ARTICLES

Influencer Speech-Torts

LEAH R. FOWLER*, MAX N. HELVESTON**, & ZOË ROBINSON***

Social media influencers have emerged as a predominant source of information for millions of Americans, contributing to the growth and spread of misinformation. Of particular concern are influencers who provide health advice—advice that, once taken, has the potential to injure or kill. Given the foreseeability of physical harms resulting from health misinformation, negligence liability seems a logical, yet underexplored, mechanism for policing harmful health influencing. But the law has not established the nature and extent of influencers' duties. While influencers would likely meet even the narrowest jurisdictional standard for imposing a duty of care, duty determinations involve more than the reflexive application of doctrinal rules. They also require courts to balance the competing interests of the tortfeasor and the victim. In the context of influencer misinformation, this involves a clash of fundamental interests—namely, the follower's right to physical liberty and the influencer's liberty interest to speak. Ultimately, then, whether influencers owe a duty of care is a matter of both doctrine and public policy. This Article justifies the imposition of duties on social media influencers in the context of influencer health advice on both grounds before analyzing the potential First Amendment obstacles for negligence-based influencer speech-torts. Drawing on the unique nature of influencer speech, the Article highlights the difficulty of categorizing influencer speech as commercial speech and, in the alternative,

* Assistant Professor of Law, University of Houston Law Center.

** Associate Professor of Law, DePaul College of Law; Associate Dean for Academic Affairs and Strategic Initiatives; and Faculty Director, Mary and Michael Jaharis Health Law Institute.

*** Professor of Law, Marquette University Law School.

We would like to thank the organizers and participants of the 2024 Berkeley Center for Consumer Law & Economic Justice Consumer Law Scholars Conference, the 2023 Loyola Chicago Wiet Life Science Law Scholars Workshop, and the 2024 Health Law Works-in-Progress Retreat at Seton Hall University School of Law. We are profoundly grateful to Nathan Cortez, Anjali Deshmukh, Danielle D'Onfro, Doron Dorfman, Thomas Healy, Irina Manta, Jessica L. Mantel, Lars Noah, Jessica L. Roberts, Matthew Sag, Amanda Shanor, Cristina Tilley, Stacey Tovino, and Michael R. Ulrich for their deep engagement with our work; the faculties at the Johns Hopkins University Berman Institute of Bioethics, Marquette Law School, Southern Methodist University Dedman School of Law, St. John's University School of Law, Syracuse University College of Law, and the University of Houston Law Center for their considered questions and comments on earlier drafts; and to Amanda Watson and Emily Lawson with the University of Houston Law Center library for exceptional research support. Finally, thank you to our Editors at *The Georgetown Law Journal*—especially Sara Brizio, Richard Coyne, Nathaniel A. Deacon, Cecile Duncan, Jenna Foster, Arooshe P. Giroti, Maria Lowe, Yasmeen Rose, and Julian Vleeschhouwer—for their diligence and thoughtfulness in bringing these ideas to print. All errors are our own.

proposes that negligent speech resulting in physical harm is a previously unrecognized category of uncovered speech. It concludes with observations on the importance of constitutional sorting beyond tort liability.

TABLE OF CONTENTS

INTRODUCTION 416

I. INFLUENCER SPEECH HARMS 422

A. INFLUENCERS AND CONSUMER HARMS 423

1. Health Influencing 423

2. Are Influencers Special? 429

B. HARMS WITH LIMITED REMEDIES 432

1. Private Mechanisms 433

2. Public Mechanisms 435

II. INFLUENCER DUTIES IN NEGLIGENCE 439

A. GROUNDING INFLUENCER DUTIES 440

B. JUSTIFYING INFLUENCER DUTIES 445

1. The Social Inutility of Health Misinformation 445

2. The Social Utility of Influencer Duties 448

3. Influencer Duties as a Social Equalizer 450

III. THE FIRST AMENDMENT AND INFLUENCER SPEECH 452

A. INFLUENCER SPEECH AS UNCOVERED SPEECH 452

1. Misleading Commercial Speech 455

2. Negligent Misinformation 460

B. FIRST AMENDMENT PROTECTION OF INFLUENCER SPEECH 467

CONCLUSION 472

INTRODUCTION

Online influencers are encouraging their followers to use bleach. Not to clean, but to take orally or via enema to "cure" a variety of diseases and conditions—

from cancer to autism to HIV.[1] Others promote drinking laundry detergent daily to treat or prevent parasites[2] or forgoing or abandoning chemotherapy, against medical advice, in favor of whole-food smoothies.[3] In fact, social media is full of influencers with implicit and explicit health recommendations. Some say castor oil can combat infections and tumors when applied topically.[4] Several suggest that followers should eschew all pharmaceuticals—even sunscreen—in favor of "natural" options.[5] Influencers even claim that they can heal poor eyesight through online health coaching, teaching followers to toss their glasses in the trash, use essential oils around their eyes, and rid themselves of the limiting beliefs that impair their vision.[6] All of this is health misinformation. And though these specific examples will be old news by the time you read this, we can say with certainty that the next social media charlatans and digital snake oil trends will already have gone viral. Quackery is a perennial problem, now amplified by the internet. The critical question is whether the law should protect individuals harmed when following influencer health misinformation and if the First Amendment would allow it.

At a superficial level, that followers would fall victim to health-harming influencer speech feels incomprehensible, and the idea that the law should step in seems absurd. But the core drivers behind decisions to abandon the medical and scientific mainstream are all too familiar. Women regularly experience gaslighting and invalidation in medical encounters.[7] Black patients—including children[8]—are more likely to have their pain undertreated or ignored.[9] Fatphobia, bias, and stigma often mean that those who are overweight have their medical

1. *See* Tim Marcin, *This "Miracle Solution" Is Marketed as a Cure for Cancer and HIV. It's Bleach.*, VICE (Aug. 13, 2019, 10:02 AM), https://www.vice.com/en/article/xwe8j3/this-miracle-solution-is-marketed-as-a-cure-for-cancer-and-hiv-its-bleach [https://perma.cc/45AE-SUR7].

2. *See* A.W. Ohlheiser, *Why TikTokers Are Drinking Laundry Detergent*, VOX (July 29, 2023, 7:00 AM), https://www.vox.com/technology/2023/7/29/23811639/tiktok-borax-challenge-dangerous-laundry-detergent [https://perma.cc/WC6Z-K3NZ].

3. *See* Abby Ohlheiser, *They Turn to Facebook and YouTube to Find a Cure for Cancer – and Get Sucked into a World of Bogus Medicine*, WASH. POST (June 25, 2019, 3:10 PM), https://www.washingtonpost.com/lifestyle/style/they-turn-to-facebook-and-youtube-to-find-a-cure-for-cancer–and-get-sucked-into-a-world-of-bogus-medicine/2019/06/25/6df3ddae-7cdc-11e9-a5b3-34f3edf1351e_story.html.

4. A.W. Ohlheiser, *How TikTok Profits Off Dangerous Health Trends*, VOX (Oct. 5, 2023, 7:30 AM), https://www.vox.com/technology/23902094/tiktok-shop-wellness-trend-castor-oil [https://perma.cc/YZS7-MCJJ].

