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When most of the communications torts were developing, it was thought that tortious speech required no constitutional protection. If the speech occurred in advertising, the tort rules of liability were doubly insulated from constitutional attack, because it was also believed that commercial speech required no constitutional protection. The courts and occasionally the legislatures developed nonconstitutional rules to adjust between the social, economic, and personal interests protected by these torts and the conflicting values of free speech. Except in defamation, these state law rules are still the dominant means of accommodating these competing interests.

Since *New York Times Co. v. Sullivan*,[1] however, we have known that the constitution protects some tortious speech. Since the 1970s we have known also that the constitution protects some commercial speech. As a consequence, all the communications torts are now vulnerable to constitutional scrutiny. The one tort that has been fully subjected to this scrutiny, libel, has been transformed into a half-tort, half-constitutional hybrid that is almost universally viewed as unsatisfactory. As Dean Bezanson observes, "it falls substantially short of safeguarding press freedom and fails to safeguard individual reputation as well."[2]

Unfortunately, the libel model is the one most emulated when courts subject other tortious speech to constitutional scrutiny. The usual result of this scrutiny is to disfigure the tort in an attempt to make it amenable to a method of analysis to which it is not suited. Very recently, the Supreme Court has embraced an entirely different model, a variant of the balancing model on which the post-Warren Court has come to rely in so many first amendment contexts. This model, developed to evaluate governmental regulation of speech, also is poorly suited to the tort context.

My purpose in this article is to provide an inventory of the various communications torts, the interests they serve, the speech interests they affect, and the analytical models courts use to resolve the constitutional issues these torts create. I examine in some detail the dominant analytical method—the defamation model—and the alternative the Court seems to

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

2. Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535, 556 (1983). Professor Halpern says of the present constitutional law of libel, "to characterize it as byzantine is charitable." Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty Five*, 68 N.C.L. REV. 273, 311 (1990).

favor at the moment—the balancing model—and conclude that neither is a general solution to tortious speech problems. My purpose is not to propose a different solution, but to suggest that there must be many different accommodations, reflecting the enormous variety of interests protected by these torts and the equally diverse types of speech by which these torts are committed.

I. The Communications Torts

The communications torts include at least the following: defamation, invasion of privacy, injurious falsehood, misrepresentation, interference with business relations, infliction of emotional distress, alienation of affections, malicious prosecution, unfair competition, speech causing physical harm, and some forms of prima facie tort.

Many of these are in fact umbrella terms for several torts, protecting different interests and governed by different rules. Defamation includes libel and slander, which have very different histories and significantly different rules. Invasion of privacy includes disclosure of private facts, intrusion, false light, and commercial exploitation; each has different rules, and the last branch protects primarily economic, rather than privacy, interests. Injurious falsehood encompasses the ancient torts of slander of title and trade libel, as well as the more modern concept of product disparagement. Misrepresentation has three distinct branches—deceit, negligent misrepresentation, and innocent misrepresentation—each with a different history, scope, and purpose. Interference with business relations includes interference with contract, to which there are few defenses, and interference with prospective advantage, to which there are many. Emotional distress may be inflicted intentionally or negligently; the states increasingly are recognizing the latter as a tort and groping for ways to define and limit it. Unfair competition may include disclosure of trade secrets, misappropriation of trade values, or boycotting. Speech causing physical harm may be a tort as conventional as liability for an airplane crash caused by a faulty navigational chart, or as novel as liability for broadcasting a program that induces viewers to emulate a dangerous act portrayed on the screen. Harmful speech that does not seem to fit any of these categories may be actionable as a "prima facie tort," whose scope and limitations seem to be developed *ad hoc* to suit the particular case.

This inventory shows that there are at least twenty distinct communications torts. Some of them overlap, and some could usefully be combined. If all or most were merely different labels for similar actions, or different ways of dealing with essentially similar conflicts, their very multiplicity might be reason to welcome constitutionalization of the field. But in fact the various communications torts (with a few exceptions) address different conflicts, arise in very different social and economic contexts, protect very different interests, and involve vastly different kinds of speech.

The prospect of developing constitutional rules to accommodate all these differences is daunting on its face, and anyone undaunted by the

prospect has to be daunted by the results of the effort so far. The attempt to accommodate by constitutional rule a few of the variables in just one tort—libel—has greatly complicated that area of law. The fragmentary efforts of courts to reconcile speech interests with other communications torts have produced crude distortions of those torts in the effort to force them into the constitutional mold developed for defamation. Before these efforts proceed further, courts should take stock of the methods of constitutional analysis that are being used, the varieties of tortious speech to which these analyses may be applied, and the diversity of interests the analyses must accommodate.

II. Constitutional Analysis

The courts have followed at least four analytical models in their attempts to reconcile the needs of tort law with constitutional imperatives: (1) an "incitement" standard borrowed from the constitutional law of criminal punishment of speech; (2) a categorical approach in which speech may or may not be subject to tort liability, depending on the constitutional importance of the category of speech; (3) the constitutional defamation model, centered around but not limited to the "actual malice" standard; and (4) a balancing method in which speech can be subject to liability if the tort interest is strong enough and the remedy is "narrowly tailored."

All except the defamation model are so embryonic that to call them models is to overstate their coherence; they might more accurately be thought of as overtures. The defamation model has been elaborately developed in libel and slander, and often extended to other torts. Although the balancing model has been applied to a tort problem only recently, it enjoys great favor with the Supreme Court in other contexts and must be considered the major alternative to the defamation model.

A. The Incitement Model

The Supreme Court has always viewed some types of speech as unworthy of first amendment protection. At one time libel (and probably all other tortious speech) was among these,[3] but no longer. One type of speech that remains beyond the protection of the first amendment is incitement to imminent lawless activity. The Court has implied that speech can be criminally punished if "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action."[4] In cases where speech causes physical injury, courts generally have employed some variant of this formula to decide whether liability may be imposed consistently with the

3. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Beauharnais v. Illinois, 343 U.S. 250 (1952).

4. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

first amendment. The theory is that liability may be imposed only if the publication goes beyond mere advocacy and amounts to incitement directed to imminent action causing injury.[5]

In truth, the incitement formula is not so much a standard of liability as an explanation for the courts' unwillingness to apply ordinary negligence rules to certain kinds of speech. The usual line of reasoning in tort cases that employ the incitement model is something like this: the first amendment protects the speech unless it falls within a recognized exception such as defamation, fighting words, obscenity, or incitement; since incitement is the only exception possibly relevant, it is the plaintiff's only hope; but the negligent speech is only advocacy (or mere description); therefore, the exception does not apply, and the first amendment bars liability.[6] Because usually it is clear that the speech is not incitement, the cases provide little guidance as to how the standard might be met. One court suggested that the plaintiff would have to prove the act causing injury was a "lawless" act,[7] but that seems too demanding. Showing that the act was foreseeably dangerous should be enough; if the incitement test, which was developed to deal with criminal speech, is to be applied to tortious speech, it should at least be adapted to the new setting.

One case in which liability perhaps could have been imposed on an incitement theory is *Weirum v. RKO General, Inc.*[8] Defendant's radio station conducted a contest exhorting its teenage audience to be first to catch up with a disc jockey driving from one location to another in the Los Angeles area. Plaintiffs' decedent was a motorist killed in an accident caused by a teenager speeding to win the contest. The California Supreme Court affirmed a judgment for plaintiffs, disposing of the first amendment defense with the inaccurate assertion that "The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."[9] The court, however, could have sustained liability on an incitement theory. If the incitement standard can ever permit liability for tortious speech causing physical injury, it should be satisfied by defendant's exhorting a teenage audience to engage in reckless driving that the station knew would be dangerous to others.

A variant of the incitement model requires proof that the speech "posed a clear and present danger of injury."[10] This standard essentially replaces the foreseeability requirement of the ordinary negligence action with a clear

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5. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

6. *See, e.g.*, Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199 (S.D. Fla. 1979); DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982); Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981).

7. *Herceg*, 814 F.2d at 1022.

8. 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975).

9. Weirum v. RKO General, Inc., 15 Cal. 3d 40, 48, 123 Cal. Rptr. 468, 472, 539 P.2d 36, 40 (1975).

10. *See* Shannon v. Walt Disney Prods., Inc., 247 Ga. 402, 276 S.E.2d 580 (1981).

and present danger test. The effect is to retain the incitement standard's focus on imminence without its emphasis on the strength of the defendant's efforts to induce action.

Of course, many cases of tortious speech causing physical injury are resolved by conventional negligence principles or even strict liability. A physician who gives an inaccurate diagnosis, or a manufacturer who inaccurately instructs a consumer on the safety of a product is likely to be held liable for resulting injury with little thought given to the fact that an element of the tort is speech.[11] There are also some cases still thought to be an appropriate means of analysis in which the speech interest is recognized by negligence principles.[12]

As a *bar* to liability for physical injury caused by speech, the incitement standard works well. It is less useful as a standard for determining when liability *should* be imposed. Whether the speaker should have to pay for such an injury has little to do with the degree of persuasion employed. More likely to be relevant are the value of the speech, the relationship between the speaker and the victim, the effect on the industry or other class of speakers of imposing liability for the particular kind of speech, and the ability of the class of speakers to socialize the costs of liability.

