I. COLLATERAL CENSORSHIP

[A] more general problem in free speech law [is] a phenomenon I call collateral censorship.1 Collateral censorship occurs when one private party A has the power to control speech by another private party B, the government threatens to hold A liable based on what B says, and A then censors B’s speech to avoid liability. The offending speech may be defamatory, obscene, fraudulent, or a violation of copyright. In most situations A has greater incentives to censor B than B has to self-censor. That is because B has an additional interest in promoting his or her own speech that A usually lacks. Hence A can be expected to censor B collaterally with little regard for the value of B’s speech to B or to society at large.

Although to my knowledge no court has yet recognized collateral censorship as a distinct doctrinal category, it appears to be a fairly common phenomenon. For example, editors and publishers, driven by fear of defamation suits, may refuse to run stories by their reporters. Internet service providers, fearing that they may be held liable for contributory infringement of copyrighted materials, may attempt to ban messages from parties suspected of disseminating such materials.

Once one recognizes the ubiquity of the phenomenon, it should be obvious that not all government regulation that leads to collateral censorship is unconstitutional. The question is which varieties are permissible and which are not. It is tempting but incorrect to argue

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1. I borrow this term from Michael I. Meyerson, Authors, Editors, and Uncommon Carriers: Identifying the “Speaker” Within the New Media, 71 Notre Dame L. Rev. 79, 116, 118 (1995).
that collateral censorship is never unconstitutional because there is no state action. It is not the state that is censoring the employee or the customer but a private party—the newspaper or the Internet service provider. In fact, there is state action in every case of collateral censorship, because the government has created incentives for private parties to censor each other. Moreover, in virtually all cases of collateral censorship, the government not only knows but expects and desires that the private party will censor the unprotected offending material, even if it does not know exactly how much constitutionally protected material will also be censored in the process.2

Even so, collateral censorship is not necessarily unconstitutional. For example, the editors and the publishers of the New York Times are liable for publishing defamatory articles written by their reporters. Hence editors and publishers of large metropolitan dailies like the New York Times exercise considerable oversight over their reporters’ stories in order to avoid liability or the costs of defending a defamation lawsuit. Often acting on the advice of attorneys, editors and publishers severely edit or even discard much of what their reporters produce, even when a reporter insists that a story is accurate. The reporter’s statements may be matters of intense public concern and core political speech. They may be constitutionally protected so that the government could not impose liability for them directly. Nevertheless, reporters who insist on writing what the editor or publisher forbids out of fear of possible liability may be disciplined or even fired.

Do such limitations on employee speech violate the First Amendment? First Amendment law clearly does recognize constitutional limitations on liability for defamation, embodied in cases like New York Times Co. v. Sullivan,3 Gertz v. Robert Welch, Inc.,4 and their progeny. One reason for these limitations is the fear that valuable speech will be chilled by liability for defamation. But the doctrines do not appear to make any distinction between chilling the speech of editors and publishers and chilling the speech of their employees, the reporters. Both reporters and editors are entitled to the same constitutional privilege. Indeed, in Cantrell v. Forest City Publishing Co., the Court approved of a jury charge which permitted

2. See Browne, Title VII as Censorship, supra note__, at 510–13 (arguing that state action requirement is satisfied when employers censor employees); Volokh, Freedom of Speech, supra note__, at 1816–18 (arguing that state action exists when employers create anti-harassment policies out of fear of government liability, but not if they create the same policies for other reasons).
3. 376 U.S. 254, 283 (1964) (holding that First Amendment requires proof of actual malice in libel actions brought by public officials against critics of their official conduct).
the imposition of vicarious liability upon a publisher for the knowing falsehoods written by its staff writer. Here, in effect, the Court allowed the jury to hold the publisher strictly liable for an employee’s defamation. Such a rule clearly gives a publisher strong incentives to censor employee speech. Yet the Court found no constitutional problem with applying the traditional doctrines of respondeat superior in this context.

Federal securities laws require investment houses, brokerage firms, investment advisors, and even corporate officials to avoid making misleading statements about company profits, securities, and related investments. Companies are strictly regulated concerning what they may say about these matters, particularly in highly regulated procedures like proxy contests. Statements made by their employees, even politically motivated statements, may subject them to liability. Thus, rational companies will often severely limit the kinds of public statements their employees may make, and discipline or terminate employees who disobey. Do such rules violate the First Amendment because they chill the speech, not of the organizations themselves, but of their employees?

My sense is that neither of these situations presents a serious First Amendment problem, even though both involve collateral censorship. But this simply raises the question of when collateral censorship is constitutional, and when it is constitutionally troublesome.