5. *See, e.g.*, Liz Flora, *How Sunscreen Became a Hot-Button Topic on TikTok and Instagram*, GLOSSY (Aug. 22, 2022), https://www.glossy.co/beauty/how-sunscreen-became-a-hot-button-topic-on-tiktok-and-instagram [https://perma.cc/7E9V-FQ72]; Petra Guglielmetti, *Birth Control TikTok Is, Unsurprisingly, a Hotbed of Misinformation*, GLAMOUR (Mar. 1, 2023), https://www.glamour.com/story/birth-control-tiktok; Rob Lever, *Posts Promote Dangerous, Unproven Use of Colloidal Silver for RSV*, AFP FACT CHECK (Dec. 1, 2022, 12:46 PM), https://factcheck.afp.com/doc.afp.com.32WK26P.

6. *See* Miles Klee, *'You Do Not Need Glasses': A Wellness Coach's Bogus Claim — and Its 100-Year History*, ROLLING STONE (Sept. 18, 2023), https://www.rollingstone.com/culture/culture-features/wellness-coaches-wearing-glasses-false-claims-1234822624 [https://perma.cc/Q8XA-8YAE].

7. *See* Charee M. Thompson, Sara Babu & Shana Makos, *Women's Experiences of Health-Related Communicative Disenfranchisement*, 38 HEALTH COMMC'N 3135, 3135 (2022).

8. *See* Monika K. Goyal et al., *Racial Disparities in Pain Management of Children with Appendicitis in Emergency Departments*, 169 JAMA PEDIATRICS 996, 998–99 (2015).

9. *See* Ruqaiijah Yearby, *Race Based Medicine, Colorblind Disease: How Racism in Medicine Harms Us All*, 21 AM. J. BIOETHICS 19, 22 (2021).

complaints, no matter how serious, reduced to a need to shed pounds.[10] Those with intersecting identities experience these injustices even more acutely.[11] Insurance-related difficulties and the ever-present threat of devastating medical bills mean that the healthcare system may not only be unhelpful or discriminatory but can also be impossible to afford.[12] And that is if you can even access it at all.[13] This translates to bad health outcomes and significant medical mistrust.[14] But while some populations experience these injustices at greater rates, none of us are immune to desperation or hope. From this vantage, it is easy to understand how even sensible people can turn away from the providers and institutions that have failed them and toward influencers and online communities with health experiences that mirror their own.[15]

Against this background, influencers take on an important role when individuals seek out health information on social media. What makes someone an "influencer" is that their followers perceive them to have certain qualities that make them, well, *influential*.[16] From a follower's perspective, influencers are credible, likable, trustworthy, and knowledgeable.[17] Followers may even develop a sense of intimacy and connectedness with an influencer, often called a "parasocial relationship,"[18] intensified by the fact that social media allows you to engage with these figures in the exact same ways you engage with your family and closest confidants.[19] In this light, an influencer is no longer just a stranger on the internet doling out weird advice. They transform into a real peer or friend,[20] as well as a trusted opinion leader and expert.[21] Once we understand influencers this way, the

10. *See* S. M. Phelan et al., *Impact of Weight Bias and Stigma on Quality of Care and Outcomes for Patients with Obesity*, 16 OBESITY REVS. 319, 319, 321 (2015).

11. *See* Rodman E. Turpin et al., *Differences in Health Care Access and Satisfaction Across Intersections of Race/Ethnicity and Sexual Identity*, 96 ACAD. MED. 1592, 1595 (2021).

12. *See, e.g.*, Gordon Gong et al., *Higher US Rural Mortality Rates Linked to Socioeconomic Status, Physician Shortages, and Lack of Health Insurance*, 38 HEALTH AFFS. 2003, 2006–07 (2019).

13. *See, e.g.*, Melissa E. Cyr et al., *Access to Specialty Healthcare in Urban Versus Rural US Populations: A Systematic Literature Review*, BMC HEALTH SERVS. RSCH., Dec. 2019, at 1, 5.

14. *See* Mohsen Bazargan et al., *Discrimination and Medical Mistrust in a Racially and Ethnically Diverse Sample of California Adults,* 19 ANNALS FAM. MED. 4, 4 (2021); Michele Statz & Kaylie Evers, *Spatial Barriers as Moral Failings: What Rural Distance Can Teach Us About Women's Health and Medical Mistrust*, HEALTH & PLACE, 2020, at 1, 1.

15. *See* Eli Saslow, *Racked by Pain and Enraptured by a Right-Wing Miracle Cure*, N.Y. TIMES (July 30, 2024), https://www.nytimes.com/2024/07/28/us/politics/far-right-miracle-cure-medbed.html.

16. *See* Demetris Vrontis et al., *Social Media Influencer Marketing: A Systematic Review, Integrative Framework and Future Research Agenda*, 45 INT'L J. CONSUMER STUD. 617, 618 (2021) (defining opinion leaders as individuals who have "superior status, social prestige, personal appeal or expertise").

17. *See id.* at 628; *see also* Joachim Scholz, *How Consumers Consume Social Media Influence*, 50 J. ADVERT. 510, 512 (2021).

18. Riva Tukachinsky et al., *Antecedents and Effects of Parasocial Relationships: A Meta-Analysis*, 70 J. COMMC'N 868, 868 (2020) (defining parasocial interactions as the "illusionary give-and-take with media figures" and parasocial relationships as the "lingering sense of intimacy and connectedness with media personalities").

19. *See* Cynthia A. Hoffner & Bradley J. Bond, *Parasocial Relationships, Social Media, & Well-Being*, 45 CURRENT OP. PSYCH., Feb. 2022, at 1, 1.

20. *See id.*; Jane R. Bambauer, *Snake Oil Speech*, 93 WASH. L. REV. 73, 95 (2018).

21. *See* Saw Teck Chew et al., *The Quality of Health Parasocial Opinion Leaders on Social Media. A Literature Review*, E-BANGI J. SOC. SCIS. & HUMANS., 2019, at 1, 1.

"irrationality" of relying on online networks for health information becomes entirely rational, and the unique position of influencers in influencing health behaviors—for better and for worse—comes into focus.

However, a key fact about influencers' apparent authenticity is that it is not real. It is a façade, carefully curated to gain followers and drive engagement. Influencers themselves are a brand, and the goal is to translate what viewers interpret as unbiased and independent—or, ironically, unfiltered and unedited—viewpoints and preferences into income streams.[22] Put simply, for influencers, social media is a way to make money.[23] The promise of financial gain is tangible, with influencer marketing estimated to be a $20 billion industry[24] and brands realizing a return on investment of $6.50 for every dollar spent.[25] But the money influencers make hinges on engagement, including everything from likes, shares, views, comments, and subscribing, to followers purchasing sponsored products and merchandise, using affiliate codes, and more.[26] As a result, perverse incentives abound. People are more likely to engage with and share content that triggers strong emotional responses.[27] Platform algorithms promote extreme and outrageous content because people have engaged with it at higher rates.[28] That amplification increases influencer visibility and metrics, and more opportunities arise. In other words, in a vicious cycle driven by engagement, a little shock value can have dollar value.

It is no surprise, then, that medical and scientific misinformation on social media has emerged as a threat to individual and public health. Robert Califf, former head of the Food and Drug Administration (FDA), identified online misinformation as the "leading cause of meaningful life-years lost" and the "most common cause of death in the United States."[29] Even the Surgeon General reports that combatting health misinformation is a "moral and civil imperative that will require a whole-of-society effort."[30] But solutions have proven elusive. Courts

22. *See* Emily Hund & Lee McGuigan, *A Shoppable Life: Performance, Selfhood, and Influence in the Social Media Storefront*, 12 COMMC'N CULTURE & CRITIQUE 18, 28 (2019).

23. *See* Vrontis et al., *supra* note 16, at 618.

