup>122</sup>

Because, in the present all-or-nothing system, the price of allowing tort liability with the full panoply of tort damages is so high, prospective speakers would be significantly deterred from speaking anytime the speech in question is within shouting distance of the designated doctrinal borderline.<sup>123</sup> As a result, as Justice White observed, courts under the current regime are forced to ratchet up tort liability standards to extremely high levels—levels that are often well beyond the technical constitutional boundaries in question. Thus, the case-by-case bluntness of the present approach to speech-tort jurisprudence translates to bluntly and imperfectly tailored doctrine on a broader level, as it forces courts to prophylactically immunize a broad swath of speech that, technically speaking, is not constitutionally protected.

3. *Distributing the Costs of Speech Disproportionately on Tort Victims.* — Taking this sort of binary approach to speech-tort jurisprudence also exacerbates a distributional disparity that is inherent to speech-tort jurisprudence. Under traditional tort theory, if the plaintiff can prove all of the elements of a tort, then he is entitled to damages sufficient to compensate him for the associated injury such that he is restored to where he would have been but for the tortious act.<sup>124</sup> But as Schauer has observed, when the First Amendment short-circuits the normal operation of tort law such that the plaintiff cannot recover damages despite establishing liability under pure tort principles, the plaintiff is left uncompensated for a social wrong that has been committed against him, all for the benefit of the general public's interest in unfettered speech.<sup>125</sup>

For example, in *Snyder*, the trial court found Westboro liable for IIED and awarded the Snyder family \$2.9 million in compensatory

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<sup>122</sup> *Id.* at 689-701.

<sup>123</sup> *Cf. id.* at 696-97 (“The severity of the potential punishment magnifies the danger, and hence the fear, of an erroneous judicial determination.”).

<sup>124</sup> *See, e.g.,* Ted Sichelman, *Purging Patent Law of “Private Law” Remedies*, 92 TEX. L. REV. 517, 519 (2014) (observing that tort law “generally seeks to return the private actor that has been harmed to the status quo ante”).

<sup>125</sup> Schauer, *supra* note \_\_, at 1322-23.

damages.<sup>126</sup> The Supreme Court, however, affirmed the Fourth Circuit’s ruling overturning this compensatory damages judgment. Again, the jury had found that the church’s actions met all of the common law elements for IIED, and nobody appeared to dispute that a reasonable jury could reach this conclusion.<sup>127</sup> Yet by applying the First Amendment to exempt the church from any liability, the Court left the Snyder family with no vindication or compensation for what the jury deemed a straightforward violation under common law tort doctrine. Thus, while the general public continues to enjoy the broad benefits of free speech<sup>128</sup> that are “paid for” when tortious harms like those suffered by the Snyders go uncompensated, the Snyders were forced to absorb a disproportionate portion of free speech’s costs (\$2.9 million, to be exact).<sup>129</sup>

As long as courts adhere to the view that the First Amendment restricts the reach of general tort principles when the application of such principles threatens speech interests, plaintiffs will always be forced to subsidize at least some of the costs of free speech for the benefit of the general public (at least barring some sort of radical shift in the law).<sup>130</sup> But the current all-or-nothing approach used by courts maximizes the extent to which tort plaintiffs are forced to shoulder this burden. Where tort principles would dictate that plaintiffs have suffered a compensable social wrong, the First Amendment steps in and leaves them with nothing: no damages and no finding of liability. Current speech-tort jurisprudence thus ensures that erstwhile tort victims are the ones left holding the bag when it comes to paying the costs of free speech, and it makes no effort to mitigate this inequity.

### *C. The Advantages of Flexible Remedies in Speech-Tort Cases*

As discussed above, courts tend to analyze speech tort-cases in a one-dimensional manner, focusing solely on the presence or absence of tort liability: either the First Amendment trumps and no tort liability exists, or normal tort liability applies with the full complement of tort damages. Yet

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<sup>126</sup> *Snyder*, 131 S. Ct. at 1214.

<sup>127</sup> *Id.* at 1223 (Alito, J., dissenting) (“Although the elements of the IIED tort are difficult to meet, respondents long ago abandoned any effort to show that those tough standards were not satisfied here.”).

<sup>128</sup> *See supra* Part \_\_\_\_ (setting forth the traditional rationales for protecting speech).

<sup>129</sup> I’m taking the jury’s finding of compensatory damages at face value here; of course, one could argue that the damages amount grossly exaggerated the actual harm suffered by the Snyder family.

<sup>130</sup> *See Schauer, supra* note \_\_\_, at 1338-43 (discussing the possibility of state-subsidized libel insurance).

as the Supreme Court itself demonstrated in *Gertz*, courts do not have to take this sort of all-or-nothing approach to speech-tort doctrine. In focusing solely on the dimension of liability, courts generally ignore the additional dimension of remedy in designing speech-tort jurisprudence. Rather than adhere to a strictly binary approach, courts could find that the First Amendment applies in certain speech-tort cases not by vitiating tort liability completely, but rather by simply limiting or eliminating the damages to which the plaintiff is entitled.

This general concept fits comfortably within the context of broader First Amendment doctrine. In a recent article, Michael Coenen outlined the numerous situations in which courts have adopted what he referred to as a “penalty sensitive” approach to First Amendment cases.<sup>131</sup> These approaches—unlike what he refers to as the more traditional “penalty neutral” approach—“ask[] whether a restriction on speech violates the First Amendment *in light of* the severity of the punishment attached to it.”<sup>132</sup> Coenen went on to highlight some of the specific contexts in which the Court has adopted penalty sensitive doctrine or rhetoric; for example, in public employment, school speech, and indecency cases.<sup>133</sup> The use of flexible remedies in the speech-tort context is simply another example of this general approach to First Amendment jurisprudence that courts have already adopted, at least to a limited extent.<sup>134</sup> And as described in detail above, the concept of flexible remedies is not foreign to the speech-tort context, at least in the context of libel.<sup>135</sup>

When the concept of flexible remedies is superimposed over the simple binary question of liability, the number of possible approaches courts can take in speech-tort cases expands. Courts would still retain the option of completely vitiating tort liability, and they could still choose to uphold traditional tort liability and award the full measure of tort damages. But two intermediate options now come into play: courts could uphold tort liability yet award no damages at all, or they could uphold tort liability and award some form of partial damages.

First, courts could resolve certain speech-tort cases by finding tort liability but awarding the plaintiff no damages (or nominal damages). In other words, plaintiffs would be entitled only to a bare finding of liability

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<sup>131</sup> See Coenen, *supra* note \_\_.

<sup>132</sup> *Id.* at 999.

<sup>133</sup> *Id.* at 1008-10, 1013-16.

<sup>134</sup> *Id.* at 995 (“Penalty-sensitive free speech analysis may be less prevalent than its penalty-neutral counterpart, but it is by no means nonexistent.”); see also *id.* at 1005-07 (discussing “penalty sensitivity” in the context of the Court’s defamation jurisprudence).

<sup>135</sup> See *supra* Part \_\_.

and nothing else. As discussed above, during the libel reform movement of the 1980s and early 1990s, a number of commentators had suggested the possibility of no-damages judgments in libel cases, with few concrete gains.<sup>136</sup> But there has since been little academic or judicial discussion of these sorts of possibilities, particularly outside of the specific context of libel.<sup>137</sup>

Courts could also resolve speech-tort cases by finding tort liability but awarding only a partial measure of tort damages. In other words, defendants would be deemed liable for the tort in question, but would have to pay only some subset of the normal measure of tort damages; the First Amendment would be taken into account simply by reducing the plaintiff's damages award. This was the approach taken by the Supreme Court in *Gertz*, where the Court held that although private figure defamation plaintiffs can recover actual damages under a negligence standard, they cannot recover presumed or punitive damages unless they prove actual malice.<sup>138</sup> But again, *Gertz* represented an anomaly in the Court's speech-tort jurisprudence, and this approach has similarly been largely ignored by courts and scholars in recent years.<sup>139</sup>

These remedy-based approaches to resolving speech-tort cases offer a number of clear advantages over the binary, all-or-nothing approach typically adopted by courts. Such approaches allow courts to advance both speech and tort interests in individual cases, they allow courts to craft broad doctrinal lines with more precision, and they mitigate the distributional disparity that is inherent to speech-tort jurisprudence.

*1. Greater Precision in Balancing Interests on a Case-by-Case Level.* — Adopting flexible remedies in speech-tort cases would provide courts with a more precise set of tools to calibrate the complex balance between speech interests and tort interests, both in the “retail” context of deciding individual cases and in the “wholesale” context of designing speech-tort jurisprudence as a whole.

In deciding individual cases, the flexibility advantages of adopting remedy-based approaches rather than pure liability-based approaches are readily apparent. As discussed above, the pure liability-based approach that courts have generally adopted resolves the conflict between speech and tort interests by simply elevating one set of interests to the complete exclusion of the other. Either speech interests trump and no tort liability attaches at all, or tort principles apply without any interference from the First

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<sup>136</sup> See *supra* TAN \_\_.

<sup>137</sup> See *supra* note \_\_ and accompanying text.

<sup>138</sup> 418 U.S. at 347-49.

<sup>139</sup> See *supra* TAN \_\_.

Amendment and traditional tort liability attaches.<sup>140</sup>

Such an approach, however, often may not do justice to the complicated balance of interests in a given case. For example, in *Snyder*, there was no meaningful dispute that the plaintiff had adequately proved all of the common law elements of IIED, but the Court vitiated all tort liability in light of the First Amendment interests implicated by that particular application of tort law. In essence, the Court stated that the speech interests in question completely trumped any tort interests such that the plaintiff was entitled to nothing.<sup>141</sup> In dissent, Justice Alito argued the opposite—that tort law should operate completely unimpeded, to the complete exclusion of any limited speech interest implicated by the case.<sup>142</sup>

One could reasonably argue, however, that neither of these solutions is entirely fair or satisfactory. Perhaps we want to recognize, on the one hand, that Westboro’s speech, as offensive as it was, was entitled to some degree of First Amendment protection, for all of the usual reasons that we encourage unfettered speech. On the other hand, we may also want to recognize that a real social harm was inflicted upon the Snyders, as evidenced by the fact that Westboro’s conduct clearly met all of the elements required to establish IIED under pure tort principles. Under the traditional all-or-nothing approach, of course, we cannot acknowledge both sets of interests in this manner.

