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# "DUTY-DEFINING POWER" AND THE FIRST AMENDMENT'S CIVIL DOMAIN

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Response to: Daniel J. Solove & Neil M. Richards, Rethinking Free Speech and Civil Liability, 109 Colum. L. Rev. 1650 (2009).

In *Rethinking Free Speech and Civil Liability*,[1] Daniel Solove and Neil Richards attempt something truly ambitious. The authors seek to map coherent boundaries for the First Amendment's vast civil domain. Their project merits serious attention. Currently, different rules apply to civil liability for speech depending on whether the liability arises in tort, contract, or property. Solove and Richards claim that these boundaries are unworkable, under-theorized, and in some cases destined to collide. They develop a framework for mapping the First Amendment's civil domain that is based upon a distinction regarding the type of *power* the state exercises in various civil liability contexts. This response critically examines the choice and meaning of power, and the boundaries that a power-defining approach would draw.

## I. CURRENT BOUNDARIES AND APPROACHES

The boundaries of the First Amendment's civil domain have not been systematically drawn. The Court started mapping civil liability boundaries in *New York Times Co. v. Sullivan*,[2] owing to the unique First Amendment concerns raised by state libel laws. From that point forward, there appears to have been no master plan. Indeed, the present boundaries might well have been quite different. With respect to access to certain private properties, for example, the Court was in favor of First Amendment applicability just a few years before it ruled against it.[3]

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1. Daniel J. Solove & Neil M. Richards, Rethinking Free Speech and Civil Liability, 109 Colum. L. Rev. 1650 (2009).

2. 376 U.S. 254 (1964).

3. Compare Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319–20 (1968) (holding nonemployee union members had right to

As Solove and Richards observe, the current boundaries have not been adequately justified.[4] Most tort claims seem to have been reflexively brought within the First Amendment's domain, while most contract and property claims have remained beyond these borders. As Solove and Richards note, however, civil liability boundaries often overlap and intersect. For example, breach of confidentiality has both tort and contract characteristics.[5] Which rule ought to apply?

As the authors note, tort, contract, and property liability *all* may substantially affect expressive interests. "Private" law, whatever its specific form, might dictate or distort public discourse, suppress the free flow of information, and limit opportunities for public exchange. Moreover, all civil liability emanates from the state. By what logic or principle, then, are only certain claims to be excluded from the First Amendment's civil domain?

Solove and Richards do superb work culling various proposed answers to this question from existing shards of judicial reasoning and academic commentary.[6] They contend, however, that each of the approaches is conceptually or theoretically flawed, and that none coherently explains the existing boundaries of the First Amendment's civil domain. Solove and Richards attempt to synthesize the vast landscape of civil liability under a single First Amendment framework. They urge that *power* be the new principal boundary marker. The authors claim that the First Amendment is substantively applicable whenever "(1) the government defines the content of the civil duty; and (2) the speaker cannot avoid accepting the duty, or the government exercises undue power in procuring the speaker's acceptance."[7] Claims that satisfy both elements of this definition are examples of the exercise of "duty-defining power," which the authors contend merits serious First Amendment scrutiny. All other civil claims arise from the exercise of "non-duty-defining power," which does not trigger any First Amendment scrutiny.[8]

Solove and Richards note that under this framework, the general boundaries of the First Amendment's civil domain would be largely unchanged. Thus, enforcement of most tort duties would continue to receive serious First Amendment scrutiny, while enforcement of most contractual duties would receive none.[9] As explained below, the extent to which the power-defining approach would redraw the boundaries of

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peacefully picket on property owned by mall), with Hudgens v. NLRB, 424 U.S. 507, 521 (1976) (holding speakers had no First Amendment rights at private shopping center).

4. See Solove & Richards, supra note 1, at 1652–54 (discussing cases of civil liability and free speech that have different outcomes under First Amendment).

5. Id. at 1669–70.

6. Id. at 1673–85 (discussing various approaches).

7. Id. at 1692 (emphasis omitted).

8. See id. at 1687–90 (explaining distinction between duty-defining and non-duty-defining power).

9. As noted infra Part III.B, the landscape with respect to property claims would be revised.

the First Amendment's civil domain is debatable. In any event, the authors' principal goal is to offer a more coherent justification for both the boundaries that exist and for the treatment of claims located at the borders, where civil forms of action sometimes overlap and intersect.