24. *See* INFLUENCER MKTG. HUB, THE STATE OF INFLUENCER MARKETING 9 (2023), https://influencermarketinghub.com/ebooks/Influencer_Marketing_Benchmark_Report_2023.pdf [https://perma.cc/3ASB-NKQU].

25. *The Value of Influencer Marketing*, GRIN, https://grin.co/blog/the-real-value-of-influencer-marketing [https://perma.cc/LM4F-4LQT] (last visited Dec. 21, 2024).

26. *See* Mike Eckstein, *Social Media Engagement: Why It Matters and How to Do It Well*, BUFFER (Jan. 29, 2024), https://buffer.com/library/social-media-engagement; *see also* Elise Dopson, *28 Important Influencer Marketing Statistics to Know in 2025*, SHOPIFY: BLOG (Nov. 11, 2024), https://www.shopify.com/blog/influencer-marketing-statistics [https://perma.cc/6FSD-YBWJ].

27. *See* Michal Lavi, *Do Platforms Kill?*, 43 HARV. J. L. & PUB. POL'Y 477, 501 (2020).

28. *Id.* at 501–02; *see also* Jeff Allen, *Misinformation Amplification Analysis and Tracking Dashboard*, INTEGRITY INST. (Oct. 13, 2022), https://integrityinstitute.org/blog/misinformation-amplification-tracking-dashboard [https://perma.cc/L3NZ-ULNK].

29. Darius Tahir, *FDA Head Robert Califf Battles Misinformation — Sometimes with Fuzzy Facts*, KFF HEALTH NEWS (July 24, 2023), https://kffhealthnews.org/news/article/fda-head-robert-califf-battles-misinformation-sometimes-with-fuzzy-facts [https://perma.cc/GPZ8-GBSL].

30. VIVEK H. MURTHY, OFF. OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUM. SERVS., CONFRONTING HEALTH MISINFORMATION: THE U.S. SURGEON GENERAL'S ADVISORY ON BUILDING A

continue to wrestle with federal agencies' abilities to combat misinformation at the source.[31] Platform-driven content moderation cannot keep up with the volume of harmful user-generated content and has been subject to legislative and legal challenges.[32] Actions by state attorneys general and federal agencies target important and related problems—like deception, inadequate disclosure of risks, or financial relationships—but often fail to combat harmful content more generally or compensate consumers for physical injuries.[33] The government is also poorly positioned to regulate. Legislatively prohibiting certain types of speech in areas as diverse and dynamic as medicine and science poses significant obstacles in drafting and implementation.[34] And that assumes consensus on issues that often overlap with political and religious beliefs is even achievable. In the morass of all these possible approaches, real people with real injuries lack good options for remediation.

Yet, among the debates about how best to curtail influencer health misinformation, commentators rarely consider the possibilities of private law. Indeed, tort law is already beginning to fill the legal gap as a targeted mechanism to address harmful influencer misinformation in some contexts.[35] This recourse to tort law makes sense intuitively. After all, a tort on social media bears a significant resemblance to a tort in the real world.[36] Yet, the site of influencer misinformation calls into question whether a duty of care *should* be imposed on influencers vis-à-vis their followers. Although influencers would likely meet even the narrowest

HEALTHY INFORMATION ENVIRONMENT 2 (2021), https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf [https://perma.cc/MA6F-VE55].

31. *See* Apter v. Dep't of Health & Hum. Servs., 80 F.4th 579, 595 (5th Cir. 2023) ("FDA is not a physician. It has authority to inform, announce, and apprise—but not to endorse, denounce, or advise. . . . Even tweet-sized doses of personalized medical advice are beyond FDA's statutory authority."); *see also* Murthy v. Missouri, 603 U.S. 43, 80 (2024) (Alito, J., dissenting) (opining that government officials coerced private entities into suppressing speech in a "blatantly unconstitutional" manner).

32. *See infra* Section I.B.1.

33. *See infra* Section I.B.2.

34. *See, e.g.*, Mark MacCarthy, *Senator Amy Klobuchar Seeks to Quell Health Misinformation on Social Media*, BROOKINGS (July 27, 2021), https://www.brookings.edu/articles/senator-amy-klobuchar-seeks-to-quell-health-misinformation-on-social-media [https://perma.cc/NZR5-9WKH] (discussing the Health Misinformation Act, S. 2448, 117th Cong. (2021), introduced by Senators Amy Klobuchar and Ben Ray Luján); *see also* Moody v. NetChoice, LLC, 603 U.S. 707, 741 (2024) (noting that "a State may not interfere with private actors' speech to advance its own vision of ideological balance").

35. *See* Lisette Voytko-Best, *Kendall Jenner Settles Fyre Festival Instagram Post Lawsuit For $90,000*, FORBES (May 20, 2020, 4:32 PM), https://www.forbes.com/sites/lisettevoytko/2020/05/20/kendall-jenner-settles-fyre-festival-instagram-post-lawsuit-for-90000 [https://perma.cc/U9GJ-F6PF] (discussing the settlement of *In re Fyre Festival Litigation*, 399 F. Supp. 3d 203 (S.D.N.Y. 2019), a negligence claim against influencer Kendall Jenner). *See generally* Pop v. Lulifama.com LLC, No. 22-cv-2698, 2023 WL 4661977 (M.D. Fla. July 20, 2023) (involving complaint against influencer for negligence).

36. Consider an example: When an employee of an ice skating business tells a customer the ice is safe, but in fact the ice is not safe, the employee is broadcasting misinformation. Equally, if the employee posts a photo of the pond on social media, geotagging it with a comment that the ice is safe, but it is not, that too is misinformation. Assuming a duty of care is owed, in each situation, the tortfeasor breaches their duty of care by disseminating misinformation and proximately causing damage to their customer.

jurisdictional standard for imposing a duty of care, imposing duties involves more than the reflexive application of doctrinal rules. It also requires courts to balance the competing interests of the tortfeasor and the victim.

Here, the subtle differences between an in-person tort and a tort on social media become significant. Influencers speak, and social media—technology designed for people to speak to each other—highlights the centrality of speech in these cases. The First Amendment is often perceived as a doctrinal and policy trump card to negligence liability.[37] Courts have been reluctant to impose a duty overriding a tortfeasor's speech interests in other contexts, such as broadcasting and publishing.[38] Instead, they conclude that speech interests either justify a categorical no-duty rule on the grounds of public policy or act as a constitutional defense to a negligence claim, even when a duty has been imposed.[39]

Notwithstanding that precedent, we argue there are good reasons for imposing duties on influencers and preferencing the physical liberty interests of followers over the liberty interests of influencers in speaking, at least where that harmful speech is directed toward commercial gain. The nature of the influencer–follower relationship and the context in which influencers speak suggest that, unlike with other speakers, legal doctrine and policy arguments support the imposition of influencer duties. Consequently, in the context of influencers, speech interests are unlikely to provide a bar to recovery, either through tort doctrine or the First Amendment.[40] Not all speech is valuable, and not all speech should be prioritized over other fundamental interests. Where influencers negligently disseminate misinformation on social media, we suggest that the First Amendment presents no obstacle to liability when that misinformation results in physical harm.

This Article proceeds in three parts. Part I introduces influencers profiting off medical mistruths as spokespeople for companies, vendors of products and services, or providers of medical advice or opinions. It highlights what makes them distinct from traditional advertisers or endorsers and what makes them special for purposes of legal analyses and policy considerations. It then explores the contexts in which existing private and public mechanisms address health-harming content and how those approaches fail to compensate consumers for physical harm.