B. The Categorical Model

The incitement model is essentially a categorical scheme: speech receives no protection if it is classified as incitement, and is absolutely protected if it is not. There are other classification schemes that use the same methodology but lack the established constitutional doctrinal base of the incitement model. The most familiar example is "fraud"; without much constitutional analysis or explanation, courts simply assume that fraudulent speech is not protected by the first amendment.[13]

Another category of this sort has been created in the constitutional law of defamation. If the defamation occurs in speech about matters of public concern, the extent of constitutional protection is determined by the rules discussed later in this article. But if it occurs in speech about "matters of purely private concern," the constitution apparently affords no protection at all.[14]

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11. *See, e.g.*, Kritser v. Beech Aircraft Corp., 479 F.2d 1089 (5th Cir. 1973); Skillings v. Allen, 143 Minn. 323, 173 N.W. 663 (1919). For an excellent study of tort liability for speech causing physical or economic harm, see Note, *Publisher Liability for Material That Invites Reliance*, 66 TEX. L. REV. 1155 (1988).

12. *See, e.g.*, Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830 (5th Cir. 1989).

13. *See, e.g.*, Perlman v. Time Inc., 64 Ill. App. 3d 190, 380 N.E.2d 1040 (1978).

14. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759-61 (1985). The Supreme Court decided only what was necessary to resolve the case before it: that the Constitution does not restrict punitive and presumed damages in these "purely private" libel cases. The Court could still hold that the Constitution bars strict liability or requires plaintiffs to prove falsity in these cases.

At the other extreme is political speech, which may be held to be absolutely protected even though the speech would otherwise be tortious. This analysis is seen in cases in which the defendant interferes with the plaintiff's economic relations for political purposes. In *NAACP v. Claiborne Hardware Co.*,[15] the NAACP organized a boycott of white merchants, and used tactics of intimidation and social ostracism to dissuade blacks from trading with the merchants. The state court held these tactics actionable as malicious interference with business. The Supreme Court reversed.

> [T]he petitioners certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign. . . . [H]owever, the purpose of petitioners' campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.[16]

The state could impose liability for the losses caused by the violent aspects of the boycott to the extent those losses could be separated from the nonviolent aspects, but not for the losses caused by speech, assembly, and petition, even though the Court acknowledged that the purpose of those protected activities was to pressure blacks into observing the boycott.[17]

In other contexts, the courts are sometimes less deferential to the interferor's political purpose. The United States Court of Appeals for the Fifth Circuit held that a local hospital staff's letter-writing campaign that allegedly interfered with the contracts of an abortion clinic could be actionable even if the campaign's purpose was political. "If, as the [clinic] alleges, the doctors' activities went beyond mere persuasion and included threats, we do not think that the purity of their motivations would shield them from liability."[18] Nevertheless, the method is still categorical; the interference is absolutely protected if the speech is political, but threats are not political speech even if politically motivated.

Another category to which the Supreme Court at one point seemed to extend absolute protection was truthful information obtained from public judicial records. The Court held that liability for an invasion of privacy resulting from publication of such information about a rape-murder was unconstitutional.[19] As we shall see in the section on the balancing model,

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15. 458 U.S. 886 (1982).

16. NAACP v. Claiborne Hardware, 458 U.S. 886, 914 (1982).

17. *Id.* at 909-10.

18. Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 551-52 (5th Cir. 1978).

19. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

the Court seemed to back away from this approach when next confronted with a similar issue.[20]

Like the incitement model, these classification schemes work better as devices for exclusion than as analytical tools. There *are* certain kinds of speech (*e.g.*, perjury) that undeniably deserve no constitutional protection from criminal sanctions, and some kinds (*e.g.*, fraudulent speech) probably deserve no protection from tort liability. Refusal to engage in any constitutional analysis of these types of speech is perfectly appropriate. It does not follow, however, that the categories of speech subject to constitutional protection by the classification decision deserve absolute protection. For example, political speech is not absolutely protected from the law of defamation, or even from prior restraint.[21] There is no obvious reason why it should be absolutely protected in interference with business relations. Anti-abortion protestors should not have an absolute right to put an abortion clinic out of business, even if their motives are purely political. The result in *Claiborne Hardware* is hard to accept on racially neutral grounds; if the defendant was the Ku Klux Klan, and had used speech to coerce whites to support a politically motivated boycott of black merchants, it seems unlikely that the Court would say the Klan's political motives should be an absolute shield against tort liability.

The classification-of-speech model may be useful at one extreme to bar any constitutional analysis of speech that requires no protection. But it is too crude a method for resolving the majority of speech-tort conflicts.

C. The Defamation Model

The rule that public officials cannot recover unless they can show "actual malice" is often perceived as the primary constitutional limit on libel law, but in fact that rule has become merely the keystone in a massive wall designed to protect defamatory speech. Whether the evidence is sufficient to identify the plaintiff as the target of the defamation, and whether the statement can be reasonably understood to be defamatory, are also issues of constitutional dimension, at least in some contexts.[22] The constitution also imposes procedural restraints; actual malice must be shown with convincing clarity[23] (a burden a plaintiff in a federal court must meet merely to survive summary judgment),[24] and a finding of actual malice must be independently reviewed by all appellate courts.[25] Proof of malice in any of the usual senses does not meet the "actual malice" requirement; there must

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20. *See infra* notes 81-82 and accompanying text.

21. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971).

22. *See* Greenbelt Cooperative Publishing Assn., Inc., 398 U.S. 6 (1970); Rosenblatt v. Baer, 383 U.S. 75 (1965).

23. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

24. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

25. Bose Corp. v. Consumers Union, 466 U.S. 485 (1984).

be proof that the defendant actually had serious doubt as to the truth of the defamatory statement.[26]

The actual malice test must be met not only by public officials, but by any "public figure" as well—a category that includes people who have done nothing to invite media attention except excel in their vocations or avocations.[27] The public figure category includes not only national celebrities, but also those who are prominent in one controversy, industry, or community.[28] It may even include some who are involuntarily drawn into public view by events beyond their control.[29]

Even those who are neither public officials nor public figures must meet the actual malice requirement if they hope to recover presumed or punitive damages for defamatory statements made in connection with matters of public concern.[30] Since few plaintiffs can prove enough actual, pecuniary loss to make litigation against media defendants feasible, actual malice has become a crucial issue in virtually all media libel cases. Private plaintiffs who are willing to forego presumed and punitive damages need not show actual malice, but still must show at least negligence on the part of the defendant.[31]

These restraints are the most familiar of the constitutional limitations on defamation, but they are supplemented by many other constitutional barriers. Truth is no longer a defensive matter; the plaintiff must prove falsity, at least in all cases except those involving purely private defamation.[32] Statements of opinion are absolutely protected, and many statements clearly implying defamatory assertions of fact are treated as opinion under this rule.[33] Some courts hold that the first amendment protects a "neutral report"

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26. St. Amant v. Thompson, 390 U.S. 727 (1968).

27. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (football coach); Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) (en banc) (professional football player); Newton v. National Broadcasting Co., 677 F. Supp. 1066 (D. Nev. 1987) (entertainer); James v. Gannett Co., 40 N.Y.2d 415, 353 N.E.2d 834 (1976) (belly dancer).

28. *See, e.g.*, Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977); Williams v. Pasma, 656 P.2d 212 (Mont. 1982), *cert. denied*, 461 U.S. 945 (1983).

29. *See, e.g.*, Dameron v. Washington Magazine, 779 F.2d 736 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986); Marcone v. Penthouse Int'l, 765 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985).

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

31. *Id.*

32. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

33. *See, e.g.*, Southern Air Transport v. American Broadcasting Co., 877 F.2d 1010 (D.C. Cir. 1989); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir. 1986) (en banc); Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 228 Cal. Rptr. 206, 721 P.2d 87 (1986), *cert. denied*, 479 U.S. 1032 (1987). The Supreme Court has not held that opinion is absolutely protected. The Court's dictum in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), that "Under the First Amendment there is no such thing as a false idea" is the source of the proposition. Recently, however, the Court has granted certiorari in a case interpreting this language as barring liability. Milkovich v. Lorain Journal Co., No. 89-645, *cert. granted*, Jan. 22, 1990.

of defamatory statements by a third party even if the publisher knows the allegation is false.[34]

The constitutional defamation rules are designed to achieve a tolerable accommodation between two well established and universally shared values—protecting reputation and encouraging robust debate on public issues. The rules are criticized for inadequately serving both of those values. They require enormous sacrifice by victims of defamatory falsehoods—by private persons who cannot show enough pecuniary loss to make litigating worthwhile, by public figures and public officials who cannot prove actual malice, and even by victims who can prove actual malice but run afoul of other constitutional rules that absolutely bar recovery. They exact a social cost by diminishing the effectiveness of defamation law as a deterrent of calumny in public discourse.

On the other hand, the constitutional defamation rules are an expensive form of protection for the press and other speakers. They appear to have increased rather than diminished the cost of defending libel suits.[35] Their emphasis on fault tends to shift the focus of litigation from the question of harm to the plaintiff's reputation to questions about the defendant's journalistic policies and practices. Consequently, in those instances where the jury is satisfied that the defendant's conduct is sufficiently egregious to meet the constitutional standards, damage awards are often very large. In addition, the need to discover the defendant's subjective state of mind as to the possible falsity of the statement often invites protracted and intrusive discovery into editorial matters.[36]

If the constitutional defamation model produces unsatisfactory results in libel, where the competing values are clearly defined and generally shared, it does not seem to be a promising method of resolving tort-speech conflicts in other areas where the competing values are very different and often less universally embraced. Nevertheless, the defamation model has been extended to many other tort cases, even when it fits poorly. The Supreme Court has employed the model in emotional distress and false light privacy cases, and the lower courts have applied it in several other torts.