The question we should ask is whether it makes sense, given the purposes of a regulatory regime, and the kind of harm that the legislature has a right to prevent, to treat the private censor and the private speaker as the “same speaker” for purposes of First Amendment law. Clearly this judgment is a legal fiction. The two speakers are not really identical, but the law is entitled to treat them as if they were one, and to hold the first liable for what the second does. The claim that the censor and speaker are the “same speaker” is just a shorthand way of saying that the private censor (the employer) has the right to control the content of the speaker’s (the

6. See id. Employers could argue for a stronger and additional privilege to void the libel laws on the grounds that fear of liability forces them to silence their employees more than they would silence themselves. For example, a newspaper might argue that defamatory statements against private figures should be held to an actual malice standard rather than the negligence standard permitted by Gertz, because newspapers will be likely to censor their employees much more severely than they would censor their own speech under the negligence standard. There is no indication, however, that the Court applies a different standard for employers who publish the speech of their employees and employers (or other persons) who publish their own speech.
employee’s) speech and that the private censor is properly responsible for the harmful effects of that speech.

Why might it be permissible to hold one speaker liable for the harms of another? One reason is that the private censor and speaker are part of the same enterprise that produces speech-related harm: They either collectively produce a single product that causes harm (a libelous publication), or their collective efforts create a harm or a risk of harm (misleading or fraudulent information about investments). A second reason is that the private censor is in the best position to avoid the harm. For example, we might think that the private censor is particularly good at distinguishing protected from unprotected harmful speech, that the private censor can avoid harms more easily and effectively than the speaker, or that the private censor has better information than the speaker.

Thus, we can identify three considerations that justify treating the private censor and the speaker as “the same speaker”: (1) the private censor’s right to control the speech of the private speaker, (2) the joint or collective production of a harm or danger of harm, and (3) the private censor’s superior ability to avoid the harm. Not surprisingly, these reasons for treating the private censor and the speaker as “the same speaker” for purposes of First Amendment law resemble traditional justifications for vicarious liability, in which courts treat employer and employee as the “same tortfeasor” for purposes of liability.8 (They also suggest why the Court found little difficulty with the application of respondeat superior in Cantrell, even though the use of that rule in the defamation context clearly chills the speech of reporters.)

It is easy to see why the justifications for vicarious liability are relevant to the constitutionality of collateral censorship. If we hold the private censor responsible for the private speaker’s harmful speech, it is reasonable to expect the private censor to censor. Conversely, if we don’t want to encourage the private censor to censor (because we value the free flow of ideas), we should ensure that the private censor is not held responsible for the private speaker’s harmful speech. Thus, collateral censorship is most acceptable from a First Amendment standpoint when vicarious liability is most acceptable, and it is least acceptable from a First Amendment standpoint when vicarious liability is least acceptable.

Moreover, these three considerations—the private censor’s right to edit and control content, the joint production of the harm by censor and speaker, and the private censor’s superior ability to avoid the harm—help explain why collateral censorship does not seem to

violate the First Amendment even when the censor and speaker are not employer and employee, or part of the same business enterprise. Take the case of authors and publishing houses, for example. Book publishers employ legal staffs to inspect author manuscripts for possible liability for defamation, fraud, or copyright infringement. Publishers do so because they will suffer the consequences of their authors’ violations of the law. As a result, publishers often demand that authors rewrite or even omit troublesome passages as a condition of publication. No one doubts that these practices affect authors’ practical ability to speak. But this collateral censorship does not violate their First Amendment rights, even when they engage in explicitly political speech. If defamation laws are constitutional with respect to suits against the author directly, they are also constitutional with respect to suits against the publisher, even though the publisher clearly has different incentives from those of the author and therefore will exercise collateral censorship in situations where the author would not self-censor.

Thus, the case of the author and publisher is much like that of the reporter and the editor. Like the newspaper editor, the book publisher possesses and exercises the right to editorial control over how authors express themselves. This editorial control over content is the price that reporters or authors must pay if they want to publish in a particular newspaper or in a book produced by a particular publisher.

Conversely, collateral censorship seems to pose the greatest constitutional problems when it is most troublesome to treat the censor and the speaker as the “same speaker” for First Amendment purposes. The most obvious example occurs when courts and legislatures impose liability for harmful speech on a distributor, a common carrier, or some other conduit that is not part of the same business enterprise as the censored speaker, lacks the right to exercise editorial control, and lacks information about the nature of the content flowing through its channels.

In fact, the one Supreme Court case that comes closest to recognizing the problem of collateral censorship seems premised on this distinction. In Smith v. California,9 a California statute made it a crime for bookstore owners to stock books that were later judicially determined to be obscene, even if the owner did not know of the books’ contents. The Supreme Court struck down the statute, arguing that “if the bookseller is criminally liable without knowledge of the contents . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene

Hence, “[t]he bookseller’s self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.”