---

37. *See* Deana Pollard Sacks, *Constitutionalized Negligence*, 89 WASH. U. L. REV. 1065, 1085 (2012).

38. *See* Jane Bambauer, *Negligent AI Speech: Some Thoughts About Duty*, 3 J. FREE SPEECH L. 343, 349–50 (2023).

39. *See* Sacks, *supra* note 37, at 1085–1100.

40. *Cf.* Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 670 (2016) (discussing regulation of revenge pornography); Snyder v. Phelps, 562 U.S. 443, 458 (2011) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989))); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 340 (1991) (noting that the Court's speech jurisprudence is underpinned by the norm that the government cannot "restrict speech on the ground that the speech will persuade people to adopt attitudes that the government considers undesirable").

To fill this gap, Part II argues in favor of negligence liability for influencers, specifically focusing on imposing a duty of care. Duty is the gatekeeper to liability, and as with most common law legal standards, the rule for determining whether a duty of care exists is jurisdiction dependent. This Part first offers doctrinal justifications for imposing a duty of care. It then turns to policy arguments in favor of duties, including the limited utility of health misinformation and the welfare-enhancing value of constraining it, the democratizing effects of duties given the inbuilt institutionalization and subordination of marginalized populations in health care, and the reduction in negative externalities.

Finally, Part III tackles head-on the chief doctrinal and public policy considerations that could be fatal to liability. Here, the primary consideration is freedom of speech. The Supreme Court has not yet addressed the question of the First Amendment's applicability to speech-torts negligently causing physical harm.[41] Using the Court's existing speech-tort jurisprudence, Part III considers two possibilities by which negligent misinformation resulting in physical harm is uncovered speech and subject to rational basis review rather than the heightened standard of strict scrutiny that applies to covered speech. It proposes that, while categorizing negligence speech-torts as covered or uncovered speech matters for determining the level of scrutiny applicable, where speech negligently causes physical harm, even strict scrutiny will be satisfied. This Article concludes by noting that this analysis of the constitutional sorting of influencer speech is critical beyond tort liability. It also has important implications for future legislative and regulatory solutions.

I. INFLUENCER SPEECH HARMS

Social media has created avenues for anyone to become influential. Though this capacity for influence has had benefits—including opportunities for financial gain[42] and increased social connectedness[43]—it has also had drawbacks. Health and wellness influencers and the physical health harms stemming from medical and scientific misinformation provide a case study. This Part introduces social media influencing. Section I.A describes how influencers monetize health content and provides examples of health-harming speech. It also asks the question, "Are influencers special?" and identifies how influencers are distinct from other categories of commercial speakers. Section I.B turns to existing private and public avenues for recourse, noting where they can succeed in part and yet still fall short of providing followers a means of recovering for physical harms resulting from influencer health speech.

41. *See* Sacks, *supra* note 37, at 1112; David S. Han, *Managing Constitutional Boundaries in Speech-Tort Jurisprudence*, 69 DEPAUL L. REV. 495, 517 (2020).

42. *See* Bernhard Rieder et al., *Making a Living in the Creator Economy: A Large-Scale Study of Linking on YouTube*, SOC. MEDIA + SOC'Y, Apr.–June 2023, at 1, 3.

43. *See* Gillian Fergie et al., *Social Media as a Space for Support: Young Adults' Perspectives on Producing and Consuming User-Generated Content About Diabetes and Mental Health*, 170 SOC. SCI. & MED. 46, 50 (2016).

A. INFLUENCERS AND CONSUMER HARMS

Social media health and wellness influencers are part of a larger influencer economy and social media ecosystem, which is monetized and regulated in myriad ways. This Section first focuses on understanding influencers and health influencing by looking at these topics descriptively: what influencers are, what they do, and the variety of mechanisms by which they can profit directly and indirectly from these activities. It then explores how the qualities that make influencers unique also make them imperfect fits for existing legal categories.

1. Health Influencing

Health influencers are online opinion leaders who make social media content related to science, medicine, or wellness more generally.[44] However, this Article's scope also includes other content creators who use their influence to impact health behaviors and purchases, even if doing so is not the exclusive or primary focus of their social media accounts.[45] The topics these influencers cover can be ordinary, factual, and even beneficial. But they can also be extreme, false, and dangerous.

There is no simple definition of an influencer. They exist across various social media platforms, each offering unique features and audiences. Many influencers use a combination of platforms to grow their social capital and maximize reach, and they may cross-link the same content to multiple platforms.[46] For example, a creator might make a TikTok video and post it to Instagram and X (formerly Twitter) or stream on Twitch and then edit the video for YouTube while also promoting it on Facebook. Some influencers benefit from an enormous viewership with millions of followers, while others have substantial sway over much smaller groups.[47] Influencers can then leverage their social network—large or small—to encourage followers to engage in certain behaviors.[48] These behaviors may involve purchasing proprietary or third-party goods and services directly or through affiliate codes, or engaging with posts by liking, following, subscribing, commenting, or otherwise interacting with an influencer's content.[49]

---

44. *See* Chew et al., *supra* note 21, at 3.

45. *See, e.g.*, Louise Roe (@louiseroe), INSTAGRAM, https://www.instagram.com/p/BqFh2TIgWGA (last visited Dec. 21, 2024).

46. Rieder et al., *supra* note 42, at 2.

47. *See* Colin Campbell & Justine Rapp Farrell, *More Than Meets the Eye: The Functional Components Underlying Influencer Marketing*, 63 BUS. HORIZONS 469, 471 (2020) (dividing influencers into five types—celebrity, mega, macro, micro, and nano—with followers ranging from over 1,000,000 on the celebrity and mega side, to as few as less than 10,000 on the nano side).

48. *See What Is an Influencer? – Social Media Influencers Defined [Updated 2024]*, INFLUENCER MKTG. HUB (Aug. 8, 2024), https://influencermarketinghub.com/what-is-an-influencer [https://perma.cc/M5L5-PBVV]; *see also* Lixia Hu et al., *Understanding Followers' Stickiness to Digital Influencers: The Effect of Psychological Responses*, INT'L J. INFO. MGMT., June 13, 2020, at 1, 1 (defining a digital influencer as "an individual who has a dedicated social following and possesses social influence over his/her followers").

49. *See* Eckstein, *supra* note 26; *see also* Sapna Maheshwari, *The Women's Magazines of 2023 Are in a Facebook Group and Your Inbox*, N.Y. TIMES (Aug. 5, 2023), https://www.nytimes.com/2023/08/05/

Regardless of platform or following size, influencers and their messaging are effective because their followers perceive them to have certain qualities that make them influential.[50] Qualities that can contribute to influence include perceived credibility, likeability, trustworthiness, and status as an expert.[51] But, expertise is a flexible construct. Though an influencer might have formal medical training,[52] they are often laypeople.[53] For the latter category, authority comes not from specific credentials but from lived experience. In fact, for many followers, an influencer's position outside mainstream media is critical. It creates an image of an independent thinker who does their own research unpersuaded by financial conflicts of interest.[54]

Once influencers have established themselves as trustworthy and credible, they can derive further influence from followers' psychological responses to their identity and content. A follower may develop a "parasocial relationship," which is a one-sided sense of intimacy and connectedness an individual may form toward a social media personality.[55] Though parasocial relationships can develop with any celebrity or public figure, the architecture of social media amplifies this phenomenon because platforms allow you to interact with these figures the same way you interact with your best friends.[56] Relevantly, studies suggest that parasocial relationships and interactions reduce opposition to persuasion attempts and increase the likelihood that the viewer complies with the media figure's message.[57]

But the power of social media holds even beyond parasocial relationships. The sense that influencers are authentic—perhaps even like a peer or a friend[58]—means that consumers will find their content more persuasive.[59] Within a health context, research supports that young people are more likely to trust their peers

business/womens-magazines-facebook-social-media.html (describing how fashion influencers make money through direct sales and affiliate codes).