1. The Defamation Model Applied to Emotional Distress

Hustler Magazine published an ad parody depicting the Reverend Jerry Falwell saying that his first sexual experience was an incestuous encounter with his drunken mother in an outhouse. Falwell sued for libel, invasion

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34. *See, e.g.*, Edwards v. National Audubon Soc'y, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977); Burns v. Times Argus, 430 A.2d 773 (Vt. 1981).

35. *See Report of the Libel Reform Project of the Annenberg Washington Program* 9 (1989).

36. *See, e.g.*, Herbert v. Lando, 441 U.S. 153 (1979). For an extended critique of the current constitutional law of libel, see Halpern, *supra* note 2. Professor Halpern would abolish most of the existing constitutional rules and require all plaintiffs to prove falsity, negligence, and actual damages.

of privacy, and intentional infliction of emotional distress. He lost in the trial court on the libel and invasion of privacy claims, but won a $150,000 judgment on the emotional distress claim.

The law of Virginia permitted recovery for this tort on a showing that the defendant intentionally or recklessly, by conduct offensive to generally accepted standards of decency or morality, caused the plaintiff severe emotional distress.[37] In the United States Court of Appeals for the Fourth Circuit the magazine argued that the constitutional rules of defamation should control, requiring Falwell (a public figure) to prove that the magazine published the parody with knowing falsity or reckless disregard for the truth. The court agreed that the magazine was entitled to the same *level* of constitutional protection that it would receive in a libel action, but that the protection need not be provided in precisely the same form.

> . . . Virginia law requires that the defendant's conduct be intentional or reckless. That is precisely the level of fault that *New York Times* requires in an action for defamation. The first amendment will not shield intentional or reckless misconduct resulting in damage to reputation, and neither will it shield such misconduct which results in severe emotional distress. We, therefore, hold that when the first amendment requires application of the actual malice standard, the standard is met when the jury finds that the defendant's intentional or reckless misconduct has proximately caused the injury complained of.[38]

The Supreme Court rejected this attempt to adapt the defamation rules to a tort where the injury and the nature of the wrong are different.[39] The Court held that the tort law requirements of intent and outrageousness were not sufficient substitutes for the constitutional requirement of actual malice. Accepting Hustler's invitation to analogize the ad parody to editorial cartoons, the Court stated that speech "in the area of public debate about public figures" deserves first amendment protection even when uttered with intent to inflict severe emotional distress.[40] The additional requirement of outrageousness was considered too subjective to provide a principled basis for defining the limits of constitutional protection.

Without further discussion of the differences between defamation and infliction of emotional distress, and without consideration of any other method of accommodating speech interests, the Court held that the case was controlled by the actual malice requirement of *New York Times Co. v. Sullivan*:

> We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason

37. Falwell v. Flynt, 797 F.2d 1270, 1275 n.4 (4th Cir. 1986).
38. *Id.* at 1275.
39. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).
40. *Id.* at 52-53.

> of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.[41]

The actual malice requirement itself, however, provided Hustler with no protection; the magazine could not and did not claim to believe what it had said about Falwell was true. Thus it was necessary to add a gloss to the *New York Times* rule: since it would be nonsensical to apply a knowing-or-reckless falsity test to parody, which by definition is "false," the plaintiff also must show that the defendant made a "reasonably believable" false statement of fact.[42] Since the jury had found in connection with Falwell's libel claim that the parody could not be reasonably understood as describing actual facts or events, there was no such statement. Falwell's claim for emotional distress, therefore, was constitutionally barred because it failed as a claim for defamation.

The apparent result of *Falwell* is to immunize all parody about public figures from all sources of tort liability; whatever the theory of recovery, the plaintiff can recover only by showing that the offending statement could reasonably be understood as describing actual facts or events—in other words, that it was not parody. *Falwell* is an effective if slightly disingenuous solution to the immediate problem. The case foreclosed the possibility that plaintiffs might circumvent the constitutional rules of defamation by suing for emotional distress instead. It avoided the difficulty of trying to distinguish between editorial cartoons and political satire, on the one hand, and crude vulgarities like the Hustler parody on the other.

As Professor LeBel has shown, however, *Falwell* is not a satisfactory prescription for accommodating first amendment interests with infliction of emotional distress generally.[43] To bring this tort within the framework of

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41. *Id.* at 56.

42. *Id.* at 57. In an important article that appeared as this volume went to press, Professor Post offers a justification for the result in *Falwell* that is far more sophisticated than the Court's. In his view, *Hustler's* parody is protected not because it fails to make a believable but false statement of fact, but because it makes a claim "about an independent world the validity of which depends upon the standards or conventions of a particular community, and about which we therefore cannot expect convergence under conditions of cultural heterogeneity." Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 660 (1990). In his view the first amendment exists to protect cultural heterogeneity in public discourse, and therefore must be construed to prevent the community from imposing its standards of civility on *Hustler.*

43. LeBel, *Emotional Distress, the First Amendment, and "This Kind of Speech": a Heretical Perspective on* Hustler Magazine v. Falwell, 60 U. COLO. L. REV. 315 (1989). Professor LeBel proposes a constitutional rule requiring plaintiff to prove intent or recklessness, distress so severe it is disabling, extreme and outrageous conduct, and that the speech is aimed directly at the plaintiff (rather than at a wider audience) or that the speech is without serious social value. *Id.* at 351. Whether or not Professor LeBel's proposal is the best solution to the problem, it shows at least that approaches are available that fit the tort better than the defamation model.

constitutional limitations established for defamation, the Court had to inject into the emotional distress action an issue of falsity, which is not logically an element of this tort. False speech is no more likely to inflict emotional distress than truthful speech. Defamation draws a distinction between truthful and false speech not because the latter is less likely to cause harm, but because truthful speech is socially more valuable.[44] But in *Falwell* the Court draws this distinction not because the value of the speech turns on its truth or falsity, but merely to make it possible to apply the actual malice test. The logic of *Falwell* is that the tort law requirements of intent and outrageousness do not sufficiently protect speech interests; the actual malice test, therefore, must be applied, and since falsity is the focus of that test, falsity must be made an element of the emotional distress tort so that actual malice can be applied.

The inappropriateness of making falsity the key to constitutional protection in the emotional distress torts is evident in the following hypothetical. Suppose a newspaper knows that P, a candidate for public office, had an abortion as an unmarried teenager. The newspaper, supporting P's opponent and hoping to induce P to withdraw from the contest, publishes references to "skeletons in P's closet" and P's "dirty little secret." The newspaper has no intention of publishing the information about the abortion, but intends to cause P such distress that she will withdraw her candidacy.

P is a public figure, so *Falwell* presumably applies; if it does, there can be no recovery because there is no false statement of fact. Yet the first amendment interest served by protecting this speech is minimal; the newspaper says only enough to serve its own purposes, not enough to inform the electorate. The courts might decline to apply *Falwell* to such a case on the ground that this is not speech "in the area of debate about public figures."[45] But that would only confirm the point that *Falwell* is an ad hoc solution to a peculiar problem, not an appropriate means of accommodating first amendment interests in emotional distress cases generally.

2. The Defamation Model Applied to False Light Privacy

The Supreme Court has had occasion to accommodate speech interests with tort interests in two kinds of privacy cases. The first are what have become known as "false light" cases. The Court has decided two of these cases, *Time, Inc. v. Hill*[46] and *Cantrell v. Forest City Publishing Co.*[47] In both, the plaintiff's complaint was that his or her experiences were exploited by the media. Hill's family had been held hostage by escaped convicts, and his complaint was with a *Life* magazine article about the opening of a play

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44. Time, Inc. v. Hill, 385 U.S. 374 (1967).

45. *Hustler Magazine, Inc.*, 485 U.S. at 53. Since the scurrility in *Falwell* was treated as speech "in the area of debate about public figures," however, one cannot be sanguine about this possibility.

46. 385 U.S. 374 (1967).

47. 419 U.S. 245 (1974).

that purported to be based on the Hills' experiences. Mrs. Cantrell's husband had been killed along with many others in a bridge collapse. Her complaint was that a newspaper's Sunday magazine feature six months later used her impoverished family to illustrate the impact of the event on the lives of survivors.

In these cases the distortion of the tort action has been a two-step process. The plaintiffs' real complaint is that the media exploited their experiences. This publicity is not actionable under the commercial exploitation branch of privacy because the exploitation occurs in news (or at least journalism).[48] It is not actionable under "true" privacy because it involves matters of legitimate public interest. Nevertheless, courts have been sympathetic to these claims. To avoid constitutional problems, courts seized upon a distinction between accurate and "fictionalized" exploitation of experiences.[49] If the analysis were worked out in conventional tort terms, the tort would be viewed as exploitation of the plaintiff's private life, and the public's legitimate interest in the matter would be treated as a conditional privilege, defeasible by a showing that the account is fictionalized.

The matter was not developed in tort terms, however. Instead, the New York Court of Appeals read a fictionalization requirement into that state's privacy statute to save it from unconstitutionality,[50] and falsity became an essential element of the tort.