## II. AUTONOMY, CONSENT, AND STATE POWER

Before turning to the power-defining framework, I want first to consider one of the approaches the authors reject—the "consensual waiver" approach. Where a speaker voluntarily agrees not to speak, as in a confidentiality agreement, why should the First Amendment apply to the enforcement of that promise? The speaker has a strong liberty interest in making such decisions.[10] This liberty interest plausibly explains some portion of the First Amendment's current civil landscape. In particular, it seems to solve the vexing puzzle of confidentiality claims. As Solove and Richards acknowledge, principles of consent and autonomy play a significant role in their power-defining framework. Indeed, the rather substantial influence of autonomy on the power-defining framework (it affects both elements of the definition of "duty-defining") is such that one might wonder why a *new* approach grounded in "power" is necessary at all.

Solove and Richards claim that the consensual waiver approach fails to take into account the rights of audiences to receive information. But their approach might be subject to the same criticism. Under the power-defining approach, so long as private parties voluntarily negotiate expressive limits or enter relationships in which a duty of confidentiality is implicit, putative audience members have no cognizable First Amendment objection to the loss of what may in some cases be information of vital public concern. As a theoretical matter, rejecting a pure autonomy approach at least allows for some consideration of audience interests. As a practical matter, however, the switch to power would seem to benefit audiences only minimally, if at all.

Solove and Richards also claim that the consensual waiver approach permits the state to effectively purchase silence from speakers. Their example is a cash-for-silence contract, under which the government can purchase the suppression of criticism of its own policies.[11] But as Solove and Richards note, under the unconstitutional conditions doctrine, such an agreement would be unenforceable.[12] The state may, of course, attempt to purchase or coerce silence in more subtle ways. The First Amendment is applicable, however, whenever the sovereign acts—whether as regulator, subsidizer, purchaser, contractor, employer, or

10. See Wooley v. Maynard, 430 U.S. 705, 714 (1977) (holding that First Amendment protects "the right to refrain from speaking at all"). See generally C. Edwin Baker, Human Liberty and Freedom of Speech (1989) (offering theory of free speech grounded in liberty and autonomy).

11. Solove & Richards, supra note 1, at 1690.

12. Id. at 1690–91.

property owner. Further, as the authors note, waivers of constitutional rights are strictly construed by courts.[13] In other words, concerns regarding the exercise of "undue power" by the state are, to some extent, built into existing First Amendment doctrine.

A pure autonomy approach helps to untangle the civil liability knot, specifically as it relates to the problem of confidentiality. The principal weakness of the autonomy approach is its lack of comprehensiveness. If the goal is to explain the relationship between free speech and civil liability in an expansive sense, principles of consent and autonomy only advance the project so far. Autonomy principles shed important light on one region of the civil liability landscape. They cannot justify or explain the remaining boundaries. The question is whether a power-based approach, modified by principles of speaker autonomy, has greater explanatory power than an autonomy approach, modified by concerns regarding state power.

## III. DUTY-DEFINING POWER AND CIVIL DISCOURSE

As Solove and Richards observe, the object of line drawing in the civil liability context is to identify instances in which state-sponsored civil actions pose the greatest threat to free speech. Mechanically and theoretically, "power" is better suited to this task than autonomy. Speech regulations are ordinarily viewed, often quite skeptically, through the prism of power. And some civil liability, as the authors correctly note, is in essence a form of regulatory power.[14] But it is not, as the authors suggest, the mere imposition of *any* mandatory duty regulating social conduct that seriously threatens the First Amendment. Rather, as is true with regard to any speech regulation, it is the character or substance of the duty that ought to determine the degree of the First Amendment threat. This, ultimately, is what separates many tort and statutory speech rules from contract rules; it is also, as I will suggest below, one of the things that sets property-based liability apart from other forms of civil liability.

### A. *Civil Liability as Regulatory Power*

Solove and Richards note that civil liability is most troublesome from a First Amendment perspective "when it inhibits or tries to direct public discourse."[15] Accordingly, the authors are primarily concerned with "[t]he government's role in shaping the speaker's expression,"[16] specifically instances in which the state is "dictating, distorting, or

13. Id. at 1677 n.149.

14. See Richard A. Epstein, Was *New York Times v. Sullivan* Wrong?, 53 U. Chi. L. Rev. 782, 789 (1986) ("The Constitution speaks about freedom of speech, and liability rules can tread upon that freedom as much as direct regulation can.").

15. Solove & Richards, supra note 1, at 1689.

16. Id.

suppressing the terms or content of public discourse."[17] They seek to identify forms of government power that are "particularly dangerous and should be curtailed as abridgements of free expression."[18] This is the appropriate benchmark. The question is whether the power-defining framework draws boundaries that faithfully track it.