50. *See* Vrontis et al., *supra* note 16, at 618.

51. *Id.* at 628; *see also* Scholz, *supra* note 17, at 518 (identifying perceived "knowledge leadership" as important).

52. *See* Emma Goldberg, *Doctors on TikTok Try to Go Viral*, N.Y. TIMES (Jan. 31, 2020), https://www.nytimes.com/2020/01/31/health/tiktok-doctors-sex-ed.html; Claudia E. Haupt, *Pseudoprofessional Advice,* 103 B.U. L. REV. 775, 775 (2023).

53. *See* Eric Afful-Dadzie et al., *Social Media in Health Communication: A Literature Review of Information Quality*, 52 HEALTH INFO. MGMT. J. 3, 4 (2023).

54. *See* Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 85 (2020) ("The products consumers purchase based on influencers' endorsements may seem healthier and safer *because of* the lack of disclosure—consumers may be more willing to take risks on products that might endanger their health or safety recommended by people they know . . . as opposed to companies. The lack of disclosure means they take uncalculated or miscalculated risks that they otherwise would not have.").

55. Tukachinsky et al., *supra* note 18, at 868.

56. *See* Hoffner & Bond, *supra* note 19, at 1.

57. Tukachinsky et al., *supra* note 18, at 876, 887.

58. *Id.* at 876; *see* Bambauer, *supra* note 20, at 95.

59. *See* Guoquan Ye et al., *The Value of Influencer Marketing for Business: A Bibliometric Analysis and Managerial Implications*, 50 J. ADVERT. 160, 161 (2021).

than medical professionals when seeking preventive healthcare information.[60] The health behaviors influencers display—positive or negative—can lead to followers adopting those behaviors and attitudes, especially when parasocial relationships are involved.[61] Social media content impacts if and when consumers—especially younger generations—will see a doctor and what treatments and prescriptions they will request when they do.[62] Other studies have shown that 51% of Americans have purchased a health product after seeing it on social media.[63] Even courts have recognized the power of social media marketing and influencers in driving health behaviors like smoking in adolescent populations.[64]

Health and wellness influencers have risen to prominence amid a culture that increasingly views citizens as neoliberal agents,[65] health as an individual project of self-improvement,[66] and social media as a legitimate authority. While social media's role within this environment can be innocuous or even beneficial,[67] it can also be dangerous. The odds of someone encountering corrective information and possessing the knowledge necessary to weigh relative speaker credibility are unlikely.[68] Those with ready access to health care and professional advice may be able to verify the accuracy of harmful health misinformation that originates on

60. Joe Cangelosi et al., *Preventive Health Care Information and Social Media: Consumer Preferences*, 38 HEALTH MKTG. Q. 270, 278 (2021).

61. *See* Hoffner & Bond, *supra* note 19, at 2–3.

62. *See* Lecia Bushak, *Gen Z, Millennials Turn to TikTok Instead of Doctors for Health Advice: Here's What That Looks Like*, MED. MKTG. & MEDIA (Feb. 17, 2023, 3:00 PM), https://www.mmm-online.com/home/channel/gen-z-millennials-turn-to-tiktok-instead-of-doctors-for-health-advice-heres-what-that-looks-like [https://perma.cc/5MH5-6RHL].

63. *The Shifting Role of Influence and Authority in the Rx Drug & Health Supplement Market*, CHARITY RX (Sept. 21, 2022), https://www.charityrx.com/blog/the-shifting-role-of-influence-and-authority-in-the-rx-drug-health-supplement-market [https://perma.cc/3ZBD-RA8T].

64. *See In re* JUUL Labs, Inc., 609 F. Supp. 3d 942, 1010 (N.D. Cal. 2022) (describing the opinions of Dr. Sherry Emery, Senior Fellow in the Public Health Group and Director of the Social Data Collaboratory at NORC at the University of Chicago).

65. *See* Mary V. Wrenn, *Agency and Neoliberalism*, 39 CAMBRIDGE J. ECON. 1231, 1233 (2015) (noting that under neoliberalism "the locus of control is the individual exercising agency through (free) market operations," not a function of systems or environment, and stating that "[n]eoliberalism teaches through the socialisation process that each individual should be accountable to herself and in so doing, each individual's responsibility to others and to the collective is eroded").

66. *See, e.g.*, Amanda Hess, *Our Health Is in Danger. Wellness Wants to Fill the Void*, N.Y. TIMES (Apr. 6, 2020), https://www.nytimes.com/2020/04/06/arts/virus-wellness-self-care.html (describing how wellness influencers have made self-improvement and wellness the focus of individuals' health concerns).

67. Online health content is not all bad or dangerous. Health content on social media can help individuals navigate complex diagnoses by providing valuable information and first-hand accounts while simultaneously counteracting feelings of loneliness and isolation with peer support. *See* Fergie et al., *supra* note 43, at 50.

68. *See, e.g.*, *id.*; Tiffany Hsu & Stuart A. Thompson, *Even Disinformation Experts Don't Know How to Stop It*, N.Y. TIMES (July 14, 2024), https://www.nytimes.com/2024/07/11/technology/disinformation-tools.html (discussing findings that corrective information efforts have only been partially effective); Mehdi Mourali & Carly Drake, *The Challenge of Debunking Health Misinformation in Dynamic Social Media Conversations: Online Randomized Study of Public Masking During COVID-19*, J. MED. INTERNET RSCH., 2022, at 1, 12.

social media, but the most vulnerable will continue to suffer.[69] More concerning still, platforms promote and amplify extreme and outrageous content because people are more likely to engage with and share content that triggers strong emotional responses, thereby increasing the chances the content will go viral.[70] Virality, in turn, can worsen the impact of misinformation because the more often someone encounters misinformation, the more likely they are to believe it, even without any evidence.[71]

Social media users are also not generally inclined to independently verify content before sharing it with their network, so bad information spreads.[72] The trust at the foundation of this action is not necessarily based on logical inference but rather on attitudes toward social media peers.[73] It is a context in which people are generally willing to believe and act without fact-checking or questioning.[74] Thus, while social media can activate viewers to make independent and informed choices, it can also delegitimize medical and scientific institutions and expertise, conditioning health-harming choices.[75]

In addition to being persuasive, influence is also valuable for platforms, companies, and creators.[76] How creators turn influence into money depends on which social media platform they use to cultivate a following and the different income streams they employ.[77] Some monetization strategies are platform specific.[78] Consider YouTube. If a creator meets certain platform-required conditions, the creator can monetize via the YouTube Partner Program, earning a share of advertising revenue from ads on monetized videos.[79] There are also opportunities for

69. *See* Haupt, *supra* note 52, at 800.

70. Lavi, *supra* note 27, at 501–02; *see also* Allen, *supra* note 28.

71. *See* Evan Orticio et al., *Social Prevalence Is Rationally Integrated in Belief Updating*, 6 OPEN MIND: DISCOVERIES COGNITIVE SCI. 77, 78, 85 (2022).

72. *See* Mahmud A. Shareef et al., *Group Behavior in Social Media: Antecedents of Initial Trust Formation*, COMPUTS. HUM. BEHAV., 2020, at 1, 1, 9.