This occurred about the same time the Supreme Court was adopting the knowing-or-reckless-falsity rubric to accommodate speech interests in defamation, and it allowed the Court to apply the same accommodation to false light. Thus, the false light tort, already distorted by the New York courts' treatment of falsity as an essential element of the wrong, was further distorted by the Court's decision to require proof not only that the account was false, but also that the defendant published with knowledge or reckless disregard of its falsity.[51]

The artificiality of the accommodation is apparent in *Cantrell*. The privacy invasion was the article's depiction of the family's poverty, the children's old and ill-fitting clothes, and the deteriorating condition of their home. These conditions were confirmed by the photographs accompanying the article, however, and while the Court suggests "significant misrepresentations were contained in the details,"[52] it does not say what these were or question the central theme that the Cantrells were living in abject poverty. The knowing falsehood principally relied upon by the Court in upholding a $60,000 judgment was an implication that Mrs. Cantrell had been present when the author visited her home and that he had personally observed her

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48. *See, e.g.*, Benally v. Hundred Arrows Press, 614 F. Supp. 969 (D.N.M. 1985); Stephano v. News Group Publications, Inc., 64 N.Y.2d 174 (Ct. App. 1984).

49. *See* Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 221 N.E.2d 543 (1966).

50. *Id.* at 329-30, 221 N.E.2d at 545-46.

51. Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967).

52. Cantrell v. Forest City Publishing Co., 419 U.S. 245, 248 (1974).

facial expressions[53]—matters that had very little to do with Mrs. Cantrell's real grievance.

3. The Defamation Model Applied to Interference with Patronage

Blatty v. New York Times is another attempt to apply constitutional defamation rules to a very different communications tort, in this instance by a state court.[54] Blatty was the author of a novel which he alleged the *New York Times* excluded from the *Times*' best-seller list even after his publisher furnished the newspaper with figures showing the book had sold more copies than other books on the list. Blatty sued on several theories, including intentional interference with prospective economic advantage. In conformity with the general common-law elements of that tort, Blatty alleged that the *New York Times* had intentionally interfered with his prospective sales to booksellers and the general public by excluding his book from the list while representing that the list was an objective and accurate compilation of sales when the newspaper knew that it was not.

The California Supreme Court affirmed dismissal of the claim on the ground that the first amendment barred the action. The court began by asserting that "Although the limitations that define the First Amendment's zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement. . . ."[55] The court then asserted that one of those constitutional defamation rules is that the actionable statement must be "of or concerning" the plaintiff. This refers of course to the venerable colloquium requirement of the common law of defamation. If the defamatory statement does not identify the plaintiff on its face, the plaintiff must show the extrinsic facts that enable the recipient to infer that the statement refers to the plaintiff. Only one small corner of the colloquium rule has been constitutionalized, however. Where the statement on its face is impersonal criticism of government, and the plaintiff's colloquium is merely that he or she is the official responsible for the criticized governmental agency or activity, "such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations."[56] The reason is that such a theory would be too close to seditious libel—a reason that has no relevance whatever to Blatty's claim.

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53. *Id.* at 253.

54. 42 Cal. 3d 1033, 232 Cal. Rptr. 542, 728 P.2d 1177 (1986).

55. Blatty v. New York Times, 42 Cal. 3d 1033, 1042, 232 Cal. Rptr. 542, 728 P.2d 1177, 1182 (1986). The court erroneously cited *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485 (1984), for the proposition that "in a product-disparagement action a public figure plaintiff must prove actual malice." The trial court so held in that case, but the issue was not before the Supreme Court and the Court chose to "express no view on that ruling." Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 513 (1984).

56. New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964).

The California Supreme Court read this constitutional rule much more broadly, as a general limitation on any cause of action alleging an injurious falsehood, "granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt."[57] The court also thought this limitation desirable as a matter of policy; in its absence, statements about a religious, ethnic, or political group might invite many lawsuits by disgruntled members, deterring the media from informing the public about such groups.[58]

Applying this reasoning to Blatty's claim for intentional interference with prospective advantage, the court held that he could not meet the constitutional burden of showing that the *Times*' publication was "of or concerning" him. The best-seller list did not explicitly refer to Blatty or his novel. It could not reasonably be understood to refer to Blatty or his novel by implication, because the implication—that his book did not sell as many copies as the books listed—would be equally applicable to all others whose books were excluded, a group that is too large to confer a cause of action on each member.[59] The court said it was proper to deny him leave to amend because there was no reasonable possibility he could cure the defect. As Professor Langevardt has observed, "the plaintiff lost the case for the precise reason that prompted him to bring the suit: that his novel was not mentioned in the list."[60]

Here as in *Falwell*, the court forces a three-legged constitutional garment to fit a two-legged tort by engrafting onto the tort an extraneous appendage. In *Falwell* the extraneous issue was falsity; here it is identification of the plaintiff. The latter is an issue in defamation because of the rule that harm may be presumed. If defamation plaintiffs were required to prove the harm caused by the statement, there would be no identification issue; it would be subsumed in the proof-of-harm issue. Because the theory of defamation is that harm may be presumed from the publication itself,[61] the plaintiff must necessarily prove that he or she is identifiable; if he or she is not, there is no basis for presuming he or she is harmed.

In interference with patronage (and in all other communications torts except defamation and perhaps privacy) there is no presumption of harm. Plaintiff recovers only for such injury as he or she is able to prove.[62] The issue is whether the offending statement caused plaintiff's harm—not whether it was "of and concerning" plaintiff.

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57. *Blatty*, 42 Cal. 3d at 1044, 728 P.2d at 1183.

58. *Id.*

59. *Id.* at 1046.

60. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMPLE L. Q. 903, 956 (1989).

61. *See* RESTATEMENT (SECOND) OF TORTS § 569.

62. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 549 (fraudulent misrepresentation), 552B (negligent misrepresentation), 633 (injurious falsehood), 774A (interference with business relations).

This point is not merely theoretical. There is no sound reason why an action for interference with prospective advantage should be denied merely because the offending speech or conduct is not directed specifically at the plaintiff.[63] Suppose, for example, that the plaintiff is a distributor of imported beer, and the defendant, a distributor of domestic beer, interferes with the plaintiff's sales by spreading rumors that imported beer contains urine. If the plaintiff can prove that the defendant intended to divert sales from imported to domestic beer, it is immaterial that the rumors were not directed at the plaintiff.

In *Blatty* the allegation was that the *Times* intentionally interfered with sales of Blatty's book by impliedly representing that his book was less popular than it was. If, as alleged, the *Times* knew its list was inaccurate, and knew that the effect would be to hurt sales of Blatty's book, it should be immaterial that the newspaper was able to accomplish its purpose without identifying Blatty.

The number of potential plaintiffs and the size of their aggregate claims may be a source of concern in these cases, but that concern bears little relation to whether the interfering statement is "of and concerning" the plaintiff. That concern should be addressed (as it is in negligent misrepresentation, for example)[64] by rules limiting the scope of liability to something less than the entire field of foreseeable plaintiffs. In the *Blatty* case, the scope of liability is self-limiting. The best-seller list contained names of 15 books; even if the *Times* was wrong with respect to every book listed, the potential class of plaintiffs is limited to the 15 authors who could show that their books should have been on the list.

4. The Defamation Model Applied to Injurious Falsehood

Disparagement, trade libel, and slander of title are distant cousins of defamation. At common law these torts were established by proof that the defendant caused specific pecuniary loss by maliciously communicating to a third party a false statement disparaging the plaintiff's product, service, or title. Malice could mean intent to do harm or want of a good faith belief in the truth of the statement.

The second Restatement of Torts suggested that the actual malice standard from defamation might replace the common-law definition of malice. Thus, liability would exist under Section 623A of the Restatement if the defendant should recognize that the statement is likely to cause

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63. Of course, there must be intent to interfere, but that can be established by showing that the defendant knew to a substantial certainty that his conduct would interfere. In the other intentional torts, it is immaterial whether the defendant's intent was directed at the plaintiff or at someone else; intent to cause harm to a third person is treated as intent to harm the plaintiff. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 18. There is no reason for a different rule here.

64. *See, e.g.*, First Equity Corp. v. Standard & Poor's Corp., 869 F.2d 175 (2d Cir. 1989).

pecuniary harm to the plaintiff and makes the statement with knowing or reckless disregard of its falsity. The courts generally have adopted this suggestion, making the actual malice standard an element of the injurious falsehood torts.[65]

Occasionally, however, the courts have carried the defamation analogy further, importing into injurious falsehood an inappropriate distinction between public and private plaintiffs. The result is an assumption that the actual malice standard is applicable only if the plaintiff is a public figure.[66] The public-private distinction is employed in defamation because the Supreme Court believes reputations of private persons deserve more protection, on the theory that they (1) have not waived that protection by participating in public matters and (2) lack the self-help opportunities of public plaintiffs, who are thought to enjoy better access to media.[67] But in injurious falsehood, the issue is not the plaintiff's reputation, but instead the "reputation" of the product, service, or title—the deserts of which have little to do with the public or private status of the purveyor. The product, service, or title is subject to public attention because it is offered in the marketplace, not because of the identity of the offeror. Trying to define "private plaintiff" in this context is nonsensical, because placing the product or service in the market makes the matter "public" in the only relevant sense.

There may be occasions when an injurious falsehood should not receive the protection of the actual malice standard—for example, when the plaintiff has not placed anything in the market—but the public-plaintiff distinction does not help to identify them.