Solove and Richards convincingly establish that, as a function of speaker autonomy and consensual waiver, contractual claims that do not involve the exercise of undue state power or influence properly lie outside the First Amendment's domain. But that leaves a substantial landscape of tort and statutory liability. Words are a potential basis for a staggering amount of civil liability. The state imposes countless mandatory duties that have some impact on the act of speaking. In addition to libel and privacy, common law duties imposed under assault, negligence, alienation of affections, interference with prospective economic advantage, and even trespass to chattels torts, all may incidentally impact speech.[19] Under the power-defining framework, all of these actions, and presumably any others not based upon consensual waiver, are deemed "particularly dangerous" threats to public discourse and public debate.[20] As a result, in common law actions the rule must either be altered, as in the case of libel, or courts must engage in ad hoc balancing.[21]

This approach would formally constitutionalize substantial areas of the common law. That would certainly be consistent with some recent trends, as evident in areas from punitive damages to prison litigation. But it bears emphasizing that *Sullivan*, from which this line-drawing exercise emanates, was an anomaly. The presumption, as Richard Epstein has noted, "should be in favor of the constitutional permissibility of the common law rules."[22] On this view, the rules ought to be altered or displaced by constitutional principles only where truly necessary to preserve core First Amendment rights and values. We ought to be looking, as the authors suggest, for the "cases where the government is using the civil liability system in ways that are especially dangerous."[23]

In drawing their boundaries, Solove and Richards have plainly opted for certainty over flexibility. The authors are extremely skeptical of state power, so much so that irrespective of the particular content of the duty being imposed, they perceive a serious threat to public discourse. Anyone who has struggled with the definitional and theoretical difficulties inherent in this area can appreciate their choice. Moreover, persuasive negative First Amendment justifications counsel

17. Id.

18. Id. at 1686.

19. State and federal statutes, including employment and intellectual property laws, are also part of this landscape.

20. Solove & Richards, supra note 1, at 1686.

21. Id. at 1696–97.

22. Epstein, supra note 14, at 791.

23. Solove & Richards, supra note 1, at 1697.

skepticism of state power.[24] There is no question that civil liability can and often does regulate the act of speaking. The question is whether this form of regulation can generally be equated with state suppression of public discourse.

Consider the great mass of potential tort claims. One of the things that distinguishes tort from contract claims is that tort law consists of extrinsically imposed obligations or directives that specify "public norms of conduct."[25] The communicative torts—that is, those that regulate speech as a primary subject rather than one among many means of violating some general duty—are, as the courts have justifiably held, particularly dangerous to free speech. As descendants of criminal speech provisions, their provenance alone provides some reason for special scrutiny. Actions that permit the state, through judges and juries, to evaluate and ultimately define the boundaries of public civil discourse raise special First Amendment concerns. Robert Post has described privacy torts, for example, as "civility rules" that define persons and communities.[26] Some civil liability rules are committed to "the task of constructing a common community through the process of authoritatively articulating rules of civility. The common law tort purports to *speak for* a community."[27] When they speak to the substance of public debate, civil liability rules deserve special scrutiny. For similar reasons, we ought to be wary of civil claims like intentional infliction of emotional distress, which may facilitate suppression of something as critical to free speech as political satire.

Absent some First Amendment scrutiny of these claims, governments would essentially be empowered, through the imposition of certain tort and statutory duties, to "maintain what they regard as a suitable level of discourse within the body politic."[28] A public civility code that rests upon common law or statutory claims is as threatening to the First Amendment as a campus speech code or a law that proscribes public utterance of derogatory or offensive words.[29]

Not all mandatory duties pose this sort of threat, however. For example, negligence law requires in many contexts that a person warn others of foreseeable dangers.[30] Enforcement of a mandatory duty to warn "dictates" or compels speech. Under the power-defining approach,

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24. See Frederick Schauer, Free Speech: A Philosophical Enquiry 86 (1982) (emphasizing deep distrust of government power to regulate expression).

25. Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 Geo. L.J. 695, 755 (2003).

26. Robert C. Post, Constitutional Domains: Democracy, Community, Management 56 (1995).

27. Id. at 67.

28. Cohen v. California, 403 U.S. 15, 23 (1971).

29. See Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 670–71 (1973) (holding state cannot proscribe speech or conduct that is merely "offensive to good taste").

30. See, e.g., Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976) (holding psychotherapist has duty to warn third parties threatened by patients).

the defendant who fails to comply with a duty to warn would presumably be entitled to some First Amendment "defense."[31] But imposition of a duty to speak under these circumstances does not seriously threaten First Amendment values. The duty to disclose or to warn not only aims to make us all safer, but creates a more informed citizenry with regard to certain hazards. This particular duty, although mandatory and relating directly to the content of speech, does not seek to evaluate or define civil discourse, or "speak for" a community. Nor does it implicate core First Amendment concerns regarding compelled belief or state ventriloquism.