So what if, for example, a court were to find the defendant liable in tort but decline to award the plaintiff any damages? Even in the absence of monetary recovery, a bare finding of liability might still provide a number of significant benefits to tort plaintiffs. Tort victims may seek and value the opportunity to demand an explanation from the defendant regarding the social wrong that was committed against them.<sup>143</sup> They may value the public vindication that would accompany a judicial finding of tort liability.<sup>144</sup> Or they may simply value the opportunity to investigate what happened to them, in the hope that it will not happen again to them or to others.<sup>145</sup> Of course, some plaintiffs may care little for these sorts of non-

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<sup>140</sup> See *supra* Part \_\_\_\_.

<sup>141</sup> *Snyder*, 131 S. Ct. at 1220.

<sup>142</sup> *Id.* at 1229 (Alito, J., dissenting).

<sup>143</sup> See Oman & Solomon, *supra* note \_\_\_, at 1162-63 (observing that in a case like *Snyder*, “it may well be that the ability to demand answers and confront another is a value in itself”).

<sup>144</sup> See, e.g., Leval, *supra* note \_\_\_, at 1293 (discussing a survey finding that “almost half of all libel plaintiffs cited either restoration of reputation or deterring further publication as the objective of their suit,” while “[f]ewer than one in four plaintiffs ... stated that they were suing to win damages”).

<sup>145</sup> See Scott Hershovitz, *Harry Potter and the Trouble With Tort Theory*, 63 STAN. L.

monetary benefits, and they might therefore choose not to sue if this were the only remedy available to them. But it seems a safe assumption that at least some subset of plaintiffs would derive significant dignitary benefits from such a judgment.

On the other hand, a liability-only, no-damages judgment would drastically reduce any chilling effects on speech as compared to a run-of-the-mill finding of tort liability and damages. If no damages are awarded, then the deterrent effect on speakers would obviously shrink significantly.<sup>146</sup>

Of course, this does not mean that there would be no chilling effect whatsoever—perhaps speakers will be deterred simply by the prospective costs of litigation.<sup>147</sup> But it is easy to see that the chilling effect on speech associated with this sort of limited remedy is drastically lower than it would be if a court were to award the full measure of tort damages.

A no-damages tort judgment is therefore a potentially powerful tool to better effectuate a nuanced balance between First Amendment and tort interests in a given case. Unlike the two extreme options currently used by courts, the no-damages option would vindicate both tort and speech interests to a limited extent. Plaintiffs would come out of the litigation with at least something to show for the social wrong that was committed against them, even if it is a mere judgment of liability. And this would come at a very low cost to overarching First Amendment interests; since defendants would not face the prospect of significant monetary loss, any chilling effect on speech would likely be minimal.

Similar arguments can be made for partial-damages judgments as well, which would serve as yet another intermediate option to resolve conflicts between speech and tort interests in a given case. If the First Amendment were to apply in a particular case by simply *reducing* the damages to which the tort plaintiff would otherwise be entitled, plaintiffs would again come out of the litigation with something to show for the social harm that was committed against them, while chilling effects on speech would be reduced in proportion to the First Amendment-mandated reduction of damages.

*2. Greater Precision on the Broad Level of Doctrinal Design.* — Adopting flexible remedies would also allow courts to craft a more nuanced balance between speech and tort interests on a broader doctrinal level, as it would give them finer tools to tailor more precise doctrinal boundaries.

Let's return to Schauer's chilling effect model, which describes

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REV. 67, 73 (2010).

<sup>146</sup> See Leval, *supra* note \_\_\_, at 1297-98 (observing that in a libel suit, “[a] declaration of falsity redresses injury without the chilling effect of damage awards”).

<sup>147</sup> I address this subject in more detail below. See *infra* Part \_\_\_\_.

courts' creation of "buffer zones" surrounding protective speech in order to counteract speech-chilling effects associated with things like vague standards, imperfections in the judicial process, or proof difficulties that may be faced by speakers. Again, this buffer zone functions by exempting from tort liability some subset of speech that, under technical constitutional standards, is unprotected, as a means of ensuring that protected speech is not chilled.<sup>148</sup>

As discussed above, if tort remedies are treated as an all-or-nothing proposition, then courts would have to create an extremely generous doctrinal "buffer zone" around the technical constitutional line dividing protected and unprotected speech, since full tort remedies would act as a powerful deterrent to speech. Such remedies must therefore be deployed carefully, in narrow circumstances safely beyond the actual constitutional threshold, to ensure that protected speech is not chilled. Of course, this accounting for chilling effects comes at a cost, since it guarantees that some technically deserving tort plaintiffs will be deprived of all remedies;<sup>149</sup> constructing a buffer zone in this manner reflects an assumption that this trade-off is worth it in order to limit chilling effects on protected speech.<sup>150</sup>

Schauer illustrated this framework with several specific doctrinal examples. In each case, he mapped out an axis measuring the constitutional value of the speech in question, and he delineated the theoretical constitutional boundary separating protected and unprotected speech, the actual prophylactic standard implemented by the Court, and the associated "buffer zone" between these two points.<sup>151</sup> For example, Schauer illustrated the *Sullivan* rule as follows:<sup>152</sup>

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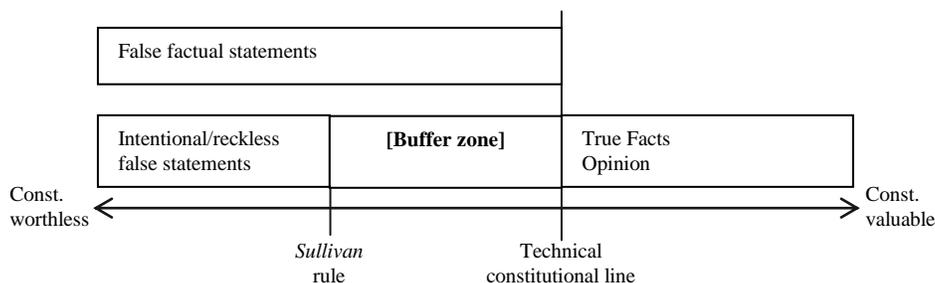
<sup>148</sup> See *supra* Part \_\_\_\_.

<sup>149</sup> See Schauer, *supra* note \_\_, at 708 (observing that every statement within the prophylactic buffer zone "represents an 'escape' of the 'guilty'").

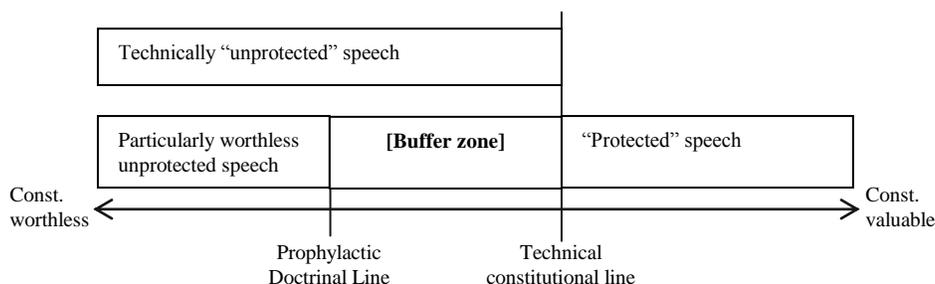
<sup>150</sup> See *id.* at 688 ("[T]he chilling effect doctrine recognizes the fact that the legal system is imperfect and mandates the formulation of legal rules that reflect our preference for errors made in favor of free speech.").

<sup>151</sup> See *id.* at 706-07 (defamation); *id.* at 715-16 (obscenity); *id.* at 722-25 (incitement).

<sup>152</sup> *Id.* at 707. I have modified Schauer's diagram in a few minor ways; for example, Schauer uses the term "social value threshold" as opposed to "technical constitutional line."



Schauer constructed similar charts covering obscenity and incitement, all of which ultimately boiled down to this basic structure:

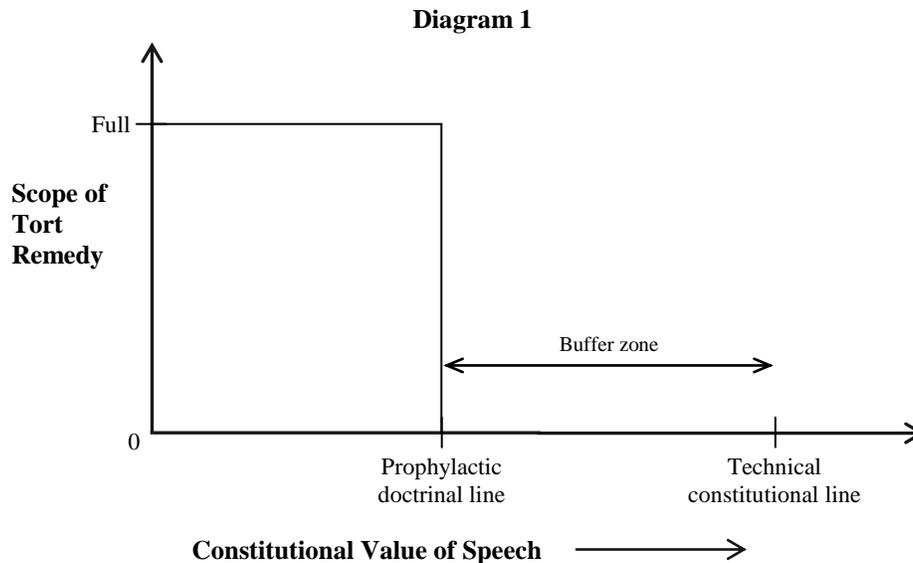


Schauer’s framework assumes the all-or-nothing approach that courts have generally applied in speech-tort cases. The prophylactic doctrinal lines under Schauer’s model thus merely mark the point at which any sort of sanction for speech is constitutionally permissible; Schauer’s model does *not* take into account the scope of the sanction involved. Thus, under this one-dimensional view, the “buffer zone” around protected speech can only be constructed by purposefully under-defining the subset of speech that can constitutionally be subject to sanction (for example, adopting an “actual malice” standard instead of a pure falsity standard in *Sullivan*).<sup>153</sup>

Coenen illustrated this point by reconceptualizing Schauer’s framework as a two-dimensional graph,<sup>154</sup> which I have adapted to fit the speech-tort context:

<sup>153</sup> *Id.* at 707-10. Schauer also observes that this buffer zone can be augmented by procedural protections, such as the requirement that actual malice be proved by clear and convincing evidence. *See id.* at 708-09.