73. *Id*. at 9.

74. *Cf*. Bambauer, *supra* note 20, at 98 ("Professionals speak in a context where the audience is most likely to act on their advice without second-guessing.").

75. *See* Anna Schneider-Kamp & Jennifer Takhar, *Interrogating the Pill: Rising Distrust and the Reshaping of Health Risk Perceptions in the Social Media Age*, SOC. SCI. & MED., 2023, at 1, 7; Anna Schneider-Kamp & Søren Askegaard, *Do You Care or Do I Have a Choice? Expert Authority and Consumer Autonomy in Medicine Consumption*, 24 CONSUMPTION MKTS. & CULTURE 419, 433, 435 (2021).

76. *See* Valentina Dencheva, *Influencer Marketing Market Size Worldwide from 2016 to 2024*, STATISTA (Feb. 6, 2024), https://www.statista.com/statistics/1092819/global-influencer-market-size [https://perma.cc/PSB6-ATQQ] (estimating that influencer marketing was worth over $21 billion in 2023).

77. *See* Rieder et al., *supra* note 42, at 2–3 (finding sources of revenue to include "direct revenue from advertising, but also various kinds of affiliate marketing, product placement, paid sponsorships, appearance fees, and other sources of income that are hard to measure").

78. For an example of specific monetization strategies on YouTube, see Yiqing Hua et al., *Characterizing Alternative Monetization Strategies on YouTube*, PROC. ACM ON HUM.-COMPUT. INTERACTION, Nov. 2022, at 1, 5.

79. Rieder et al., *supra* note 42, at 3. Some platforms have similar programs, though they vary in specifics and funding sources. *See* Robyn Caplan and Tarleton Gillespie, *Tiered Governance and Demonetization: The Shifting Terms of Labor and Compensation in the Platform Economy*, SOC. MEDIA + SOC'Y, Apr.–June 2020, at 1, 2 (describing the programs for Medium, Twitch, and others). X recently

direct payment from other third parties. For example, influencers can engage in affiliate marketing[80] and sales of products and services related to the influencer's content or viewers.[81] Companies may compensate influencers directly.[82] Sometimes, a brand collaborates with an influencer to produce a video to market a product.[83] In other cases, brands are more hands-off and may influence content via product placements—sending free products to specific creators, hoping that the creators will feature the product in a positive light.[84] An entire ecosystem of companies has emerged to support this lucrative business model.[85] Some third-party applications can help influencers integrate sponsored or unsponsored purchasable products into social media posts, while others can broker opportunities with brands.[86]

Examples of compensation for dangerous health content abound. A 2022 BBC investigation revealed that social media influencers promoted third-party injectables and nasal sprays intended to "accelerate tanning."[87] According to one account, a follower purchased the injectable, frequented tanning beds for two months to "activate" the drug, and allegedly developed stage-one melanoma.[88] Simply expressing a viewpoint for a third party—even unrelated to a product or service—can be a lucrative business opportunity.[89] In 2021, several European YouTubers expressed concern after a subsidiary of a digital marketing company allegedly contacted them on behalf of an anonymous client to spread vaccine disinformation.[90] The influencers were never asked to sell products, just to share specific disinformation and provide links to articles mischaracterizing the same sets

launched a version of this type of program called Creator Revenue Sharing. *Creator Revenue Sharing*, X: HELP CTR., https://help.x.com/en/using-x/creator-revenue-sharing (last visited Dec. 21, 2024).

80. For example, Amazon, eBay, or Etsy. Hua et al., *supra* note 78, at 13.

81. For example, Teespring, Spreadshirt, or Teepublic. *Id.*

82. Campbell & Farrell, *supra* note 47, at 470. Companies are increasingly likely to pay money instead of sending free products or giving discount codes. *See* INFLUENCER MKTG. HUB., *supra* note 24, at 22.

83. Claudia Gerhards, *Product Placement on YouTube: An Explorative Study on YouTube Creators' Experiences with Advertisers*, 25 CONVERGENCE: INT'L J. RSCH. INTO NEW MEDIA TECHS. 516, 519 (2019).

84. *Id.* at 520.

85. *See* LTK, https://company.shopltk.com/en/company [https://perma.cc/QS45-PFFQ] (last visited Dec. 22, 2024); *Our Story*, SHOP MY, https://shopmy.us/about [https://perma.cc/7JH3-LAHB] (last visited Dec. 22, 2024).

86. Hund & McGuigan, *supra* note 22, at 20, 24.

87. Anna Collinson & Eleanor Layhe, *'Dangerous' Tanning Products Promoted by Influencers*, BBC (Mar. 17, 2022), https://www.bbc.com/news/health-60348334 [https://perma.cc/J22H-5V6M].

88. *Id.*

89. *See* Anahad O'Connor, Caitlin Gilbert & Sasha Chavkin, *The Food Industry Pays 'Influencer' Dietitians to Shape Your Eating Habits*, WASH. POST (Sept. 13, 2023, 5:00 AM), https://www.washingtonpost.com/wellness/2023/09/13/dietitian-instagram-tiktok-paid-food-industry ("[C]ompanies generally pay a few thousand dollars per video . . . [and] offers could be as high as tens of thousands of dollars for creators with the biggest social media audiences.").

90. Charlie Haynes & Flora Carmichael, *The YouTubers Who Blew the Whistle on an Anti-Vax Plot*, BBC (July 24, 2021), https://www.bbc.com/news/blogs-trending-57928647 [https://perma.cc/7SEB-ECN9].

of decontextualized data.[91] This mysterious opportunity would have paid 2,000 euros.[92]

Other creators offer proprietary products or services instead of or in addition to third-party opportunities. Health- and diet-related coaching and guidance are common. For example, Belle Gibson rose to prominence in Australia for claiming that adopting a whole-foods-based wellness diet cured her cancer of the blood, spleen, uterus, and liver.[93] Riding on her successes as a popular influencer, she developed a diet app, wrote a book, and made millions sharing the secrets to her alleged success.[94]

Influencers also share products, views, and information with no obvious financial motive but may still profit indirectly through increased engagement and the opportunities it creates. A recent TikTok trend involves influencers drinking small amounts of borax every morning for its purported health benefits.[95] In these videos, influencers might explicitly or implicitly recommend that viewers do the same.[96] And, since provocative content can drive up engagement and is more likely to go viral, it can ultimately lead to more viewership, followers, and commercial opportunities in the future.[97]

Finally, creators might also earn income using alternative monetization strategies, even if discrete posts are not obviously commercial.[98] An influencer might request monetary donations via third-party platforms to support their content or channel more generally[99] or, though less common, request cryptocurrency payments.[100] These approaches may be presented as hyperlinks or information in the description section of various types of social media content, or may appear on the content creator's profile. Alternative or indirect monetization strategies are common among "problematic" or fringe creators who are unlikely to be monetized, are at higher risk of demonetization,[101] or are too risky for more formal partnerships. But alternative monetization is not just for bad actors. It is becoming more frequent across all channels.[102]

---

91. *Id.*

92. *Id.*

93. Jennifer McShane, *How Wellness 'Guru' Belle Gibson Duped the World with Her Brain Cancer Scam*, IMAGE (July 9, 2022), https://www.image.ie/living/culture/how-wellness-guru-belle-gibson-duped-the-world-with-brain-cancer-scam-281858 [https://perma.cc/5WGE-FLJG].