The defamation model works more or less well depending on the tort setting in which it is employed. Whether the actual malice test accomplishes its purposes in libel and slander can be debated, but at least the model fits. The model also fits reasonably well in the injurious falsehood torts, if it is applied by analogy rather than literally. The defamation model can be made to fit false light privacy cases, but only by distorting the tort to change its focus from privacy to falsehood. It can be made to fit infliction of emotional distress only through similar distortion. It does not fit interference with business relations at all.

D. The Balancing Model

In several areas of first amendment law, the Supreme Court resolves cases by a balancing process that is, if not ad hoc, at least highly situational. Before media can be subjected to differential taxation, "the State must show that its regulation is necessary to serve a compelling state interest and

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65. *See* Pecora v. Szabo, 94 Ill. App. 3d 57, 418 N.E.2d 431 (1981) (stating that overwhelming authority holds that malice requires knowledge of falsity of disparaging statements or reckless disregard of falsity).

66. Bose Corp. v. Consumers Union, Inc., 508 F. Supp. 1249 (D. Mass. 1981), *rev'd on other grounds*, 466 U.S. 485 (1984).

67. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974).

is narrowly drawn."[68] A newspaper reporter has a first amendment right to attend a trial unless the state can show that it has a substantial interest in exclusion, that the exclusion is the least restrictive means of protecting that interest, and that the exclusion is likely to be effective.[69]

1. Commercial Speech Doctrine

Variations of this process are used in other areas of first amendment analysis, including commercial speech. In that area, the Court has expanded the balancing process into a four-part analysis:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[70]

Last year the Supreme Court modified the fourth prong of that test. All that is required now is a "reasonable fit" between the objective and the means chosen to achieve it, "not necessarily the least restrictive means."[71]

Litigants sometimes look to commercial speech doctrine for a solution to speech-tort conflicts, but usually it does not provide one. In the first place, many tortious speech cases do not involve commercial speech. The Supreme Court has sometimes defined commercial speech narrowly, as "speech proposing a commercial transaction," and sometimes more broadly, as "expression related solely to the economic interest of the speaker and its audience."[72] But much tortious speech falls outside either of those definitions. Libel and invasion of privacy are only the most obvious instances where the offending speech has nothing to do with either commercial transactions or economic interests. The offending speech may be noncommercial in almost any of the other communications torts as well. Protestors who seek to turn potential patients away from an abortion clinic are not engaged in commercial speech. Animal rights activists who disparage a furrier's products are attempting to influence commercial transactions, but also to influence public opinion. The misrepresenter usually does so to obtain something of value from the victim, but not always.[73] Speech inflicting

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68. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

69. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

70. Central Hudson Gas v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980).

71. Board of Trustees of State Univ. of New York v. Fox, 109 S. Ct. 3028, 3035 (1989).

72. *Central Hudson Gas*, 447 U.S. at 561 (1980); Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-56 (1978).

73. *See, e.g.*, Burr v. Bd. of County Comm'rs of Stark County, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986) (misrepresentation by adoption agency of baby's health).

emotional distress, either intentionally or negligently, usually is not "commercial."

Even when the tortious speech is "commercial," that body of doctrine may not provide an appropriate framework for decision. Commercial speech doctrine begins by asking whether the transaction proposed by the speech is lawful. That inquiry is little help; even in torts where the speech deserves no protection, the speech may propose perfectly legal activity. The deceiver who says "Buy my stock and I will make you rich" may be proposing a perfectly legal transaction, as may the newspaper that says "If you want to read the books everyone else is reading, buy these best-sellers."

The next inquiry in commercial speech analysis is whether the speech is false or misleading. This question may or may not be helpful in analyzing a communications tort. In the injurious falsehood torts, some false speech is protected, and should be, to create "breathing space" for vigorous discussion in the marketplace, even by competitors.[74] On the other hand, some tortious speech deserves no protection even if truthful. Whether Texaco should be liable for interfering with Penzoil's contract to buy Getty Oil has little to do with the fact that Texaco was telling the truth when it said "We will pay a higher price."[75]

These two inquiries, which together comprise the first branch of commercial speech doctrine, would protect some tortious speech that does not deserve protection and exclude some that does. The remaining branches of the doctrine are not peculiar to commercial speech, but are merely an application of the general balancing model, to which we now turn.

2. The Balancing Model Applied to Privacy

Last term the Supreme Court employed the balancing model in a tort case for the first time in *Florida Star v. B.J.F.*[76] The tort was a newspaper's disclosure of true but embarrassing private facts about the plaintiff—that she had been a rape victim. The Court said liability for disclosure of truthful information lawfully obtained is constitutional, "if at all, only when narrowly tailored to a state interest of the highest order."[77]

The victim's name was treated as having been lawfully obtained, even though the police in disclosing it to the newspaper and the newspaper in printing it both apparently violated a criminal statute forbidding disclosure of a rape victim's identity. The publication was also in violation of the newspaper's own policy against such disclosures.[78]

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74. *See, e.g.*, Flotech, Inc. v. E.I. du Pont de Nemours & Co., 814 F.2d 775 (1st Cir. 1987).

75. *Cf.* Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. App. 1987).

76. 109 S. Ct. 2603 (1989).

77. Florida Star v. B.J.F., 109 S. Ct. 2603, 2613 (1989). *Florida Star* was decided four weeks before *Board of Trustees of the State University of New York v. Fox*, 109 S. Ct. 3028 (1989), which held that "narrowly tailored" does not mean "least restrictive" in commercial speech analysis. *Fox* does not mention *Florida Star* and it is not yet clear whether *Fox* modifies the balancing formula in applications other than commercial speech.

78. *Id.* at 2605-06.

The state interest in the case before the Court was that of compensating a rape victim for a newspaper's disclosure of her full name, with details identifying her neighborhood, while the assailant was still at large. The victim testified that the publication resulted in threatening calls from a man who said he would rape her again, and that she was forced to move, change her phone number, seek police protection, and obtain mental health counseling.[79]

The Court conceded that protecting the privacy and safety of rape victims and encouraging them to report the crime without fear of exposure were highly significant interests. "We accordingly do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these interests as to satisfy the . . . standard."[80] Nevertheless, the Court concluded that imposing liability in this case was "too precipitous a means of advancing these interests,"[81] and thus did not meet the "narrowly tailored" standard.

In its only previous private-facts privacy case,[82] the Court used a very different method of analysis—a variant of the categorical model—to hold that information obtained from an open judicial record was absolutely protected from tort liability. In both the previous case and in *Florida Star* the Court was invited to adopt a much broader categorical rule—that all truthful speech is absolutely protected from liability for invasion of privacy. In neither case did the Court rule out that possibility; it merely elected to decide the case on narrower grounds. *Florida Star* suggests, however, that the Court is not likely to adopt the broader ground:

> We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.[83]

The Court insisted it was leaving open the possibility that publication of a rape victim's name might be actionable under some circumstance, but if *Florida Star* was not such a case, it is difficult to imagine a case that would be actionable. And since publication of a rape victim's name seems to present the privacy interest in one of its stronger forms, the *Florida Star* decision seems to leave little vitality in the tort of disclosure of private facts.

3. Evaluating the Balancing Model

A balancing analysis of the sort prescribed in *Florida Star* may be the Court's most likely response to future claims of constitutional protection

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79. *Id.* at 2606.
80. *Id.* at 2611.
81. *Id.* The Court's reasoning is analyzed at *infra* notes 87-91 and accompanying text.
82. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).
83. *Florida Star*, 109 S. Ct. at 2609.

for tortious speech. For the past 20 years, the balancing method has been the Court's solution of choice for new types of first amendment issues. It is the closest thing to a universal solvent for first amendment problems that the Court has found since the clear and present danger test. The inquiries it prescribes—into importance of state interests and appropriateness of the remedy—are now familiar to lawyers and judges, not only from other first amendment contexts, but also from equal protection law.[84] Perhaps most important, the balancing method would provide a single analytical model for all the tortious speech problems the Court has not yet addressed. It would, however, be a singularly inappropriate solution for tortious speech cases.

a. Unpredictability

For one thing, the balancing model does not produce generally applicable principles. *Florida Star* did not even produce a resolution for other privacy cases in which the private fact disclosed is a rape victim's name; the Court specifically observed that tort liability for publishing the name might be constitutional on other facts.[85] To appreciate how little predictive value such a method has, one need only try to guess what "other facts" would suffice. In defamation the Supreme Court rejected the balancing model for precisely this reason:

> [T]his approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.[86]

These concerns are no less pertinent in other torts contexts, including privacy.

b. Abstraction

But its ad hoc and thus unpredictable nature is not the only objection to the balancing model. Tort law itself is more than a little ad hoc, and if the unpredictability of the balancing method does not preclude its use to determine whether a speaker may be punished criminally,[87] unpredictability perhaps need not preclude use of the balancing model to determine whether tort liability is constitutional. Rather, the objection to balancing in tort-speech conflicts is more fundamental: the balancing model was designed for scrutiny of governmental regulation and cannot be applied intelligibly to

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84. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439-42 (1985); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

85. *Florida Star*, 109 S. Ct. at 2611.

86. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-44 (1974).

87. Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

common-law tort liability. As *Florida Star* illustrates, the outcome of a tort case under the balancing model turns not on the merits of the case, but on an evaluation of an elusive abstraction—the state's "regulation" of tort liability.