<sup>154</sup> *See Coenen, supra* note \_\_, at 1028-29.



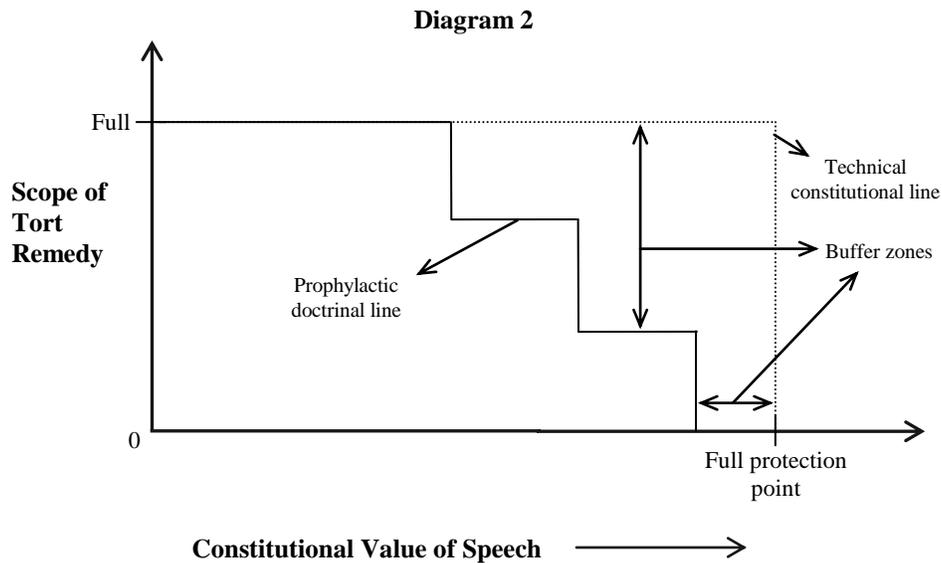
What might this diagram look like if we instead adopt a remedy-based approach? As an initial matter, mapping this out requires making an assumption as to the nature of the technical constitutional line in a given set of speech-tort cases. Is the technical constitutional boundary in these cases “penalty-sensitive” (to use Coenen’s term)? In other words, does the actual, theoretical scope of First Amendment protection rest—at least in part—upon the *degree* of sanction levied on the speech in question? Or is the technical constitutional boundary penalty-neutral, such that technical First Amendment protection rests only on the speech’s constitutional value, without regard to the degree of sanction imposed? Note that—to use Berman’s terminology as discussed above—I am here referring specifically to the “operative proposition” of what the First Amendment technically *means* rather than to “decision rules” as to how First Amendment protections ought to be *implemented* doctrinally.<sup>155</sup>

For the purposes of my argument, it doesn’t matter whether one conceptualizes the technical constitutional line to have penalty-sensitive elements or not. The benefits associated with adopting a flexible-remedy approach to speech-tort *doctrine* (that is, the decision rules *implementing* the underlying constitutional meaning) will be realized regardless. But for the sake of completeness, let’s first assume that the technical constitutional

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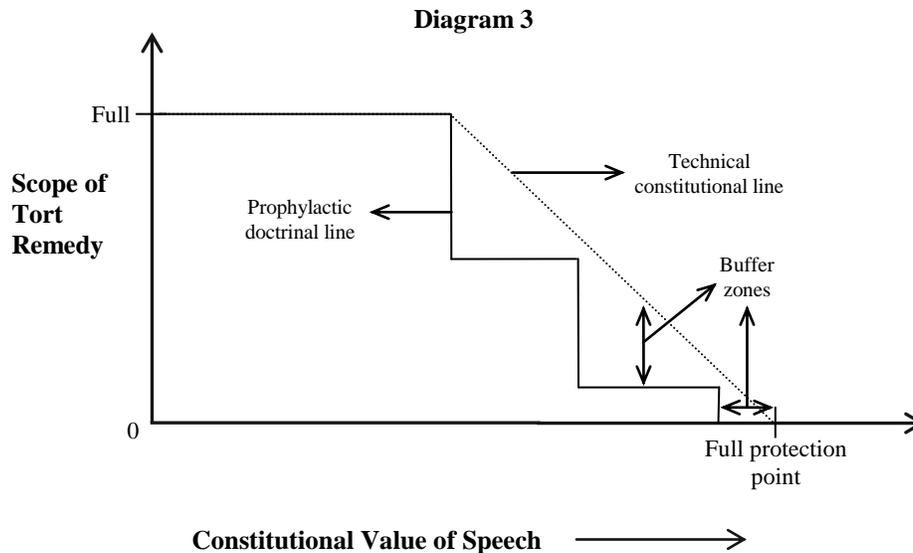
<sup>155</sup> See *supra* TAN \_\_\_. In other words, does the *text* of the Free Speech Clause necessarily exclude the degree of sanction as a constitutionally relevant consideration in mapping out the technical boundaries of protection?

line in a given speech-tort context is penalty-neutral. A flexible-remedy approach might look like this:



Now let's assume that the technical constitutional boundary is, in fact, penalty-sensitive, at least in part; in other words, the boundary is not simply a point along a single axis corresponding to the constitutional value of the speech, but is rather a line encompassing *both* the constitutional value of the speech *and* the scope of the tort remedy to which the plaintiff is entitled.<sup>156</sup> A flexible-remedy approach might look like this:

<sup>156</sup> This seems to me a reasonable reading of the text of the First Amendment, which is cast only in the most abstract terms. See U.S. CONST. AMEND. I (“Congress shall make no law ... abridging the freedom of speech.”). In any event, the historical record is of little help here, as it reveals no clear answers as to what exactly the Framers intended by this language. See STONE ET AL., *supra* note \_\_, at 6-7 (“Scholars have long puzzled over the actual intentions of the framers of the first amendment.... The framers themselves were unsure what a constitutional guarantee of ‘freedom of the speech or of the press’ would mean.”).



Note how the different assumptions regarding the technical constitutional boundary are manifested in each of these diagrams. In the first, the technical constitutional boundary is binary and penalty-neutral—in other words, the First Amendment technically permits full tort damages for any speech falling below a particular speech-value threshold, and it technically bars all tort remedies for any speech exceeding that threshold. In the second, the technical constitutional boundary is partially penalty-sensitive; for the subset of speech represented by the sloped part of the line, technical constitutionality rests not simply on the constitutional value of the speech, but also on the *scope of the sanction* imposed on the speech.<sup>157</sup> In any case, in both diagrams, there is a point at which speech cannot be constitutionally subject to *any* sanction whatsoever; I call this point the “full protection point.”

In both diagrams, the solid line represents the *doctrinal* boundary set by courts. In theory, this line could take many different forms. For reasons I explain in detail below,<sup>158</sup> rather than adopt a pure “sliding scale” system

<sup>157</sup> This diagram reflects my own intuition regarding the technical boundaries of the First Amendment. On the one hand, certain speech is so constitutionally valuable that it simply cannot be sanctioned in any way. On the other hand, certain speech is so worthless that it can be subject to full tort damages. In the middle, technical constitutionality is a function of both the constitutional value of the speech and the scope of the sanction imposed on the speech. But this is just the way I see things—again, my argument here holds regardless of how one conceptualizes the technical constitutional boundary.

<sup>158</sup> See *infra* Part \_\_\_\_.

in which courts determine tort damages limits on a case-by-case basis, it would be far more sensible and administrable for courts to adopt some sort of categorical system in which certain *subsets* of speech are subject to preset levels of tort damages (or a liability judgment without damages). Under this system, the doctrinal line would resemble a series of steps rather than a smooth slope, as indicated in the diagrams.

The diagrams illustrate that allowing for flexible remedies in the speech-tort context would produce a number of positive results, regardless of how exactly one conceptualizes the technical constitutional boundaries in question. First, courts need not craft massive liability-based “buffer zones” when carving out First Amendment exceptions to tort doctrine; in other words, they need not create the sorts of excessively high bars to tort liability that Justice White bemoaned in his *Greenmoss* concurrence. If courts were to adopt partial-damages or no-damages judgments, the chilling effects on speech resulting from error, vagueness, or procedural uncertainty would be much smaller, since in a flexible remedies regime, speech that is slightly more “severe” than is constitutionally permissible may not be subject to full tort damages, but rather only to, for example, a no-damages finding of liability.<sup>159</sup> Any chilling effect on speakers engaging in this sort of borderline speech would therefore be drastically reduced, which in turn would allow courts to stretch the scope of tort liability closer to the “full protection” point.<sup>160</sup> In other words, when the scope of the chilling effect associated with error, vagueness, or uncertainty is reduced, courts can reduce the size of the liability-based buffer zone and craft speech-tort doctrine to hew more closely to the actual constitutional lines.

Furthermore, adopting flexible remedies would give courts significantly more freedom in crafting the buffer zone around protected speech. Courts can create a buffer not only by extending full First Amendment immunity to some subset of technically unprotected speech, but also by limiting the *damages* that defendants must pay to some level below the constitutionally permissible maximum. This ability to spread out the buffer zone over a spectrum of remedies allows courts to calibrate their doctrinal framework on a much finer level, with closer adherence to actual constitutional boundaries.<sup>161</sup> And this approach also yields more equitable

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<sup>159</sup> Cf. Schauer, *supra* note \_\_, at 696-97 (“[T]he severity of the potential punishment magnifies ... the fear[] of an erroneous judicial determination.”).

<sup>160</sup> See Coenen, *supra* note \_\_, at 1033 (“[G]iven that punishment severity also contributes significantly to a law’s deterrent effect, penalty-sensitive adjudication also can operate to combat chilling effects.”).

<sup>161</sup> As Diagram 3 illustrates, this sort of close-tailoring is especially pronounced if one assumes that the technical constitutional line contains penalty-sensitive elements.

results on a case-by-case basis; as the diagrams illustrate, it expands the set of cases in which tort victims will come away with something to show for the social wrongs that have been committed against them.