94. *Id.*

95. Ohlheiser, *supra* note 2.

96. *See id.*

97. *See supra* notes 26–28 and accompanying text.

98. *See* Hua et al., *supra* note 78, at 2–3.

99. For example, Patreon, Paypal, or Streamlabs. *Id.* at 12–13; *see also Turning Passion to Profit: Ways to Make Money on TikTok LIVE*, TIKTOK (Dec. 15, 2022), https://www.tiktok.com/live/creators/en-US/article/turning-passion-to-profit-ways-to-make-money-on-tiktok-live_en-US [https://perma.cc/W5JF-FU4N] (explaining the mechanisms by which creators can use TikTok LIVE to make money).

100. For example, Bitcoin, Litecoin, or Ethereum. Hua et al., *supra* note 78, at 12.

101. *Id.* at 3; *see also* Caplan & Gillespie, *supra* note 79, at 8 (describing the pervasive belief that creators who discuss controversial or contested subjects, or those asserting conservative political beliefs, are demonetized more frequently).

102. Hua et al., *supra* note 78, at 13.

2. Are Influencers Special?

The descriptive account of influencers and their behavior necessarily leads to the question of whether influencers are special.[103] That is, can influencers be sufficiently distinguished from existing legal categories—e.g., advertisers, endorsers, the media, and others—to warrant distinct legal treatment? This question is not merely theoretical. Instead, it is a pragmatic question that directly asks why influencers cannot be sorted into existing legal categories. Commentators typically categorize influencers as advertisers, endorsers, or a combination of both.[104] However, we argue that influencers constitute a legally distinct category.

Advertising is often cited as being closely analogous to influencing. Advertising is a "paid, mediated form of communication from an identifiable source, designed to persuade the receiver to take some action, now or in the future."[105] While advertising is traditionally associated with conventional, informational advertising,[106] developments have shifted the focus from informational advertising to advertising based on lifestyle imagery and integrated advertising.[107] Integrated advertising is analogous to social media influencing, where advertising is absorbed through outlets including editorials, direct mail, movies, and peer-to-peer messaging.[108]

The Federal Trade Commission (FTC) recognizes the complexity of sorting influencers into existing legal categories, highlighting that they are something other than advertisers and disaggregating influencing from product placement.[109] Endorsements are facially analogous to influencing. An endorsement is an "advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the

103. Scholars often question the "specialness" of concepts and individuals in constitutional categorization. *See, e.g.*, Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1289 (1983) (asking whether First Amendment theory supports special protections for speech and whether speech is distinguishable from other constitutional activities); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1352 (2012) (examining whether religion is constitutionally "special").

104. *See* Stasia Skalbania, *Advising 101 for the Growing Field of Social Media Influencers*, 97 WASH. L. REV. 667, 677, 685 (2022).

105. Jef I. Richards & Catharine M. Curran, *Oracles on "Advertising": Searching for a Definition*, 31 J. ADVERT. 63, 74 (2002). For the various definitions of advertising, see *id.* at 64–74.

106. Ellen P. Goodman, *Peer Promotions and False Advertising Law*, 58 S.C. L. REV. 683, 687 (2007) (stating that informational advertising is where a brand "asserts factual claims about a product or service in an organized campaign designed to reach a large portion of the relevant market"); *see also* CHARLES GOODRUM & HELEN DALRYMPLE, ADVERTISING IN AMERICA: THE FIRST 200 YEARS 37–38 (1990) (discussing early informational advertising).

107. *See* Goodman, *supra* note 106, at 694 (describing integrated advertising); STUART EWEN, CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE 100 (1976) (examining the shift from informational to image advertising).

108. *See* Goodman, *supra* note 106, at 686–87.

109. *See* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53124 (Oct. 15, 2009) (codified in pertinent part at 16 C.F.R. §§ 255.0(g) exs. 1, 7, 255.1(c) (2023)) [hereinafter FTC Endorsement Guides]; Hannibal Travis, *The Freedom of Influencing*, 77 U. MIA. L. REV. 388, 396–98 (2023).

sponsoring advertiser."[110] Influencers do, of course, advertise and endorse products—what might be termed "direct commercialization." They contract with third parties to produce advertisements or sponsored posts pitching a product, service, or idea for some type of direct compensation.[111] Yet, even when influencers are engaged in these direct commercial activities, how they advertise or endorse products, services, or ideas is distinct from traditional advertising and endorsement. Influencers unsettle the traditional formats by generating their own, often unscripted, content that can include text, images, and videos.[112] One example is influencer Leah Hazley's post about Bloomlife's[113] pregnancy contraction monitor. Hazley posts a picture of herself with the monitor attached, accompanied by text about the difficulties of pregnancy, what she was trying to continue doing while pregnant, and how contractions were disrupting her day.[114] Hazley then pivots to promoting Bloomlife's at-home contraction monitor.[115]

But, more than single posts advertising or endorsing a product, influencers intersperse sponsored posts with day-to-day posts that implicitly amplify the brand's products, services, or advice. Influencer Louise Roe frequently talks about her skin condition, psoriasis, all the while posting photos highlighting her clear, perfect-looking skin.[116] These posts are interspersed with other posts about Celgene, a biotechnology company that produces a psoriasis medication called Otezla.[117] The mix of explicit posts about Otezla and implicit posts of Roe with her clear skin and happy life presents the message that consumers prescribed Otezla can expect the same.[118] The value of brands engaging Roe, Hazley, and other influencers in direct commercial activities, then, is that they advertise and endorse the brand in a "native" way,[119] intertwining the brand itself with the brand of the influencer.

However, while advertisements on television and other forms of traditional media are readily identifiable as advertisements, even directly commercialized content on social media is not always obviously an advertisement.[120] Influencers

110. FTC Endorsement Guides, *supra* note 109, at 53124.

111. *See supra* notes 76–102 and accompanying text.

112. *See supra* notes 76–102 and accompanying text.

113. Bloomlife is a consumer health technology company focused on maternal and fetal health. BLOOMLIFE, https://www.bloom-life.com [https://perma.cc/TV3M-2C6T] (last visited Dec. 22, 2024).

114. *See* Leah Hazley (@mrshazleyathome), INSTAGRAM (Nov. 27, 2018), https://www.instagram.com/p/BqsrlN8AjaL [https://perma.cc/V433-KRNT].

115. *Id.*

116. Suzanne Zuppello, *The Latest Instagram Influencer Frontier? Medical Promotions*, VOX (Feb. 15, 2019, 8:00 AM), https://www.vox.com/the-goods/2019/2/15/18211007/medical-sponcon-instagram-influencer-pharmaceutical [https://perma.cc/Y3HN-DCBQ].

117. *Id.*

118. *Id.*; *see also* Roe, *supra* note 45; *As Influencer Marketing Races to Become a $15 Billion Business, What Will Prompt Action by Regulators?*, FASHION L. (Dec. 16, 2019), https://www.thefashionlaw.com/as-companies-influencers-continue-to-ignore-disclosure-law-what-will-prompt-action-by-regulators.

119. *See* Eliezer Joseph Silberberg, Note, *Too Hot to Handle?: Native Advertising and the* Firestone *Dilemma*, 106 MINN. L. REV. 2059, 2060 (2022).