What the Court calls “self-censorship” in Smith is actually collateral censorship that arises from the different incentives of the bookseller and the book author. In Smith the Court saw through (or, more correctly, did not even notice) the state action objection that a private party was doing the censoring.

Note that the Supreme Court suggested that it was unfair to hold the bookstore owner liable because the bookstore owner lacked information about the content of each and every book. This injustice is not merely unfairness to the individual bookseller. Nor is it purely a concern about inefficient sorting. If our only concern were keeping harmful speech out of bookstores, we could accept a blunderbuss approach. But in the First Amendment area we should be as concerned with false positives (non-obscene books that don’t get stocked) as with false negatives (obscene books that wind up on the bookstore shelves). We should be concerned about closing off means of expression to the authors on the one hand, and closing off information to audiences on the other. That is why it is a bad idea, from a First Amendment perspective, to squeeze the distributor (such as a bookstore owner or a common carrier) in the middle. Concerns about mismatched incentives and inadequate information lie at the heart of the constitutional objection to collateral censorship.

The common law of defamation features similar policy concerns about collateral censorship, although the courts do not use the term and the relevant doctrines are not constitutionalized. The law of defamation recognizes the problem of collateral censorship through what is called the distributor’s privilege. Generally speaking, a person who repeats a defamatory statement is as liable for publication as the original speaker (assuming the person also acts with the requisite degree of fault). However, a distributor of information, such as a newsstand or a bookstore, is generally not held to this standard unless the distributor knows of the publication’s

10. Id. at 153.
11. Id. at 154.
12. See Meyerson, supra note 1, at 118 n.259.
13. This may be due to the fact that the Court describes the phenomenon as “self-censorship.” Because of the state statute, the bookstore owner cannot sell the books he or she might otherwise want to. But the most serious form of censorship is actually the censorship of the book’s author and publisher, not of the bookstore, which acts mostly as a distributor or conduit for the censored speech.
14. See Restatement (Second) of Torts § 578 (1977) (“Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”).
defamatory content.\textsuperscript{15} The fear is that if distributors were held to be
publishers, distributors might restrict the kinds of books and
magazines they sold, greatly reducing the public’s access to
protected expression.

To receive the common law privilege, a distributor does not have
to be a common carrier, which must take on all customers without
oversight.\textsuperscript{16} Although distributors make some content-based
judgments—for example, in choosing what books or magazines to
stock—their editorial control is very different from and much more
limited than that of the book publisher or magazine editor.

In the telecommunications industry, collateral censorship poses a
genuine and recurrent constitutional problem: Cable companies and
Internet service providers regularly act as conduits for the speech of
unrelated parties. Treating them like publishers or editors would
have the predictable effects noted above.\textsuperscript{17} Thus, in the
Telecommunications Act of 1996, Congress extended a special
privilege to Internet service providers whose customers post
indecent, obscene, or “otherwise objectionable” matter in
cyberspace, declaring that, as a matter of law, they should not be
considered the publishers of such material.\textsuperscript{18}

\textsuperscript{15} See id. § 581 (“[O]ne who . . . delivers or transmits defamatory matter published by a
third person is subject to liability if, but only if, he knows or has reason to know of its defamatory
character.”).

\textsuperscript{16} A fortiori, telecommunications companies that act as common carriers receive the
distributor’s privilege. See id. § 581 cmt. f; see also Anderson v. New York Tel. Co., 320 N.E.2d
647 (N.Y. 1974) (holding telephone company not liable for defamation delivered across
telephone lines).

\textsuperscript{17} Indeed, the argument for distributor privileges or other forms of reduced liability has
regularly been made in cyberspace, because Internet service providers and computer bulletin
boards are unable to supervise the content that flows through them. See, e.g., James Boyle,
(1996); David J. Conner, Cubby v. Compuserve, Defamation Law on the Electronic Frontier, 2
Geo. Mason Indep. L. Rev. 227 (1993); Meyerson, supra note 1; Henry H. Perritt, Jr., Tort
Liability, the First Amendment, and Equal Access to Electronic Networks, 5 Harv. J.L. & Tech.
Note, New Technology, Old Problem: Determining the First Amendment Status of Electronic
Information Services, 61 Fordham L. Rev. 1147, 1197–1201 (1993); see also Religious Tech. Ctr.
(“If Usenet servers were responsible for screening all messages coming through their systems,
this could have a serious chilling effect on what some say may turn out to be the best public
forum for free speech yet devised.”).

\textsuperscript{18} 47 U.S.C. § 230(c)(1) (Supp. II 1996); see Blumenthal v. Drudge, 992 F. Supp. 44, 49–
52 (D.D.C. 1998). In fact, the 1996 Act gives Internet service providers more protection than the
traditional distributor’s privilege, because knowledge of defamatory content is not sufficient to
subject them to liability. See Zeran v. America Online, 129 F.3d 327, 331–32 (4th Cir. 1997),