Finally, as Coenen observed, all penalty-sensitive approaches to First Amendment jurisprudence promote basic fairness insofar as similar cases are more likely to be treated similarly.<sup>162</sup> Under the current all-or-nothing approach, the doctrinal boundary set by the court—such as *Sullivan*'s “actual malice” standard—creates a massive cliff effect between speech that barely meets the standard and speech that barely misses the standard: the former is subject to the full panoply of tort damages, while the latter is completely exempt from liability. Diagram 1 clearly illustrates this disconnect: the sheer drop in potential liability that resides at the doctrinal boundary indicates that similar cases on either side of this boundary will be treated completely differently.<sup>163</sup>

Flexible remedies, however, would mitigate this disparity in treatment between similar speech. Rather than draw a single doctrinal line that starkly separates speech subject to full tort damages from speech subject to no tort liability whatsoever, a court could draw a series of lines delineating a graduated spectrum of potential remedies.<sup>164</sup> Thus, a doctrinal boundary in a flexible remedy regime might merely distinguish between, say, speech subject to a no-damages judgment of tort liability and speech subject to no tort liability whatsoever. Providing for a flexible set of tort remedies thus ensures more similar treatment of “threshold” speech that resides around the doctrinal boundaries set by courts.

*3. Mitigating Distributional Disparity in Allocating the Costs of Free Speech.* — Finally, because these intermediate, remedy-based approaches provide tort victims with *some* degree of vindication, they help to mitigate the distributional disparity that is inherent to speech-tort jurisprudence. Again, whenever the First Amendment applies to vitiate tort liability completely, uncompensated tort victims are, in effect, subsidizing the costs of free speech, the benefits of which are enjoyed by the public at large.<sup>165</sup> But if the First Amendment applies *not* to vitiate liability completely, but merely to limit or eliminate the damages to which plaintiffs are entitled, then the degree of this distributional imbalance is reduced.

If partial damages are awarded, then tort victims will have at least *some* degree of monetary compensation for their injuries. And even if tort victims receive only a finding of liability without any damages, they may

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<sup>162</sup> See Coenen, *supra* note \_\_\_, at 1027-31.

<sup>163</sup> *Id.* at 1029.

<sup>164</sup> See *id.* at 1029-30.

<sup>165</sup> See *supra* Part \_\_\_.

still come away from the litigation with the potentially significant intangible benefits associated with such a finding,<sup>166</sup> which would still leave them in a better position than in the present all-or-nothing system. Of course, neither of these solutions would completely eliminate this distributional disparity—since the disparity generally follows from the idea that the First Amendment limits the scope of tort law<sup>167</sup>—but both would soften the blow by giving plaintiffs at least some degree of vindication (whether monetary or dignitary) for the injuries they have suffered.

### III. POSSIBLE CRITIQUES TO ADOPTING FLEXIBLE REMEDIES IN SPEECH-TORT DOCTRINE

Given the benefits of flexible remedies in speech-tort cases, why have courts generally neglected to adopt such an approach? This is a difficult question to answer, since there is little indication that many courts have even thought seriously about adjusting tort damages as a possible means of doctrinal design. Perhaps the most likely reason for this is that the option simply does not occur to present-day courts, probably due to the Supreme Court's general adherence to the all-or-nothing approach in speech-tort cases ranging from *Sullivan* through *Snyder*.<sup>168</sup>

But there are a number of potential reasons as to why one might balk at introducing flexible remedies into speech-tort cases, rooted in either theoretical concerns regarding the nature of rights, or practical concerns regarding judicial discretion, chilling effects, or administrability. I will walk through each of these potential critiques in turn.

#### A. Theoretical Concerns Regarding the Nature of Rights

One possible critique of adopting flexible remedies in speech-tort jurisprudence is that First Amendment rights, by their very nature, simply cannot be balanced against mere tort interests. Rather, the right to freedom of speech, like any other right, must by nature act as a trump against all

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<sup>166</sup> See *supra* TAN \_\_\_\_.

<sup>167</sup> But see Schauer, *supra* note \_\_, at 1338-43 (discussing state-subsidized libel insurance as a potential means of eliminating this disparity).

<sup>168</sup> Another possible reason might be the incremental nature of common law development. Assembling a complex doctrinal framework premised on flexible remedies might be difficult for courts to do on a case-by-case basis, especially if courts do not encounter sufficient cases in a given area to identify multiple distinguishing factors. See *infra* Part \_\_. If this is the case, then legislatures, rather than courts, might be better suited to crafting such modifications to speech-tort doctrine. See *infra* TAN \_\_\_\_.

interests that conflict with it.<sup>169</sup> Thus, it would not make any sense to conceptualize certain speech as, in effect, “partially protected”—either speech is protected and not subject to any sanction, or it is not protected and the government can generally regulate it as it pleases.

There is, of course, a longstanding theoretical debate regarding the nature of rights. Do rights necessarily act as trumps that cannot be balanced against other interests, or are they best conceptualized as mere “shields” that place upon the state a heightened burden to justify its regulation?<sup>170</sup> But there’s no need to wade into these deep theoretical waters for present purposes. Again, in proposing a flexible remedies approach, I am merely proposing a set of doctrinal rules *implementing* the meaning of the First Amendment right to free speech. In other words, my proposal is for a set of decision rules; I am not attempting to delineate the actual meaning of the free speech right.<sup>171</sup> And as many have noted, decision rules are often prophylactic in nature: they represent an overlay of practical considerations on top of the abstract meaning contained in constitutional provisions.<sup>172</sup> Diagram 2 above clearly illustrates this distinction while making clear that the benefits of a flexible remedies approach apply even assuming a purely “penalty-neutral” view of the technical constitutional boundaries.

Of course, as a practical matter, the Supreme Court has already demonstrated in *Gertz* that flexible remedies represent a viable means of designing speech-tort jurisprudence.<sup>173</sup> And *Gertz* is not a *sui generis* example of prophylactic speech regulation that applies only in the realm of false speech. Prophylaxis is everywhere in First Amendment doctrine—particularly in the context of speech-tort doctrine, where, as discussed

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<sup>169</sup> See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977) (“Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.”).

<sup>170</sup> Compare DWORKIN, *supra* note \_\_, at xi, with Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 52-53 (1998) (“Rights ... are not trumps in the sense that they exclude all consideration of consequences. Instead, they are at most ‘shields’ against weak or unacceptable reasons for government action.”).

<sup>171</sup> See *supra* TAN \_\_ (describing Berman’s distinction between “decision rules” and “operative propositions”).

<sup>172</sup> See, e.g., David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 207 (1988) (observing that constitutional doctrine incorporates “both the principles and values reflected in the relevant constitutional provisions *and* institutional realities”).

<sup>173</sup> See *Gertz*, 418 U.S. at 347-49 (holding that private libel plaintiffs can recover actual damages by proving the defendant’s negligence in publishing the defamatory statement, but they cannot recover presumed or punitive damages under that standard).

above, courts constantly overprotect speech to limit chilling effects.<sup>174</sup> Indeed, as David Strauss and others have observed, First Amendment doctrine can be conceptualized as consisting primarily of rules that overprotect speech beyond technical constitutional boundaries.<sup>175</sup> This includes even the fundamental tenet of First Amendment jurisprudence that content-based speech regulations are subject to much harsher scrutiny than content-neutral regulations. Strauss notes that “if the Court were enforcing only the ‘real’ first amendment, it would make a case-by-case inquiry [of content-based regulations] to see if an impermissible motive is at work.”<sup>176</sup> But rather than take on such an unwieldy task rife with uncertainty and unchecked discretion, the Supreme Court instead “devised a prophylactic rule—content-based restrictions are almost conclusively presumed invalid, unless they fall within one of a few categories.”<sup>177</sup> So regardless of how one conceptualizes the nature of the actual constitutional right to free speech, flexible remedies can be used to craft the prophylactic doctrinal boundaries *implementing* this underlying right.<sup>178</sup>

### *B. Excessive Judicial Discretion and Administrability Concerns*

On a more practical level, one might argue that allowing courts to design speech-tort jurisprudence via flexible tort remedies would provide

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<sup>174</sup> See *supra* Part \_\_\_\_.

<sup>175</sup> Strauss, *supra* note \_\_\_, at 198 (“[T]he most significant aspects of first amendment law can be seen as judge-made prophylactic rules that exceed the requirements of the ‘real’ first amendment.”); see also Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 902 (1999) (“[V]irtually the entire body of free speech law can be redescribed as prophylactic.”).

<sup>176</sup> Strauss, *supra* note \_\_\_, at 202.

<sup>177</sup> *Id.*; see also Levinson, *supra* note \_\_\_, at 902-03.

<sup>178</sup> For what it’s worth, my own view is that we ought to adopt a pragmatic approach when it comes to these broad theoretical questions. The fundamental principle of the Free Speech Clause is merely that “protected” speech must be treated differently from other types of conduct. See SCHAUER, *supra* note \_\_\_, at 8. It does not necessarily follow that protected speech must always be completely immunized from sanction; speech may be “protected” beyond other types of conduct merely by diminishing the degree to which speech can be sanctioned. This view of the First Amendment, I think, better reflects the pragmatic realities of speech-tort doctrine. There may be many situations where the speech is so valuable that the Constitution requires that it be immunized completely from any sanction. But there may also exist a subset of cases for which splitting the difference makes more sense: the speech carries some degree of constitutional value such that it warrants special treatment, but not so much value as to trump completely the tort interests arising from the social harm caused by the speech. In these cases, why not say that the First Amendment allows the government to give both sets of interests their due by instituting some form of partial tort remedy?

them with far too much discretion. Unlike under the present binary approach—where courts can choose only full tort damages or no liability whatsoever—allowing for flexible remedies would give courts potentially infinite options to resolve speech-tort cases. Thus, any gains in case-by-case equity or a more closely tailored set of speech-tort doctrines may well be outweighed by the dangers of unchecked judicial discretion and opaque doctrinal standards. For example, chilling effects may increase as speakers face heightened uncertainty as to how harshly their speech will be sanctioned, and judges and juries would be afforded greater opportunities to surreptitiously decide cases based on their personal approval or disapproval of the speech in question.<sup>179</sup> Perhaps the all-or-nothing approach, for all of its faults, remains the best option in light of these possible dangers.