Tort liability was constitutionally impermissible in *Florida Star* for "three independent reasons," each of which persuaded the Court that liability in the case was not narrowly tailored to protect the interests of rape victims.[88] First, the state had available a more limited means of protecting those interests; it could prevent the police from releasing the name to the press. The statute forbade such release, but that was not enough, because that effort to protect the victim's interests had failed.[89] The victim could not recover for the wrong done her by the newspaper because she was also wronged by the police. Once the police placed the information in the public domain, albeit illegally, B.J.F.'s "hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy, and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence."[90]

The second reason B.J.F. lost was that the state had allowed her to recover on a theory of negligence per se, based on the newspaper's violation of the statute prohibiting disclosure of rape victims' names. This circumvented two requirements B.J.F. would have had to meet if she had sued for invasion of privacy at common law: (1) that the disclosure was of a sort that a reasonable person would find highly offensive, and (2) that her identity was not a matter of legitimate public interest.[91] The Court also objected that the negligence per se theory required no showing of fault in the form of scienter (meaning, presumably, awareness that the disclosure would invade B.J.F.'s privacy).[92] Because the theory of recovery might have included these requirements but did not, it was not narrowly tailored. These requirements, however, almost certainly would have made no difference in B.J.F.'s case. Disclosure of a rape victim's name and the neighborhood in which she lives, at a time when the assailant is still at large, surely could be found to be highly offensive. The defendant could hardly contend that the plaintiff's identity was a matter of legitimate concern, or that the defendant was unaware that publication would invade B.J.F.'s privacy, because the *Star*'s policy (violated inadvertently in this instance) was not to publish such information. And B.J.F. *did* show fault; the award of punitive

88. *Florida Star*, 109 S. Ct. at 2611-13.

89. *Id.* at 2611-12. The sheriff's department placed an incident report containing B.J.F.'s name in the press room, where there were signs indicating that publication of rape victims' names was prohibited. B.J.F.'s suit included the sheriff's department, which settled for $2,500. *Id.* at 2606, 2616.

90. *Id.* at 2611-12.

91. *Id.*

92. *Id.*

damages was based on a finding that the newspaper published with "reckless indifference" toward her rights.[93]

Third, B.J.F.'s recovery was barred because the state gave her a remedy only against dissemination of her name by the mass media, and not against dissemination by individuals. This underinclusiveness led the Court to doubt the bona fides of the state interests ascribed to the statute by B.J.F.[94] Because the state did not give B.J.F. a remedy against all possible sources of invasion of her privacy, it could not give her a remedy against the most obvious one.

None of the Court's reasons for holding that the constitution barred recovery in B.J.F.'s case had much to do with the merits of her case. The balancing model did not scrutinize the particular case, but the state's scheme of regulation. It is the scheme (or as Justice White called it, the "liability regime")[95] that must be narrowly tailored to serve interests of the highest order, not the plaintiff's claim. For this reason B.J.F. had to defend not only the state's decision to give her a remedy against the newspaper, but also the possibility that the state had decided not to give her a remedy against others.

The balancing model employed in *Florida Star v. B.J.F.* not only fails to provide general principles for use in similar cases, but it fails to provide a just solution for the case at hand as well. The latter interest would be better served by true ad hoc balancing—balancing the interests in compensating the injury in the particular case against the impact of that particular recovery on speech. The same question would be asked—is the remedy narrowly tailored to advance a state interest of the highest order—but it would be answered by evaluating the facts of the case at hand rather than the state's scheme of liability.

This model would produce a very different analysis of B.J.F.'s case. The interests advanced by allowing recovery are strong: the name was published while the assailant was still at large; the victim's name was not already widely known; and the defendant did not even argue that the public had any special interest in knowing the plaintiff's name. Imposing liability would have no "chilling effect" on the defendant because the newspaper's policy was not to publish such information anyway; liability would only induce the defendant to enforce its policy more strictly. The press generally and the reporter in this case were under no illusion that they could safely publish such information, because the criminal statute forbade it.[96]

This kind of balancing probably would produce a different result in *Florida Star*, one that seems more appropriate on the facts. That is the strength of ad hoc balancing. But if this method were adopted, there would be little left of tort rules, and little means of predicting what behavior ultimately might be held constitutionally actionable.

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93. *Id.* at 2606.
94. *Id.* at 2613.
95. *Id.* at 2617 (White, J., dissenting).
96. *Id.* at 2616 (White, J., dissenting).

c. Evaluating a "regime of liability"

Scrutinizing the state's "liability regime" is a far more complex matter than scrutinizing a criminal statute or agency regulation. Statutes and regulations are codified, and though subject to change, are at any given moment fixed and ascertainable. Any particular scheme or regime of tort liability, however, is a shifting inchoate thing, the mechanics and scope of which must be discovered in the holdings, language, and implications of cases. Its boundaries are often fuzzy; the law of any given state is often incomplete, both because there are issues the courts of that state have not yet resolved, and because tort law by its nature is incomplete, waiting to expand or contract as conditions and the perceptions of judges change. This phenomenon is especially true in the communications torts, a number of which are relatively undeveloped.

The scrutiny is also complicated by the fact that the state is not present to explain its regime. This absence is particularly troublesome in evaluating whether the state's interests are "of the highest order." When balancing is employed to test a regulation, the state or one of its agencies is present as a party to explain what the promulgator of the regulation had in mind. In the tort action, the articulation of the state's interests must be left to the omniscience of the plaintiff. In *Florida Star* the Court says:

> When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant.[97]

But of course it is *not* the state that must demonstrate its commitment; it is the plaintiff who must ascertain what the state's commitment is and demonstrate that the state has chosen the appropriate means of vindication.

Attorneys general no doubt are often imperfect expositors of the goals of regulators or legislators, but private litigants are at a much greater disadvantage. The attorney general may consult the legislators or the agency that promulgated the regulation. The private litigant has no access to the judges who promulgated the regime of tort liability except through their opinions. Since those opinions usually deal with only the questions presented by litigation, the goals of tort law are often unstated or embodied more in received wisdom than in judicial opinions.

These differences between evaluating a regulation and evaluating a "regime of liability" may not have been fully apparent to the Court in *Florida Star*, because in that case the cause of action was based on a statute enabling the Court to analyze the case as if the "regulation" being scrutinized were the criminal penalty prescribed by the statute, not B.J.F.'s tort action. The Court repeatedly refers to the issue as whether the state may

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97. *Id.* at 2613.

"punish publication."[98] Because of the statute, the Court did not encounter some of the uncertainties that would normally arise in determining what circumstances would create liability.

Yet even in this relatively easy setting, ascertaining the scope of the state's remedy presented enough difficulty to give a hint of the trouble that lies ahead if the Court persists in applying the balancing model to tortious speech. As we have seen, one of the determinative inquiries in *Florida Star* was whether the remedy was underinclusive. The Court decided it was because the statute applied only to mass media. But as Justice White pointed out in dissent, Florida's remedies for invasion of privacy include the common law as well as the statute. The scheme that should be reviewed, therefore, is not merely the statute, "but rather the whole of Florida privacy tort law."[99] Justice White concluded that it was possible that Florida common law would provide a comparable remedy for nonmedia disclosures, and if so, the liability regime could not be attacked on the underinclusiveness ground relied upon by the majority. The majority did not even acknowledge this possibility. Justice Scalia, concurring on the underinclusiveness ground, said it was not clear "that Florida's general privacy law would prohibit such gossip."[100]

This exchange illustrates two aspects of the difficulty of applying the balancing model to tort actions. One aspect is the difficulty of ascertaining what the state's liability regime is. Nothing in the common law of privacy distinguishes between media publicity and nonmedia disclosures; if it did it almost certainly would be unconstitutional for discriminating against the press.[101] Perhaps the only reason the Florida courts have not considered the possibility that the common law of privacy covers nonmedia as well as media disclosures is that lawyers have considered the proposition so likely that it was not worth questioning. Yet the possibility was treated by the majority as nonexistent and by Justice Scalia as not sufficiently clear.

The second aspect of the difficulty is that any uncertainty about the state law tends to be resolved against its constitutionality. This principle is implied in the majority's position and is explicit in Justice Scalia's. It is consistent with other applications of the balancing model, which also place the burden of justification on the party defending the state law.[102] The balancing model thereby presumes the unconstitutionality of any particular

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98. *See id.* at 2608, 2609, 2610, 2611, 2613. The $100,000 judgment included $25,000 in punitive damages, but the Court's analysis does not distinguish this from the remainder of the award, which was compensatory.

99. *Id.* at 2617.

100. *Id.* at 2613 (Scalia, J., concurring in part and concurring in the judgment).

101. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983).