As the example shows, the character of the duty matters. The duties we ought to be most concerned with are those that evaluate and define the substance of public discourse and debate. We ought to be especially wary of these civil claims owing to the primary state interests they serve, namely protecting public audiences from uncivil speech and shielding persons from various dignitary harms associated with public disclosure. These purposes directly conflict with the individualism at the core of the contemporary First Amendment.

It is not simply that some liability rules specify, in very general terms, "the content of duties that private actors owe to each other,"[32] or that they create rules of social conduct that may impact speech, which poses a "particularly dangerous" First Amendment threat. It is, rather, what some tort and statutory standards do—or are capable of doing—to individuals that marks them as serious threats to free speech. Certain duties press and impinge upon speakers and speech in a manner and to a degree that others do not. Some communicative or expressive duties aim principally to regulate what can be said to another. Others specify how information can properly ("civilly") be obtained and shared with the public. These duties are not merely *duty*-defining; they are *person*-defining and *expressive community*-defining in a much broader sense. This is what renders defamation, false light, and privacy torts far more serious threats to free speech than the duty not to interfere with possession of one's chattels, marital relations, or prospective economic advantages. In the latter actions, moreover, speech often occurs in more private settings and is regulated not for its own sake, but as one means of accomplishing some other forbidden end. It is thus difficult to characterize these forms of liability as "cases where the *government* is using the civil liability system in ways that are especially dangerous."[33]

To be clear, I am not suggesting that speech concerns are absent in any of these contexts. But just as the authors would have contract law play the principal role in assessing "coercion,"[34] courts could apply tort

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31. The defense would undoubtedly fail. Indeed, Solove and Richards might argue for a categorical rule to that effect. That adjustment may be warranted; but creating categorical rules cannot resolve questions regarding the accuracy or viability of the power-defining approach.

32. Solove & Richards, supra note 1, at 1686.

33. Id. at 1697 (emphasis added).

34. See id. at 1701 (suggesting that coercion "would be an issue for contract law, not

and statutory liability in light of free speech concerns without holding the First Amendment fully "applicable" any time a mandatory duty is imposed.[35] Where the common law or statutory duty is not itself constitutionally tainted, perhaps it would be best to allow states to experiment with, develop, or repeal doctrines that implicate speech concerns.[36]

The power-defining framework improves upon the autonomy approach by asking what is unique, and uniquely threatening, about certain forms of civil liability. We ought to conceive of "duty-defining power" as regulatory power that not only undermines or eliminates speaker autonomy, but authorizes an evaluative process by which the state dictates the substance of public discourse. So characterized, duty-defining power is a form of censorship or suppression that merits serious First Amendment scrutiny.

### B. *Property Lines*

When, as suggested above, we measure the substance of a duty against First Amendment values and concerns, the property lines drawn by the duty-defining approach seem somewhat incongruous. The tort duty not to trespass onto the land of another is defined by the state, is mandatory, and may indeed affect speech. Although they prohibit speakers from converting the private property of another into a speech forum, thus affecting the location of expression, property rules do not generally purport to evaluate or dictate the substance of public discourse. If they are to be congruent, the First Amendment's property lines ought to mark off places in which the state arguably has some duty to facilitate expression. It is in such places that property exclusions pose the greatest threat to free speech.

Solove and Richards reject the *Hudgens* rule, which holds that the First Amendment is not technically applicable on private properties. They contend that the First Amendment is also *substantively* applicable whenever a civil no trespassing duty is enforced.[37] This means that a trespassing backyard or living room protester possesses a First Amendment interest in expressing herself in that location. The authors are clearly uncomfortable with this result, which conflicts with significant residential privacy interests and the basic First Amendment principle that speakers do not have a right to convey messages "whenever and however and *wherever* they please."[38] They retreat to the position that a categorical rule, namely that the homeowner's interests always outweigh

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the First Amendment").

35. See, e.g., Cucinotti v. Ortmann, 159 A.2d 216, 217 (Pa. 1960) ("Words in themselves, no matter how threatening, do not constitute an assault.").

36. See Elaine W. Shoben, Uncommon Law and the Bill of Rights: The Woes of Constitutionalizing State Common-Law Torts, 1992 U. Ill. L. Rev. 173, 179 (arguing that constitutionalization of assault and other torts would be unwise).