The scope of the risks associated with unchecked judicial discretion, however, depends to a significant extent on how exactly courts choose to implement flexible tort remedies in designing speech-tort doctrine. At one extreme, one could design a system in which courts would be free, in each case, to calculate an exact percentage of tort damages to which the plaintiff would be entitled, not unlike a determination of comparative negligence in a pure tort context.<sup>180</sup> Thus, for example, a court in a particular case might hold that First Amendment principles require capping tort damages at, say, 42% of compensatory damages. This sort of system would create a true sliding scale, based on ad-hoc balancing, that would allow courts to tailor remedies for every single speech-tort case based on its particular facts.

Most would agree, however, that it would be foolish and dangerous to adopt such an open-ended approach, which would maximize the risks associated with unchecked judicial discretion and lead to doctrinal incoherence and unpredictability. In the absence of clear rules, potential defendants would have little ability to predict the extent to which they might face liability for their speech, which would in turn create massive chilling effects.<sup>181</sup> The potential extent of liability might also swing wildly based on the judge assigned to a particular case; a speech-friendly judge might eliminate all tort damages, while a tort-friendly judge might allow a large proportion of tort damages. Furthermore, the unstructured nature of this sort of ad-hoc analysis would give judges and juries plenty of cover to smuggle their own personal views of the speech into the calculus while limiting opportunities for effective review.

Incorporating flexible remedies into speech-tort jurisprudence,

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<sup>179</sup> See Schauer, *supra* note \_\_, at 694-95.

<sup>180</sup> See DOBBS, *supra* note \_\_, at 504 (describing comparative negligence).

<sup>181</sup> See, e.g., Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 275-76 (2009).

however, need not take this sort of highly discretionary form. A more workable system would be designed around predictable rules defining *subsets* of speech that correspond to a set remedy.<sup>182</sup> *Gertz* itself represented a clear example of this more rule-based approach: the Court carved out a particular subset of libel plaintiffs—private individuals—and capped the relief to which they are entitled under a negligence standard to actual damages.<sup>183</sup> Such an approach incorporates greater flexibility into speech-tort doctrine while limiting the risks of unchecked judicial discretion.

The optimal balance of the predictability afforded by clear rules and preset remedies versus the flexibility afforded by standards and case-by-case judgments in designing speech-tort jurisprudence is a complicated issue—one that would likely depend on the specific characteristics of the speech in question<sup>184</sup>—and I do not here suggest what the ideal balance ought to be. I do think, however, that courts can and should do more to incorporate some degree of remedial flexibility into their doctrinal frameworks for all of the reasons explained above; at the very least, courts should put serious thought into the *possibility* of adopting such approaches in speech-tort cases, since there is little indication that they do this now.

### C. Underprotection of First Amendment Interests

Perhaps allowing for flexible remedies would have the effect of eroding First Amendment interests. One of the fundamental issues underlying speech regulation is that the benefits of speech tend to be more abstract and far-reaching when compared to the more immediate and concrete social harms produced by speech.<sup>185</sup> First Amendment interests

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<sup>182</sup> See Coenen, *supra* note \_\_, at 1001 n.32 (observing that “penalty-sensitive doctrine” need not involve open-ended standards; it “may also assume a structure more reflective of categoricalism”).

<sup>183</sup> *Gertz*, 418 U.S. at 347-49.

<sup>184</sup> See Coenen, *supra* note \_\_, at 1050 (“[C]ourts can tailor the penalty-sensitive aspects of their holdings to further whatever implementation-related priorities they have chosen to pursue.”).

<sup>185</sup> See Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 744 (2002) (“[T]he costs of freedom of expression are often more salient than the benefits, and their salience may cause the balance to shift too far toward suppression.”); Frederick Schauer, *The Wily Agitator and the American Free Speech Tradition*, 57 STAN. L. REV. 2157, 2168 (2005) (observing that the First Amendment is “about imposing constraints on even reasonable, well-intentioned, and empirically justified restrictions on speech, and about doing so in the service of deeper or longer-term values”).

are therefore uniquely vulnerable when courts evaluate the constitutionality of speech regulations, since it is easy to overvalue, for example, the immediate emotional distress suffered by the Snyder family as compared to the far-reaching social benefits associated with unfettered speech. Thus, if courts are given the option to partially vindicate tort interests through some form of flexible tort remedy, this might result in systemic overdeterrence of speech, since they would tend to overvalue the concrete harm suffered by tort victims as compared to the more abstract chilling effects that imposing tort liability might have on speech.<sup>186</sup>

This general concern is not limited to the speech-tort context; it is present in nearly every instance of speech regulation. And because courts are familiar with this tendency, they can and do make *ex ante* doctrinal adjustments to account for it. Indeed, this tendency is likely an additional factor that plays into the Court's decision to create large constitutional buffer zones around protected speech. For example, as noted above, the highly speech-protective *Sullivan* standard protects a subset of speech that is significantly broader than what might technically be constitutionally protected.<sup>187</sup> This buffer presumably incorporates, among other things, the known tendency of decisionmakers to overvalue the concrete and immediate harms caused by speech as compared to the abstract and far-reaching benefits of unfettered speech.

Courts could thus presumably incorporate similar sorts of protective measures into the design of a flexible remedy-based speech-tort doctrine. That is, if courts introduce no-damages and partial-damages tort judgments into speech-tort cases, they can also build into the doctrine some sort of buffer that accounts for courts' general tendency to undervalue speech interests in comparison to more immediate tort interests. This might be achieved by exempting a broader subset of speech from all tort liability than is constitutionally mandated, or by limiting tort damages for particular speech to a level significantly below the constitutionally mandated maximum. In other words, chronic underprotection of speech as a result of introducing flexible remedies into speech-tort jurisprudence would not be a problem if, in crafting the doctrine *ex ante*, courts purposefully stacked the deck in favor of speech.

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<sup>186</sup> Cf. Posner, *supra* note \_\_, at 744 (“[B]ecause the cost of heterodox speech is immediate and its benefit deferred, the benefit may be slighted. All this must be kept steadily in mind by judges called upon to uphold the suppression of expression in the name of protecting people from being offended.”).

<sup>187</sup> See *supra* TAN \_\_.

*D. Chilling Effects Associated with Litigation Costs and Negative Publicity*

One might argue that even the least severe of the remedies proposed—a judgment of tort liability without any award of damages—would still produce significant chilling effects on speech due to litigation costs and the possibility of negative publicity.<sup>188</sup> If this is the case, the usefulness of any sort of partial remedy would be limited to the extent that it continues to create a strong disincentive for speakers to engage in protected speech.

With respect to litigation costs, it is difficult to dispute, as an initial matter, that allowing only for no-damages liability judgments in certain speech-tort cases would strongly deter most plaintiffs from bringing suit. Plaintiffs without financial means would not be able to hire attorneys working on contingency to represent them in such suits, while plaintiffs with means would not likely deem a no-damages case worth their investment unless they cared deeply about the nonmonetary benefits associated with obtaining a bare judgment of tort liability.

The exception to this, of course, might be the deep-pocketed plaintiff who insists on pressing on with a no-damages suit simply to bleed out the defendant through litigation costs. If, by introducing flexible tort remedies as a means of resolving speech-tort cases, courts were to expand the number of cases in which plaintiffs can obtain a judgment of tort liability (regardless of the amount of damages to which plaintiffs might be entitled), they might also be increasing the number of situations in which a plaintiff, acting in bad faith, could use litigation costs as a means of strong-arming the defendant (and potential future defendants) into silence.

Even assuming that many plaintiffs would adopt this sort of strategy (which, as a purely empirical matter, is unclear), there are a number of procedural devices available to courts that could mitigate this type of abuse. For example, many states have adopted so-called “anti-SLAPP” motions<sup>189</sup> in which a defendant may stay discovery and require the plaintiff to make an initial evidentiary showing in order to proceed with his claim (with the

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<sup>188</sup> See Schauer, *supra* note \_\_, at 700 (observing that “the costs involved in securing a successful judicial determination” create a chilling effect on defendants, and that defendants must often absorb “the extrajudicial harm that flows from the popular conception that one who is charged, even if acquitted, is not entirely free from culpability”).

<sup>189</sup> “SLAPP” stands for “strategic lawsuit against public participation.” See, e.g., Cal. Civ. Proc. Code § 425.18(a).

plaintiff required to pay attorney’s fees if the defendant prevails).<sup>190</sup> Courts or legislatures could also develop creative fee-shifting procedures that would prevent this sort of abuse, such as requiring plaintiffs to pay the defendant’s litigation costs—win or lose—if they choose to proceed with a no-damages tort claim. Perhaps, in certain cases, the constitutionality of permitting no-damages or partial-damages judgments in speech-tort cases may depend on the availability of these sorts of protective procedures, given the risk of plaintiff abuse and chilling of speech that might otherwise result.<sup>191</sup>

To the extent speakers may be deterred by the possibility of negative publicity resulting from, say, a no-damages tort suit, any such “chilling effect” is in fact a legitimate by-product of First Amendment principles. Westboro may be free to express its views in the way that it did, but the public is of course free to express its outrage in response. The negative publicity that such a lawsuit might produce is no different from the negative publicity that would result from general media exposure of the underlying incident. Furthermore, it is difficult to see how a technical finding of tort liability would meaningfully magnify any negative publicity beyond whatever outrage would be sparked based on the nature of the conduct itself. Westboro’s actions, for example, were met with tremendous public outrage; indeed, this outrage may well have been magnified by the Court’s decision deeming the church *immune* from any tort liability.<sup>192</sup>

#### *E. Chilling Effects Associated With More Complex Analyses*

Finally, one could argue that creating a multi-tiered speech-tort doctrine necessarily means drawing more doctrinal lines, and that drawing more doctrinal lines necessarily means more of a chilling effect, since this would create multiple points of uncertainty rather than, say, a single point of

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<sup>190</sup> See, e.g., Cal. Civ. Proc. Code § 425.16.