102. *See, e.g.*, Board of Trustees of the State Univ. of New York v. Fox, 109 S. Ct. 3028 (1989). In *Fox* the Court stated ". . . since the State bears the burden of justifying its restrictions, [citation omitted], it must affirmatively establish the reasonable fit we require." *Id.* at 3035.

communications tort recovery against which a plausible first amendment argument is made. The tort victim must establish the strength of the state's interest in providing the recovery in question and that the remedy is narrowly tailored to serve that interest; if the state of the law is unclear, the constitution will bar recovery.

d. Intrusiveness

The balancing model is a more intrusive means of accommodating speech interests in the communications torts than even the defamation model. The latter at least prescribes what the constitution requires, and those are rules of general application that can be relied upon in deciding pretrial motions and incorporated into jury instructions. The balancing model, however, contains no prescription of rules beyond the sweeping generalities of the balancing formula itself. A plaintiff trying to determine his or her potential obstacles, or a trial judge trying to decide a motion for summary judgment, will find little guidance in that formula. The balancing model requires reviewing courts not merely to determine whether a particular result is consistent with a defined constitutional standard, but to evaluate the state's total response to the speech and tort interests implicated in the type of tort action under review. A reviewing Court must evaluate not only the rules the state has applied, but also the strength of the interests served, and the availability and efficacy of other means of serving them. This process requires the reviewing court to second-guess many choices of the sort that normally are thought appropriate for common-law courts. The *Florida Star* case again illustrates some of these choices.

First, the common law of privacy protects not only secrets known to the plaintiff alone, but also matters that are known to the plaintiff's friends but not the public at large.[103] The law thus assumes that spreading such information before the public causes a harm that is not present when the information is made available to only a few. *Florida Star*, on the other hand, refuses to accept the proposition that the public disclosure of a private fact in a newspaper is a harm that the law might treat differently from backyard gossip.[104] Justice Scalia answered the common law's assumption with his own empirical assumption, which many might question:

> In the present case, I would anticipate that the rape victim's discomfort at the dissemination of news of her misfortune among friends and acquaintances would be at least as great as her discomfort at its publication by the media to people to whom she is only a name.[105]

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103. Most matters, even of the most private nature, are known to some persons other than the plaintiff—family members, medical personnel, business associates, etc. The Restatement (Second) of Torts § 652D comment b, mentions as "normally entirely private matters" sexual relations, illnesses, personal letters, details of home life, and details of past history that plaintiff would rather forget—all matters that are certain to be known by some other persons.

104. *Florida Star*, 109 S. Ct. at 2612-13.

105. *Id.* at 2613 (Scalia, J., concurring in part and concurring in the judgment).

Second, the private-facts branch of privacy law contains no requirement of scienter or other species of fault on the part of the defendant. The apparent reason is that invasions of privacy are very unlikely to be inadvertent. The risk that a disclosure will be privacy-invading is usually apparent from the very nature of the information. The need to provide breathing space for honest error as to truth or falsity, which is the rationale for requiring fault in the constitutional law of defamation, is therefore much diminished in privacy. The majority in *Florida Star*, however, considered it "perverse" to require fault in defamation but not in privacy.[106]

Third, through the doctrine of negligence per se, courts give legislatures a role in deciding what conduct should give rise to liability. Through this doctrine, courts defer to the legislative prohibition of certain conduct as also determinative of what conduct should be considered reasonable in tort law. In *Floirda Star*, by treating violation of the statute as negligence per se, the Florida courts ascribe to the legislature a judgment that publication of a rape victim's name is (at least presumptively) highly offensive and not a matter of legitimate public concern.[107] The majority says the courts cannot defer to the legislature in this respect, because individualized adjudication is "indispensable" when constitutional interests are at stake.[108]

Finally, tort law often chooses to make available only incomplete remedies. Caps on damages for pain and suffering, limitations on the classes of survivors who can recover for wrongful death, and denial of damages for economic loss are familiar examples. Courts make these compromises for many reasons: sometimes for administrative convenience, sometimes for fear of abuses, and sometimes to protect particular classes of defendants. But in *Florida Star* the Court said a rule affording only an incomplete remedy for invasion of privacy (reading Florida law as allowing the action only against media dissemination) "simply cannot be defended on the ground that partial prohibitions may effect partial relief."[109]

Second-guessing tort law choices, of course, is precisely what constitutional rules are designed to require. The entire constitutional law of defamation is a product of second-guessing the judgments tort law had made about the need to protect speech interests from the effects of libel judgments. But in that context the second-guessing is less intrusive because the reviewing court makes a one-time evaluation of those effects and then prescribes general rules that it believes will better accommodate the competing interests. In the balancing model, the second-guessing occurs anew with each case.

III. Tort Law

These models of constitutional analysis enable courts to take into account a great number of variables in assessing the speech interest at stake

106. *Id.* at 2612.
107. *Id.* at 2617 (White, J., dissenting).
108. *Id.* at 2612.
109. *Id.* at 2613.

in any communications tort setting. They permit distinctions between speech on matters of public significance and speech of purely private concern. Speech that is politically motivated can be treated differently from economically motivated speech. Truthful speech is distinguished from falsehood, and within the latter, knowing or reckless falsehoods may be distinguished from those that are merely negligent or even innocent. Truthful speech can be further parsed by determining whether it was lawfully acquired. Commercial speech is distinguished from "more important" speech. Commercial speech doctrine exempts "misleading" speech, suggesting a refinement of the true-false dichotomy that has yet to be developed. Fraudulent speech may be exempted from protection, along with incitement.

The recognition of all these variables gives courts great flexibility in dealing with the speech side of speech-tort conflicts. What is lacking is any recognition that the variables are at least as numerous on the tort side. It is important, of course, to recognize the many speech interests that may be affected by tort liability, and to appreciate the variety of constitutional analyses that can be consulted. But these analyses will not produce sensitive and efficient resolutions of speech-tort conflicts unless we also appreciate the diversity of the pertinent torts.

A. Interests Protected

The labels of the various torts only begin to suggest the variety of interests they protect. Defamation protects not only reputation, but also public image, personal dignity, and emotional security. Privacy protects similar dignity and emotional interests, but also one's personal secrets, one's security from unwanted intrusions, and one's power to control the commercial exploitation of one's persona. Actions for infliction of emotional distress protect against mental anguish, but also against the physical illness and social and economic dysfunction that can flow from severe emotional distress. Misrepresentation, injurious falsehood, and interference with business relations protect trade relations, economic expectancies, goodwill, the value of corporate and product image, and commercial secrets.

In addition to those interests of the particular plaintiff, the communications torts protect a range of broader social interests. The defamation, privacy, and emotional distress torts help preserve a modicum of humanity, civility, and integrity in public discourse.[110] The law of misrepresentation, injurious falsehood, and interference with patronage protects the integrity of the marketplace, and interference with contract helps protect the bargaining process.

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110. *See* Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986). This superb article reveals the interests served by the law of defamation to be more powerful, more subtle, and more varied than most of us had previously appreciated. If the perceptiveness of this article were brought to bear on the interests served by other communications torts, I suspect some of those also would turn out to be more compelling than is commonly supposed.

The interests protected vary in importance as well as in kind. Consider, for example, the two most important privacy torts. The first, commercial exploitation, is primarily an economic construct. By creating a tort for use of a person's image to promote a business, a product, a service, or even a charity, the law has created an entire industry that generates millions of dollars of income for entertainers, sports heroes, retired politicians, and other celebrities, to say nothing of the agents, photographers, producers, and lawyers who are employed in the endorsement industry. The law in this area is generous with its protection. Plaintiffs are able to prevent not only unauthorized use of their own names, photos, and voices, but even the use of impostors who look or sound like them.[111] Indeed, most states allow the celebrity's heirs to continue to control the commercial use of the image after the celebrity's death.[112]

The other major privacy tort, disclosure of private facts, has little economic value. In a society that is deeply committed to openness, the tort is hedged about with restrictions that lead some to question whether it protects anything at all. Plaintiffs rarely win during their lifetimes, and once they die their secrets may be mercilessly exposed with impunity.[113] No lawyers make a living from this branch of privacy law.

But which of these torts protects the more important interests? Abolishing the law of commercial exploitation would substantially reduce the income of a few thousand individuals, but would hardly threaten the Republic. The interests this tort protects are commercially important, but they are not interests perceived as essential to a civilized society. Protection of personal privacy, however, is a value many consider as important as any in our legal system. In a few contexts, such as contraception and abortion, personal privacy receives specific constitutional protection, and it is a more general goal of many constitutional rules, such as the prohibition against unreasonable searches. That personal privacy is a value sometimes protected by constitutional law does not mean it must be protected by tort law, of course. But it does suggest that this area of tort law protects an interest that we value highly. An exploration of the interests served by other communications torts would reveal similar complexity. But a comparison of these two related torts is enough to indicate that identifying the interests protected by a particular tort and evaluating their importance is not the straightforward matter that the balancing formula implies.

B. Effects on Speech

The impact of these torts on speech interests is as varied as the interests they protect. Some, like defamation, clash with speech interests strongly

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111. *See, e.g.*, Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Onassis v. Christian Dior-New York, Inc., 122 Misc. 2d 603, 472 N.Y.S.2d 254 (Supp. 1984).

112. The cases are reviewed in *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products*, Inc., 250 Ga. 135, 296 S.E.2d 697 (1982).

113. *See* RESTATEMENT (SECOND) OF TORTS § 652I. The Restatement (Second) of Torts states "Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded." *Id.*

and frequently. Others, like misrepresentation, rarely present any serious conflict. Some torts are more likely than others to chill speech. The threat of defamation lurks in much speech and is often difficult to detect in advance. The risk of invasion of privacy is less frequent, at least in speech that lies close to the core of first amendment values, and is usually readily apparent. The risk of liability for interference with contract is confined to very specific circumstances, and is not a factor in the vast majority of speech. These variations are present even in the same general body of tort law. Negligent misrepresentation, for example, often presents the potential for unexpected and draconian liability, while the risks flowing from deceit are usually obvious.