37. Solove & Richards, supra note 1, at 1698–99.

38. Adderley v. Florida, 385 U.S. 39, 48 (1966) (emphasis added).

the trespasser's, may be appropriate.[39] Notably, by contrast, their approach would permit those in gated communities, condominium associations, and other private associations to enact and enforce substantial speech restrictions by covenant or agreement.[40] Putting aside which of these limitations is actually the greater threat to free speech,[41] the boundaries here seem anomalous; the trespasser in a private community would enjoy some level of First Amendment protection, while the residents of the community may enjoy none at all.

Property is indeed critical to free speech. The *where* of speech can be just as important as *what* may be said or *how* information may be disseminated. But in terms of First Amendment values, not all places are of equal significance. The greatest threats to free speech in terms of property rules are the public forum and time, place, and manner doctrines, which have resulted in increasingly diminished opportunities for expression and exchange even in traditional public forums.[42] The First Amendment is undoubtedly both technically and substantively applicable to regulations of public expression in these places; the problem lies in the balance that has been struck between state and speaker interests.

Solove and Richards correctly reject the traditional state action frame, which obscures more than it elucidates, with regard to private properties. The more appropriate question, as Mark Tushnet has recently observed, is whether the government has a substantive duty to provide or protect the right in question.[43] With respect to properties that are generally open to the public, tend to be heavily subsidized by the state, and facilitate access to large public audiences, one could plausibly argue that government has a duty to facilitate and protect expressive rights. Exclusion from quasi-public venues like large shopping centers, which have replaced the town squares and public streets speakers have largely abandoned or been displaced from, poses the greatest threat to the First Amendment. Increasingly, it is *only* in such places that significant public audiences can be found.[44] With regard to these properties, trespass enforcement may well be "duty-defining," in the sense that it suppresses public discourse on a substantial portion of our expressive topography. By contrast, backyards and living rooms are not significant speech venues; restricting access to

39. Solove & Richards, supra note 1, at 1698–99.

40. See id. at 1700–01 (discussing restrictive residential covenants).

41. See Timothy Zick, Speech Out of Doors: Preserving First Amendment Liberties in Public Places 159–61 (2008) (discussing free speech implications of "gated communities" and other forms of privatization).

42. See id. at 53–59 (criticizing "judicial bureaucratization" of public places).

43. Mark Tushnet, State Action in 2020, *in* The Constitution in 2020, at 69, 70 (Jack M. Balkin & Reva B. Siegel, eds., 2009) ("[T]he state-action doctrine is not really about what the state does, but what it has a *duty* to do.").

44. See N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 779 (N.J. 1994) (recognizing, under state constitution, that "if the people have left for the shopping centers, our constitutional right includes the right to go there too, to follow them, and to talk to them").

such places has little to do with *public* debate. The state has no duty to extend speech protections over backyard fences or through front doors.

Property-based duties not to trespass on, interfere with, or convert private property certainly "shape social conduct in ways defined by the state."[45] But as with the duty to warn, this is not sufficient to render the First Amendment fully applicable. The substance of these duties, which protect against interference with possession or use of real property and chattels, seems rather far removed from concerns regarding state censorship or suppression of speech. That is not to say that no First Amendment concerns arise where property rules exclude speakers from preferred venues. But again, there are ways to address such concerns short of imposing First Amendment standards on all private properties.[46]

## CONCLUSION

*Rethinking Free Speech and Civil Liability* will enhance critical thinking about the boundaries of the First Amendment's civil domain. The power-defining approach is an impressive attempt to blend principles of state power and speaker autonomy into a coherent and workable formula. Solove and Richards successfully untangle the confidentiality knot. Their approach resolves difficult borderline cases in which different standards sometimes collide. It is determinate without, as the authors show through various examples, being rigidly categorical. Moreover, by focusing on power, Solove and Richards remind us that some liability rules can be as dangerous to free speech as ordinary laws and regulations. I have raised questions about the extent to which we ought to constitutionalize speech-related civil actions. But disagreement with regard to where the boundaries of the First Amendment's civil domain ought to be drawn is perhaps inevitable with a project of this scope. Solove and Richards may not have drawn perfect boundaries. But the lines they have drawn, and more importantly the reasons for them, are more coherent and determinate than those that currently exist.

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45. Solove & Richards, supra note 1, at 1686.

46. Courts might, for example, tighten the requirements for a prima facie case where speech concerns are present. See, e.g., Intel Corp. v. Hamidi, 71 P.3d 296, 303–04 (Cal. 2003) (requiring recipient of noncommercial spam email to prove actual damage to computer to state trespass to chattels claim).