<sup>191</sup> On the other hand, one could argue—based on a different normative judgment regarding the appropriate balance of speech and tort interests—that no-damages suits should be available to *all* plaintiffs, not just wealthy plaintiffs who can afford to pay the legal costs of such a suit. Under this view, a more traditional fee-shifting rule awarding attorney’s fees to the prevailing party might make more sense. In any event, my goal here is not to endorse a particular normative view of how speech and tort interests ought to be balanced; my only point is that procedural devices governing the allocation of litigation costs can be used to tweak parties’ incentives to better capture whatever normative balance one seeks to reach.

<sup>192</sup> See Brian Brooker, Letter to the Editor, *Free Speech: Where to Draw the Line?*, N.Y. TIMES, Mar. 3, 2011, at A26 (“[I]t is the wrong place to put public speech above the family’s right to privacy. Shame on our Supreme Court justices for doing so.”).

uncertainty in a purely binary analysis. Take, for example, the Supreme Court’s reasoning in *Snyder v. Phelps*, which rested largely on a single binary inquiry: whether the speech in question was of public concern or private concern.<sup>193</sup> Of course, some speech will likely be chilled due to uncertainty as to how it will be categorized; that is, if I’m not sure whether my speech will be deemed “speech of private concern,” then I may simply decide to keep my mouth shut rather than risk liability. But if we wanted to create multiple tiers of liability, we would have to add *additional* factors to the test—such as, for example, whether the plaintiff is a public figure or a private figure.<sup>194</sup> Adding additional unclear doctrinal lines might simply multiply the chilling effect, since speakers must now confront multiple loci of uncertainty rather than just one.<sup>195</sup>

The severity of chilling effects, however, is a function of multiple factors beyond the complexity of the analysis in question. Clear doctrinal lines create far less of a chilling effect than vague ones, for obvious reasons.<sup>196</sup> And as I observed above, chilling effects are exacerbated when the stakes are high—if, for instance, a mistaken prediction by a speaker would lead to full tort liability and full tort damages, the associated chilling effect would be much higher than if the same mistake would lead to, for example, a no-damages finding of tort liability.<sup>197</sup> It would thus be overly simplistic to posit that adding a degree of analytical complexity would necessarily heighten chilling effects; this would depend on things like the nature of the analytical inquiry and the stakes in play at each doctrinal junction.

Furthermore, even if one were to assume that adopting a remedy-based approach would lead to greater chilling effects, such an approach would also provide the benefit of closer tailoring—that is, as I observed above, it would allow courts to build a more nuanced doctrine that is more closely tailored to the technical constitutional boundaries.<sup>198</sup> Thus, it is not simply a question of whether adopting such an approach would lead to greater chilling effects; it is whether those chilling effects offset the gains associated with crafting a more nuanced speech-tort doctrine. Although it is probably impossible to answer this question in the abstract, given the highly

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<sup>193</sup> 131 S. Ct. at 1215-17.

<sup>194</sup> See *infra* Part \_\_\_\_.

<sup>195</sup> This argument parallels the general argument often made in favor of adopting categorical approaches to speech regulation as opposed to open-ended standards. See, e.g., Stone, *supra* note \_\_\_\_, at 275-76.

<sup>196</sup> See, e.g., Schauer, *supra* note \_\_\_\_, at 698-700.

<sup>197</sup> See *supra* TAN \_\_\_\_; Coenen, *supra* note \_\_\_\_, at 1033.

<sup>198</sup> See *supra* Part \_\_\_\_.

rigid nature of current speech-tort doctrine, my sense is that there are significant incremental benefits to adopting flexible remedies that can be reaped at a relatively low cost in chilling effects.

#### IV. APPLYING FLEXIBLE REMEDIES TO SPEECH-TORT JURISPRUDENCE

In this Part, I first make some broad observations as to how courts might design speech-tort doctrine to accommodate the institution of flexible remedies. I then set forth specific examples of what a flexible remedies regime might look like within two distinct areas of speech-tort jurisprudence. In doing so, my goal is not to advance any sort of normative view as to how speech and tort interests ought to be balanced, nor is it to advocate for any specific doctrinal framework; it is simply to highlight the practical feasibility of adopting a flexible remedies regime by illustrating what such a regime might look like in practice.

##### *A. Some Observations on Doctrinal Design*

If remedies in the speech-tort context are assumed to be binary in nature—that is, the plaintiff is entitled to either the full panoply of tort damages or no liability at all—then the analytical framework adopted by courts will of course reflect this assumption. Thus, courts must necessarily adopt tests that produce a binary output; even analyses involving multiple complex, nuanced factors and detailed exceptions must still ultimately produce a single yes-or-no answer.

Take, for example, the rules governing libel of public figures, as established by the Court in *Sullivan* and clarified in subsequent cases. The *Sullivan* Court held that in order for a public official plaintiff to prevail on a libel claim based on a statement regarding the plaintiff's official duties, the plaintiff must prove that the defendant acted with actual malice.<sup>199</sup> Subsequent cases clarified that the plaintiff in such cases must also prove the falsity of the statement in question<sup>200</sup> and that actual malice and falsity must be proved by clear and convincing evidence.<sup>201</sup> Thus, for this subset of libel cases, the Court established a complex set of rules with a simple, binary output: assuming that the plaintiff has met the relevant state law standards for libel, he still cannot prevail in his suit unless he has proved falsity and actual malice by clear and convincing evidence. If he has done

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<sup>199</sup> *Sullivan*, 376 U.S. at 279-80.

<sup>200</sup> See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986).

<sup>201</sup> *Gertz*, 418 U.S. at 342.

so, he can recover the full panoply of tort damages; if he has not done so, the First Amendment precludes him from recovering anything.

Of course, courts could not adopt analyses that produce only this sort of binary output if they were to add some form of intermediate remedy into the equation. Rather, the analytical framework must lead to at least three distinct outcomes for classifying the speech in question:<sup>202</sup> for example, plaintiffs are entitled to full tort remedies under X set of conditions; they are entitled to some form of partial remedy under Y set of conditions; and if neither set of conditions is met, they are not entitled to any liability.<sup>203</sup> Thus, to use *Gertz* as an example, if, in a case dealing with an issue of public concern, a private figure plaintiff can prove actual malice, he is constitutionally entitled to the full panoply of tort damages; if he can prove negligence, he is constitutionally entitled to only actual damages; and if he cannot prove negligence, he is not constitutionally entitled to any remedy.<sup>204</sup>

There are many bases by which courts can construct these tiers of liability. Courts might distinguish between tiers based on the content of the speech in question: for example, whether the speech was of public or private concern,<sup>205</sup> whether the speech constituted direct words of incitement,<sup>206</sup> whether commercial speech was involved,<sup>207</sup> or whether the speech was true or false.<sup>208</sup> They might distinguish tiers based on the defendant's degree of fault (for example, "actual malice" versus negligence versus strict liability),<sup>209</sup> or based on the evidentiary burden of proof (for

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<sup>202</sup> This assumes that a certain subset of the speech in question would still be fully protected (in that no sanction whatsoever would be constitutionally permissible) and that a certain subset would still be fully unprotected (in that full tort damages would be constitutionally permissible).

<sup>203</sup> This could be accomplished in many different ways. Courts might simply adopt a single inquiry with multiple tiers—for instance, subdividing tortious speech based on whether it was made negligently, recklessly, or intentionally. Or courts could overlay multiple binary factors on top of each other, with different remedies available based on which factors were met. Both of these approaches were taken by the Supreme Court in *Gertz*, as I described above. *See supra* TAN \_\_\_.

<sup>204</sup> *See Gertz*, 418 U.S. at 347-49.

<sup>205</sup> *See, e.g., Snyder*, 131 S. Ct. at 1215-16.

<sup>206</sup> *See Brandenburg*, 395 U.S. at 447.

<sup>207</sup> *See Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989) (deeming appropriation of a celebrity's name or likeness unprotected by the First Amendment if its use was "simply a disguised commercial advertisement for the sale of goods or services").

<sup>208</sup> *See, e.g., Gertz*, 418 U.S. at 340 ("[T]here is no constitutional value in false statements of fact.").

<sup>209</sup> *See, e.g., Sullivan*, 376 U.S. at 279-80 (requiring showing of "actual malice" in libel cases brought by public officials regarding statements related to official conduct); *Gertz*,

example, proving an element based on clear and convincing evidence rather than preponderance of the evidence),<sup>210</sup> or based on the context of the speech (for example, speech within a public forum versus speech in a highly private context).<sup>211</sup> Any of these factors—either individually or in combination—could serve as a basis for adjusting the remedies to which speech-tort plaintiffs are entitled.

Once these tiers of liability are established, courts have multiple options in determining what remedies ought to be available for speech falling into one of the middle tiers. One option, as noted above, is to simply allow for a judgment of liability with only nominal damages.<sup>212</sup> And if courts want to provide for some form of partial damages, there are multiple approaches they could take. They could eliminate punitive damages and limit recovery to compensatory damages.<sup>213</sup> They could limit the types of compensatory damages to which plaintiffs are entitled—for example, allowing recovery for only economic injuries as opposed to mental distress,<sup>214</sup> or allowing damages for mental distress only when accompanied by a showing of physical injury.<sup>215</sup> They could institute a hard cap on damages (for example, plaintiffs cannot recover more than \$10,000 for certain claims).<sup>216</sup> They could even mandate percentage discounts on damages in certain situations (for example, plaintiffs can recover only 50% of compensatory damages for a particular subset of claims).

By overlaying this wide range of potential triggering factors over the wide range of potential remedies, there are countless ways in which courts can design speech-tort jurisprudence to incorporate some degree of flexible remedies. But the specter of excessive chilling effects dictates a number of

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418 U.S. at 347 (permitting recovery of actual damages on a showing of negligence in libel cases brought by private figures).

<sup>210</sup> See *Gertz*, 418 U.S. at 342 (clarifying that *Sullivan* actual malice standard requires proof by clear and convincing evidence).

<sup>211</sup> Cf. *Snyder*, 131 S. Ct. at 1218 (observing, in rejecting IIED liability against the Westboro Baptist Church, that “the church members had the right to be where they were”).

<sup>212</sup> See *supra* notes \_\_ and accompanying text (describing proposals for no-damages libel suits where the only relief is a declaration of the statement’s falsity).