Moreover, fear of self-censorship must somehow be reconciled with the fact that one of the purposes of tort law is deterrence. An impetus to self-censorship may be exactly what the law *should* create. If the tort involves speech urging the elderly to buy worthless insurance policies, the chilling effect that the remedy will produce is a plus.

Attempts to assess the effect of tort liability on speech must also take into account the nature of the speech. In a related area, the Supreme Court has observed that commercial speech may be less vulnerable to chilling because it is easier to verify and more durable than other types of speech.[114] If commercial speech is durable, fraudulent speech sometimes seems to be indestructible. Even in noncommercial speech, risks of self-censorship may differ. Plaintiffs rarely win against the media in either private-facts privacy or defamation cases, yet the media continues to view defamation law as a significant source of self-censorship, while privacy law seems to have little chilling effect.

C. Tort Law Protections for Speech

The communications torts also vary widely in the degree to which their own rules accommodate speech interests. Most of the common law of defamation consists of rules designed to protect speech: privileges, restrictions on what may be considered defamatory, special harm requirements, and defenses such as substantial truth. Much of privacy law was developed after courts recognized that tortious speech might be constitutionally protected, so its own rules include important speech protections. The business torts developed largely without constitutional influence, but even they provide some protections for speech. The law of interference with business relations accommodates speech values by asking whether the interference is "malicious" or "improper."[115] Deceit protects even false speech unless it is

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114. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 n.24 (1976).

115. "Malice" was the requisite at common law. *See* Lumley v. Gye, 118 Eng. Rep. 749 (1853). "Improper" is the substitute proposed by the Restatement (Second) of Torts § 767, and that concept is widely employed today. *See, e.g.*, Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978).

spoken with scienter, *i.e.*, lack of any reasonable basis for believing it is true. The negligent misrepresenter faces no liability even for false information unless the speaker intends the recipient to rely on it in a business transaction.

In some instances the courts might decide that these tort law protections are sufficient. For example, if tort law clearly states that speech interests must be given heavy weight in determining whether speech interfering with patronage is actionable, there may be no need for any additional constitutional protection. One of the unfortunate consequences of prescribing constitutional rules is that it stunts the growth of state law. This has happened in defamation, where constitutional requirements have left the states little room or incentive to experiment with their own solutions to the speech-tort conflict.

Today there is little reason to believe that state courts are generally insensitive to speech interests or unwilling to change outmoded tort rules. Indeed, some state courts are now more protective of some kinds of speech than the Supreme Court.[116] In areas not already preempted by constitutional rules, courts are fashioning new tort rules that protect speech quite effectively. They have blunted the threat of newspaper liability to readers who suffer financial losses through reliance on erroneous information by holding that readers are not within the scope of the newspaper's liability for negligent misrepresentation.[117] They have protected publishers from liability for publishing ads that cause physical harm by holding that the publisher has no duty in negligence law to screen the ads.[118]

When some states are adequately protecting the speech values in tort cases and others are not, a solution may be to selectively constitutionalize the tort rules that are sufficiently protective. This appears to have occurred (though for other reasons) in private-facts privacy; the common-law rule denying liability when the disclosure is of a matter of legitimate public interest now seems to be a constitutional rule.[119] The decisions mentioned above, restricting publishers' liability for negligently caused economic and physical harms, are other examples of rules that might be constitutionalized if states fail to follow them as a matter of tort law. Courts should use this option sparingly, however, because tort rules when constitutionalized become as stultifying as any other kind of constitutional rules.

IV. CONCLUSION

The balancing model is not an appropriate method of analyzing specific speech-tort conflicts, but it does ask some questions that are pertinent in a

116. *See, e.g.*, Hall v. Post, 323 N.C. 2590, 372 S.E.2d 711 (1988) (refusing to recognize cause of action for private-facts branch of privacy); State v. Henry, 302 Or. 510, 732 P.2d 9 (1987) (obscene speech protected by state constitution).

117. *See* Gutter v. Dow Jones, Inc., 22 Ohio St. 3d 286, 490 N.E.2d 898 (1986).

118. *See* Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830 (5th Cir. 1989).

119. *See, e.g.*, Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975).

more general way: what are the interests served by the tort in question, and what is its impact on speech interests? Before choosing a model of constitutional analysis for a particular case—indeed, before concluding that it is necessary to supplement the tort analysis with *any* constitutional model—courts should ask those questions. The answers might lead a court to conclude, for example, that the private-facts branch of privacy deserves considerable deference, while the false-light branch does not. The former is the only means of protecting a personal dignity interest that is almost universally recognized, while the latter overlaps to some extent with defamation and private-facts remedies, and seems to protect only interests that those bodies of law have chosen not to protect.[120]

Courts might conclude that the tort of deceit requires less constitutionalization than interference with contract. The former by definition imposes liability for only falsehood, and it provides a remedy for speech that experience shows is hard to deter, and is almost always economically and socially destructive. Interference with contract, on the other hand, is as likely to be accomplished by truth as by falsehood, and its social and economic consequences are more questionable. It helps preserve the inviolability of contracts, but it is only supplementary to the usual breach-of-contract remedies in that respect, and it interferes with the concept of efficient breach of contracts. It subjects the interferor to punitive damages, while the breacher (who would seem to be at least equally culpable) is not subject to such damages—a fact that makes it hard to find that the remedy is narrowly tailored.

When a court concludes that tort rules are insufficient to protect first amendment interests, it has essentially two options. The first is simply to hold the challenged tort law unconstitutional, leaving the state to guess how or whether the tort can be modified to make it constitutional. The other option is to prescribe what the constitution requires.

Employing the balancing model to hold a tort recovery unconstitutional is a manner of exercising the first option; the decision prescribes nothing. The balancing court may conclude that the interest protected by the tort is not strong enough to justify *any* burden on the speech interest, but more often it will merely indicate that the remedy in question is not a permissible means of addressing the tort interest. The process may tell the state what is wrong with its remedy, but it does not prescribe the solution.

The defamation model is the preeminent example of the second option, prescribing specific constitutional rules to supplement or replace tort principles. In the Supreme Court's defamation cases the states are not only told why their libel law gives insufficient protection to speech, but they are also told how their law must be modified to be constitutional: public plaintiffs must not be allowed to recover unless they can show actual malice; private plaintiffs must not be allowed to recover unless they can show negligence,

120. *See* Renwick v. News and Observer Publishing Co., 310 N.C. 312, 312 S.E.2d 405 (1984), *cert. denied*, 469 U.S. 858 (1984).

and then only for actual injury; both classes must carry the burden of proving falsity, and neither can recover for statements of opinion.

The first option is attractive to courts for several reasons. It keeps courts' constitutional role separate from their common-law role. It leaves the states some room to experiment with their own solutions to speech-tort conflicts. Perhaps most important, it enables courts to identify problems without having to provide solutions. For example, it has allowed the Supreme Court to recognize the collision between the private-facts branch of privacy law and first amendment interests, and to resolve those conflicts on an ad hoc basis in favor of the speech interests, without having to decide how or whether the underlying conflict can be resolved. This aspect of the nonprescriptive approach is especially valuable when there is little consensus among members of the Court; obtaining five votes to hold a particular recovery unconstitutional is no doubt easier than reaching agreement as to what would be constitutional.

Use of this option in the tort context, however, is profoundly unfair to private litigants. In the regulatory context, the legislature or an agency must decide how to respond, if at all, to a decision holding a statute or regulation unconstitutional. These bodies have the power and the responsibility to decide the state's interests. If they choose to experiment with solutions that may or may not prove sufficient, they do so at public expense. If the first solution fails, their institutional continuity enables them to follow up with alternatives.

When a court provides no solution to a constitutional problem in tort law, however, these burdens fall on private litigants. The plaintiff whose case identifies the constitutional problem may get no opportunity to suggest a solution; even if the decision has little to do with the merits of the case, as in *Florida Star*, it usually disposes of the plaintiff's claim. The burden of proposing a solution to the tort-speech conflict falls to those future litigants who are willing to gamble on their own (or their lawyers') ability to predict whether a particular solution will be constitutionally acceptable. Because not every potential litigant will be able or willing to take that gamble, some deserving claims will not be brought, and some defendants will settle improvidently.

This nonprescriptive approach also exacts a price from the public. Whether the speech-tort conflict is ever revisited—and if it is, the thoroughness with which the competing interests are identified and articulated—is entirely at the mercy of private litigants. The Court in *Florida Star* conceded that the state has strong interests in protecting the privacy of rape victims, and said that those interests might justify imposition of tort liability in some circumstances. But the matter will get no further consideration until some future rape victim whose name is published is willing to gamble that her case will seem more compelling to a court than B.J.F.'s. There is always the possibility that the legislature will intervene to vindicate the state's interest, but insofar as tort liability is concerned, legislatures are accustomed to deferring to the courts.

When a court holds a recovery for tortious speech unconstitutional, it shirks its responsibility if it fails to say what, if anything, can be changed

to make the rules of the tort constitutionally acceptable. The burden of prescribing is onerous, and it cannot be discharged by embracing the defamation model as an all-purpose solution for other types of tort-speech conflicts to which that model is not suited. But the court is best positioned to resolve the conflict, and it is unfair to place the burden on future litigants. Moreover, here as elsewhere the power to proclaim is more likely to be exercised judiciously if it is accompanied by the responsibility to resolve.