<sup>213</sup> Cf. *Gertz*, 418 U.S. at 347 (allowing recovery of only actual damages, but not presumed or punitive damages, upon a showing of negligence in libel cases involving private figure plaintiffs).

<sup>214</sup> Cf. *Lewis*, *supra* note \_\_, at 615-17 (arguing that presumed damages should be eliminated in libel cases and that compensatory damages should be limited to “compensation for proved injury”).

<sup>215</sup> See, e.g., *Daley v. LaCroix*, 179 N.W.2d 390, 392 (Mich. 1970) (discussing common law rule that recovery for mental distress is not available in a negligence case unless accompanied by physical injury).

<sup>216</sup> See *Epstein*, *supra* note \_\_, at 815.

practical—and perhaps constitutional—limitations on the approaches that courts might take in this area. As discussed above, courts should not adopt an analytical structure that would afford judges or juries broad discretion to adjust damages awards on a case-by-case basis; such a structure would create massive chilling effects on speakers and give judges and juries the space to surreptitiously punish unpopular speech if they choose.<sup>217</sup> Courts should also be wary of constantly tweaking their analytical frameworks—for example, by frequently identifying new factors and incorporating them into their analyses—as this would similarly create substantial chilling effects by destabilizing speakers’ ability to accurately predict their risk of liability. Finally, courts should craft categorical tests carefully, ensuring not only that they set forth workable standards, but also that they accurately reflect the underlying constitutional bases for sanctioning certain types of speech more or less severely than others.<sup>218</sup>

### *B. Examples of Possible Flexible-Remedy Frameworks*

With these theoretical concerns in mind, what might speech-tort doctrine look like if flexible remedies were adopted? In this section, I set forth some examples of what a flexible remedies regime might look like in the areas of intentional infliction of emotional distress and media negligence. My goal here is not to win converts to any of the particular frameworks I set forth, but rather to illustrate that a workable speech-tort jurisprudence incorporating flexible remedies can realistically be constructed.

As an initial matter, I should emphasize that in setting out these examples, I do not offer any views as to the particular *means* by which any doctrinal change should take place. There are multiple ways by which the law governing speech torts can be modified.<sup>219</sup> A court might do so by evaluating the First Amendment’s effect on state tort law,<sup>220</sup> or it might simply modify the contours of state tort law without any reference to the

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<sup>217</sup> See *supra* TAN \_\_.

<sup>218</sup> See David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 212 (“[I]f a bright-line rule is to be effective, it must both pose a workable set of questions and carefully track the normative values of the right it is designed to protect.”).

<sup>219</sup> See *supra* note \_\_.

<sup>220</sup> See, e.g., *Sullivan*, 376 U.S. 254; *Snyder*, 131 S. Ct. 1207. And as David Anderson has observed, courts’ responses to constitutionally invalid applications of tort law can range from minimalist (for example, “a simple declaration of constitutionality”) to maximalist (a full-blown prescription of detailed constitutional rules). See David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 784-93 (2004).

First Amendment whatsoever.<sup>221</sup> The legislature can of course redesign speech-tort law directly by statute.<sup>222</sup> I make no judgment here as to which method of doctrinal change is most sensible or appropriate; I am merely setting forth various possibilities of what a flexible remedies approach might look like, whether established by common law modification of tort law, constitutional interpretation, or statute.

Let's start with intentional infliction of emotional distress. If we wanted to build a more flexible, remedy-based doctrinal regime governing speech-based IIED claims, what sorts of considerations might we take into account to distinguish between different subcategories of IIED-causing speech? In other words, what sorts of considerations might influence the weight we place on the First Amendment interest in preserving free speech? And what considerations might influence the weight we place on the state's interest in compensating IIED victims and deterring socially harmful behavior?

The Court in *Snyder* specifically identified the content of the speech as a relevant consideration—that is, whether the speech in question dealt with matters of public concern or with matters of private concern.<sup>223</sup> This distinction—which was similarly recognized by the Court in its defamation jurisprudence<sup>224</sup>—is premised on Meiklejohn's argument that the First Amendment protects speech as a necessary component of democratic self-governance: because the Constitution calls on the citizenry to govern themselves, they must be able to discuss public issues freely, without fear of reprisal.<sup>225</sup> Thus, speech on matters of public concern is deemed to carry more constitutional value than speech on matters of private concern.<sup>226</sup>

Another consideration might be the identity of the plaintiff—in other words, was the plaintiff a public figure or a private figure? Again, this distinction was recognized by the Supreme Court in the defamation context, under the rationale that states have a greater interest in protecting the reputational interests of private figures, who have not sought any sort of public exposure, as opposed to public figures, who have generally invited

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<sup>221</sup> See, e.g., *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991) (finding, as a matter of state negligence law, that a publisher “ha[s] no duty to investigate the accuracy of the contents of the books it publishes,” and observing that “[w]ere we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs”).

<sup>222</sup> See, e.g., *Franklin*, *supra* note \_\_\_, at 812-13 (setting forth model language for a Libel Reform Act).

<sup>223</sup> *Snyder*, 131 S. Ct. at 1215-16.

<sup>224</sup> See *Greenmoss*, 472 U.S. at 758-61 (plurality opinion).

<sup>225</sup> See *supra* TAN \_\_\_.

<sup>226</sup> See *Snyder*, 131 S. Ct. at 1215-16.

such exposure.<sup>227</sup> In the wake of *Snyder*, some commentators have argued that the Court should have taken *Snyder*'s status as a private figure into account,<sup>228</sup> while others have argued that the public figure/private figure distinction is irrelevant in the IIED context.<sup>229</sup> In any event, the identity of the plaintiff could serve as a potential basis for distinguishing among cases.

The degree of fault might be an additional consideration. Under Maryland law, IIED can be proved by a showing of either intentional or reckless conduct;<sup>230</sup> perhaps lesser remedies would be available for reckless rather than intentional conduct. Perhaps the truth or falsity of the speech might be a consideration—a distinction that was recognized, in a somewhat oblique manner, by the Court in *Hustler v. Falwell*.<sup>231</sup> Or perhaps distinctions can be drawn based on the general context of the speech: perhaps there is a specific carve-out for speech interfering with a private funeral,<sup>232</sup> or speech interfering with a private event of great emotional significance, or speech delivered while trespassing on private property, and so forth.<sup>233</sup>

This is not meant to be an exhaustive listing of all potential bases for distinguishing among speech-based IIED cases. But it illustrates the wide range of potential factors by which courts could subdivide IIED cases into discrete categories with varying remedies. Based on the above distinctions, here are some examples of remedy-based approaches that courts or legislatures could adopt in the IIED context.<sup>234</sup> Note that each option

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<sup>227</sup> See *Gertz*, 418 U.S. at 344-47.

<sup>228</sup> See, e.g., Oman & Solomon, *supra* note \_\_\_, at 1166-67; Jeffrey Shulman, *Free Speech at What Cost?: Snyder v. Phelps and Speech-Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO 313, 325-26, 333-34.

<sup>229</sup> See, e.g., Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300, 304-06.

<sup>230</sup> See *Snyder*, 131 S. Ct. at 1215.

<sup>231</sup> See *Hustler*, 485 U.S. at 56 (holding that public figures may not recover for IIED based on an offensive parody unless “the publication contains a false statement of fact which was made with ‘actual malice’”).

<sup>232</sup> See Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 514 (2011) (“Interfering with a person's grieving of a family member is ... perhaps the oldest pure emotional harm tort there is: the right of family members to be protected from such intrusions is extremely well entrenched in the common law.”).

<sup>233</sup> Cf. *Snyder*, 131 S. Ct. at 1218 (observing that Westboro Baptist Church members “had the right to be where they were,” that they conducted their protest “some 1,000 feet from the church, out of the sight of those at the church,” and that the protest involved no “shouting, profanity, or violence”).

<sup>234</sup> The options listed below take different positions regarding the appropriate balance of speech and tort interests. Again, I make no normative claim here as to what the appropriate balance should be.

assumes that the plaintiff has *already proved the common law elements of IIED*; in other words, the plaintiff has proved intent or recklessness, extreme and outrageous conduct, causation, and severe emotional distress:<sup>235</sup>

### Option 1

Nature of speech	Nature of plaintiff	Remedy
Public concern	Public figure	No liability
Public concern	Private figure	Liability, nominal damages
Private concern	Public figure	Liability, economic damages <sup>236</sup> only
Private concern	Private figure	Liability, full tort damages <sup>237</sup>

### Option 2

Nature of speech	Physical Context of Speech	Remedy
Public concern	No physical trespass and no interference with private event of great emotional significance	No liability
Public concern	Significant interference with private event of great emotional significance; no physical trespass	Liability, economic damages only
Public concern	Physical trespass	Liability, full tort damages
Private concern	Any	Liability, full tort damages

<sup>235</sup> *Id.* at 1215.

<sup>236</sup> By “economic damages,” I mean damages for proved pecuniary losses, which would not include damages for purely intangible harms like mental anguish. *See* Lewis, *supra* note \_\_, at 615 (proposing limitation of libel damages to injuries that are “tangible and measured by evidence of financial loss”); *cf.* DOBBS, *supra* note \_\_, § 408, at 1143 (describing common law rule that slander plaintiffs must plead and prove “specifically identified pecuniary harm resulting from the slander” in order to recover).

<sup>237</sup> This would include all tort remedies to which the plaintiff would normally be entitled, including punitive damages.

**Option 3**

Nature of speech	False Statement of Fact?	Remedy
Public concern	No	No liability
Private concern	No	Liability, economic damages only
Public concern	Yes	Liability and full tort damages only if actual malice is proven; otherwise, liability and nominal damages
Private concern	Yes	Liability, full tort damages

Let’s now turn to media negligence cases—that is, cases in which the plaintiff alleges negligence based on the defendant’s dissemination of some form of media that serves as a harmful basis of imitation or instruction. As I noted above, courts have generally dealt with these cases by applying the highly stringent *Brandenburg* incitement standard on top of common law negligence standards; in other words, defendants are liable only if their speech was “directed to inciting or producing imminent lawless action” and was “likely to incite or produce such action.”<sup>238</sup> Given this high bar, plaintiffs raising such claims are typically denied any finding of liability, even when they can prove all of the common law elements of negligence.<sup>239</sup>

If we were to build a flexible remedies regime in this area of law, what considerations might come into play in subdividing the speech in question? Certainly the two main components of the *Brandenburg* test could be relevant: whether direct words of incitement were used, and whether imminent lawless action was likely to be produced from the speech. The degree of fault might again be relevant—that is, whether the defendant acted intentionally, recklessly, or merely negligently. The nature of the speech might play a role—for example, whether the speech involves political advocacy, whether it’s part of a creative artistic enterprise, whether it’s purely instructional in nature, or whether it seeks to achieve commercial ends.<sup>240</sup> Perhaps the characteristics of the audience would come into play—

<sup>238</sup> *Brandenburg*, 395 U.S. at 447; see *supra* TAN \_\_\_\_.

<sup>239</sup> See, e.g., *Olivia N.*, 178 Cal.Rptr. 888; *McCollum*, 249 Cal.Rptr. 187; *Herceg*, 814 F.2d 1017.

<sup>240</sup> See, e.g., *Herceg*, 814 F.2d at 1023-24 (deeming magazine article on autoerotic asphyxiation protected speech in part because it “was not an effort to achieve a commercial result”); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 248-50 (4th Cir. 1997) (characterizing

if, for example, the speech specifically targeted children, or if the speaker knowingly sought to exploit the particular sensitivities of a specific audience.<sup>241</sup> Maybe the nature of the speech would play a role—for example, a detailed video tutorial or a highly realistic simulator encouraging someone to commit unlawful acts might be treated differently than a mere guidebook.<sup>242</sup>

Again, this set of factors is not meant to be exhaustive—just an illustration of the means by which courts could draw distinctions in this set of cases. Assuming again that the plaintiff has otherwise proved all of the common law elements of negligence—that is, the existence of a duty, breach of that duty, cause-in-fact, proximate cause, and damages—courts might draw on some of these factors and adopt one of the following approaches:

#### Option 1

Very high likelihood of harm?	Direct words of incitement?	Remedy
No	No	No liability
No	Yes	Liability, nominal damages
Yes	No	Liability, economic damages only
Yes	Yes	Liability, full tort damages

#### Option 2

Degree of Fault	Remedy
Negligence	No liability
Recklessness	Liability, nominal damages
Intent	Liability, compensatory damages only; full tort damages if full <i>Brandenburg</i> test is met

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handbook on contract killing as “focused instructional assistance” entitled to less protection than “abstract advocacy”).

<sup>241</sup> Cf. *McCollum*, 249 Cal. Rptr. at 190 (describing plaintiff’s unsuccessful argument that record company should be liable for teenager’s suicide caused by Ozzy Osbourne’s music because the music targeted “troubled adolescents and young adults” who were “extremely susceptible to external influence and directions from a cult figure such as Osbourne”).

<sup>242</sup> Cf. *Herceg*, 814 F.2d at 1023 (“[I]t is conceivable that, in some instances, the amount of detail contained in challenged speech may be relevant in determining whether incitement exists...”).

**Option 3**

Type of Speech	Direct words of incitement?	Remedy
Political speech or artistic expression	Yes or No	No liability unless full <i>Brandenburg</i> test is met
Instructional speech	No	Liability, nominal damages
Instructional speech	Yes	Liability, compensatory damages only; full tort damages if full <i>Brandenburg</i> test is met
Commercial speech	No	Liability, compensatory damages only
Commercial speech	Yes	Liability, full tort damages

*C. Practical Feasibility of Adopting Flexible Remedies*

One might quibble with the particular factors selected as bases for subdividing the speech in these examples or with the particular remedies attached. But again, I set forth these examples only as possible approaches that courts or legislatures might choose to take. I express no views as to the wisdom of any particular approach; my only goal here is to illustrate that courts or legislatures could plausibly construct a remedy-based approach to speech-tort cases that imposes meaningful limits on judicial discretion while reaping the benefits of a doctrine that captures a more nuanced balance of speech and tort interests.

A critic might argue that adopting doctrinal approaches like the ones outlined above would lead to unchecked judicial discretion, which would in turn create massive chilling effects that would doom the entire project. Any such argument, however, would be undercut by the fact that the vast majority of the categorical distinctions used to subdivide the speech above are not novel; they have been discussed and applied in other tort or First Amendment contexts.<sup>243</sup> For example, both the distinction between private and public figures and the distinction between true and false statements have been applied in defamation cases.<sup>244</sup> The distinction between negligence, recklessness, and intent is a familiar one in common-law tort contexts.<sup>245</sup> Of course, questions regarding the imminence of possible

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<sup>243</sup> Cf. Coenen, *supra* note \_\_, at 1049 (“[T]he existence of an already-developed body of penalty-sensitive case law means that penalty-sensitive First Amendment analysts need not paint on a blank canvas.”).

<sup>244</sup> See *supra* note \_\_ and accompanying text.

<sup>245</sup> See, e.g., DOBBS, *supra* note \_\_, § 147, at 351 (distinguishing between negligence, recklessness, and intent).

lawless action, what constitutes “direct words of incitement,” and the likelihood of imminent lawless action have been addressed by courts applying the *Brandenburg* test.<sup>246</sup> And the distinction between political speech and commercial speech has been discussed by the Supreme Court on multiple occasions.<sup>247</sup>

The same is true on the remedy side: courts are well acquainted with limiting damages recoveries based on the types of damages in question. For example, common law courts have long distinguished between harms for emotional distress and physical harms, since traditionally damages for negligently inflicted emotional distress were awarded only as “parasitic damages” accompanying a showing of actual physical harm.<sup>248</sup> Common law slander requires courts to distinguish special damages—that is, damages for concrete, pecuniary harm—from other damages, since recovery for slander is generally available only upon proof of the former.<sup>249</sup> And courts are often called upon to apply tort reform measures that limit traditional common law damages regimes in various ways; for example, California has passed a statute limiting the scope of joint and several liability to economic damages only.<sup>250</sup>

Thus, courts need not operate on an empty slate. They have encountered many potential differentiating factors in other legal contexts, and thus would be guided by an existing body of law in applying them to speech-tort cases. This doctrinal backdrop would significantly dampen any risk of unchecked judicial discretion—and its associated chilling effects—connected to the creation of new categorical distinctions within a subset of speech.

In any case, crafting tests and drawing doctrinal lines through common law development is standard operating procedure in First Amendment jurisprudence. After all, the entire body of law is ultimately

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<sup>246</sup> See, e.g., *McCollum*, 249 Cal.Rptr. at 193-95.

<sup>247</sup> See, e.g., *Bolger v. Youngs Drug Prods.*, 463 U.S. 66-68 (1983) (analyzing whether mass mailings from a drug company constituted commercial speech or “fully-protected” speech).

<sup>248</sup> See, e.g., *DOBBS*, *supra* note \_\_, § 308, at 836 (2000) (“When the defendant’s negligent act caused emotional distress alone, without causing personal injury, courts at one time simply denied all recovery unless the defendant’s act amounted to some other tort such as libel or slander.”).

<sup>249</sup> See, e.g., *Liberman v. Gelstein*, 605 N.E.2d 344, 347 (N.Y. 1992) (“Slander as a rule is not actionable unless the plaintiff suffers special damage,” which involves “the loss of something having economic or pecuniary value.”). The exception to this rule is if the slander falls into one of the traditional categories of slander per se. See *id.* at 348 (listing slander per se categories).

<sup>250</sup> Cal. Civ. Code § 1431.2.

premised on a bare-boned textual provision that offers little meaningful guidance.<sup>251</sup> If courts are capable of crafting a complex set of constitutionally mandated rules governing libel law, there is no reason why they could not similarly craft rules incorporating flexible remedies in a wide range of speech-tort contexts.

I should emphasize that although my examples here focused on the areas of IIED and media negligence, similar frameworks could be implemented in any speech-tort context. Apart from obvious areas like defamation and false light privacy claims, a remedy-based approach could be adopted in “publicizing private facts” privacy cases—a tort upon which the Court has yet to clearly opine<sup>252</sup>—or in “right of publicity” cases, where courts have formulated different tests to identify when appropriations of a person’s name or likeness are protected by the First Amendment.<sup>253</sup> It could be adopted in cases dealing with tortious interference with contract or prospective economic advantage, where courts have recognized First Amendment limitations in various contexts.<sup>254</sup> And it goes without saying that such an approach could be adopted in crafting any novel form of civil liability, whether established via statute or common law.

## V. CONCLUSION

The binary approach that courts typically adopt in speech-tort cases cripples courts’ ability to craft a nuanced balance between speech and tort interests, both in individual cases and in the context of broader speech-tort doctrine as a whole. Adopting a more flexible, remedy-based approach—where the First Amendment’s limitation on tort law is reflected by adjusting the damages to which plaintiffs are entitled—would allow courts to better capture this complicated balance. And in doing so, it would mitigate, at least to some extent, the disproportionate burden placed on speech-tort plaintiffs every time the First Amendment forecloses any remedy for the social harm they have suffered.

I am not arguing that a remedy-based approach should be adopted in

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<sup>251</sup> See Han, *supra* note \_\_, at 119 (noting also the absence of “a clear historical record of the Framers’ intent”).

<sup>252</sup> See *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989) (declining to “accept appellant’s invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment”).

<sup>253</sup> See *Hart v. Electronic Arts, Inc.*, 717 F.3d 141, 153-70 (3d Cir. 2013) (surveying the approaches adopted by different courts).

<sup>254</sup> See, e.g., *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody’s Investor’s Servs.*, 175 F.3d 848, 856-58 (10th Cir. 1999); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990).

all speech-tort cases. Perhaps—because of administrability concerns, concerns over chilling effects, or simply one’s normative views regarding the scope of the First Amendment—an all-or-nothing, liability-based approach makes more sense in many cases. But there’s little indication that courts even consider remedy-based approaches when deciding speech-tort cases; rather, they appear to adopt an unspoken assumption that speech-tort jurisprudence is necessarily an all-or-nothing affair. This is a significant lost opportunity for courts and legislatures in search of a more sensible and equitable approach to these cases. However courts ultimately decide to craft the boundaries between the First Amendment and tort law, they ought to be drawing these lines with a finer set of tools than the blunt, liability-based approach upon which they currently rely.