120. *See, e.g.*, Nathan A. Silver et al., *Examining Influencer Compliance with Advertising Regulations in Branded Vaping Content on Instagram*, FRONTIERS PUB. HEALTH, Jan. 9, 2023, at 1, 1 (finding minimal influencer compliance with FTC regulations in the context of vaping products); *see*

make a lot of content, and when that content is sometimes sponsored and sometimes independent, it can make it particularly challenging for viewers to distinguish between the two.[121] This unique way by which influencers engage in marketing makes it difficult to sort them and their conduct into existing legal categories as "advertisers" or "endorsers," consequently imposing a significant obstacle for capturing influencer conduct within these existing legal frameworks.

Further, influencers complicate legal categorization not only by the way they engage in direct commercial activities but also because influencer content is often indirectly commercial. The influencer economy is not just about what influencers sell. Influencers themselves are a brand. An influencer may spread misinformation unrelated to a product or service simply because a third party has paid them.[122] They may spread misinformation because they know doing so will drive engagement, and engagement leads to increased compensation through shared-revenue programs with the social media platform, more click-throughs on alternative monetization links, or increased account value through higher follower and view counts.[123] Or, they may endorse a harmful product not because they are paid to do so but because they sincerely believe it is good or because they know doing so will also drive up engagement, go viral, increase viewership and followers, and lead to commercial opportunities.[124] They may also receive compensation that supports their channel generally, unrelated to any specific health-related content or posts.

In addition, in both direct and indirect commercial activities, an influencer speaks to a specific audience that has opted in to the influencer's content: their followers.[125] In traditional advertising and endorsing, the supply side determines the audience. The advertiser or endorser targets marketing to the public or a specific sought-out subgroup. In contrast, in the context of influencer marketing, the demand side determines the audience. Influencers make content in response to follower engagement trends, and influencer marketing targets a specific community subgroup that has deliberately opted in to receive content.[126]

Opting in to an influencer's content establishes a relationship between the influencer and follower that is distinct from standard advertising and endorsing

also Katie Notopoulos, *93% of Top Celebrity Instagram Ads Aren't Properly Disclosed*, BUZZFEED. NEWS (June 12, 2017, 12:45 PM), https://www.buzzfeednews.com/article/katienotopoulos/most-celebrities-arent-disclosing-instagram-ads [https://perma.cc/BT52-BHZK] (citing a report by Mediakix finding only 7% of reviewed ads followed required disclosures).

121. *See* Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 747–48 (2010).

122. *See supra* notes 90–92 and accompanying text (discussing COVID-19 misinformation and European YouTubers).

123. *See supra* notes 70–102 and accompanying text (outlining monetization and the virality of extreme content).

124. *See supra* notes 70–102 and accompanying text.

125. Many consumers will encounter harmful influencer content not because they follow an influencer, but because the social media platform's algorithm shows it to them based on viewing patterns and demographic characteristics. We distinguish and address this scenario in Part III.

126. *See* Roberts, *supra* note 54, at 84.

contexts. As scholars have noted, the value of influencer marketing is that "it is often not perceived by consumers as advertising."[127] By creating content to share with their followers and not simply sharing formal brand advertising with the world, influencers become the "social acquaintance who provides information to a private audience rather than a public one,"[128] amplifying their persuasive power. Because consumers are more likely to perceive influencers as neutral and unbiased peers with special claims to trustworthiness, credibility, and expertise,[129] this persuasion goes far beyond the consumer response we might expect from a traditional television commercial. And when consumers form parasocial relationships, they will be even less likely to oppose the influencer's message.[130] Whereas advertisers (and perhaps endorsers) are what Jane Bambauer calls "peddlers," or "commercial speaker[s] whose statements are directed at potential customers,"[131] influencers' unique value is that they offer more than a simple commercial shill.[132]

Influencers prime their followers through the totality of their content while developing and selling a personal brand, and the real success of influencer marketing results from this long game. "Priming" is a tool of strategic communication that influences how a follower will respond to subsequent information.[133] The perceived authenticity of the influencer's sharing of their life and experiences in noncommercial posts primes followers to respond favorably to subsequent commercial content.

Influencers are special. Regardless of whether influencers engage in direct or indirect commercial activity or some combination, how they engage their specific audience means that they stand apart from traditional advertisers or endorsers. Consequently, followers seeking to hold influencers liable do not necessarily have a clear legal path.[134] Influencer speech, particularly in the health context, raises real risks of physical harm. Yet, despite the significance of the harm, existing remedies offer inadequate solutions.

B. HARMS WITH LIMITED REMEDIES

Significant legal and scholarly attention is paid to platform and company liability for the information or products promoted by influencers.[135] However, significantly

127. Ye et al., *supra* note 59, at 160.

128. Bambauer, *supra* note 20, at 95.

129. *See supra* notes 50–64 and accompanying text (discussing trustworthiness and credibility).

130. *See supra* notes 55–57 and accompanying text (discussing parasocial relationships).

131. Bambauer, *supra* note 20, at 101.

132. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 385 (1973) (discussing advertisements that "[do] no more than propose a commercial transaction").

133. *See* Vilma Luoma-aho et al., *Primed Authenticity: How Priming Impacts Authenticity Perception of Social Media Influencers*, 13 INT'L J. STRATEGIC COMMC'N 352, 355 (2019).

134. Some commentators have argued that even novel and non-traditional advertising formats—like user-generated advertisements—do not evade regulation or the reach of existing advertising law. *See* Tushnet, *supra* note 121, at 731; *cf.* Goodman, *supra* note 106, at 702, 704 (arguing that paid blogger speech is hybrid speech, complicating the application of existing advertising laws).

135. On platform liability, see the Communications Decency Act, 47 U.S.C. § 230. For more information about private content platforms as systems of governance, see generally, for example, Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV.

less attention is paid to mechanisms addressing influencer liability directly. The following subsections focus on the limited capacity of private and public mechanisms to compensate individuals for physical harm resulting from influencer speech.

1. Private Mechanisms

Private mechanisms—that is, direct action by non-governmental entities like social media platforms—provide nimble approaches to addressing influencer speech. Through one such mechanism, content moderation, platforms can review and remove user-generated content that does not conform with their terms of use.[136] Content moderation can be conducted by employees or contractors tasked with viewing flagged content and judging whether it should be deleted in light of the company's policies.[137] However, the process is increasingly automated.[138] In many cases, content moderation is also a requirement imposed on platforms. The Apple App Store and the Google Play Store, for instance, reserve the right to remove apps with user-generated content that lack a mechanism to report offensive content and ensure timely responses to those concerns.[139]

Health-harming information is often—though not always—in violation of community guidelines and should ideally be identified and addressed through content moderation. For example, YouTube specifies that it does not "allow content that encourages dangerous or illegal activities that risk serious physical harm or death"[140] or medical misinformation that "poses a serious risk of egregious harm," including misinformation about prevention, treatment, and denial of specific health conditions.[141] In an August 2023 post on its official blog, YouTube publicly reaffirmed its commitment to addressing medical misinformation that poses "serious real-world risks," especially when related to cancer treatments.[142]

L. REV 1598 (2018). For scholarship discussing the complexities of regulating platforms, see generally, for example, Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303 (2021). For work exploring platform liability for harmful terrorist content, see generally, for example, Lavi, *supra* note 27. On company liability, see generally Roberts, *supra* note 54 (arguing that company-to-company lawsuits for false advertising by influencers should be made pursuant to Section 43(a)(1)(B) of the Lanham Act).

136. *See* Thomas Stackpole, *Content Moderation Is Terrible by Design*, HARV. BUS. REV. (Nov. 9, 2022), https://hbr.org/2022/11/content-moderation-is-terrible-by-design [https://perma.cc/UF2X-JTZN].

137. *See id.*

138. *See* Tomas Apodaca & Natasha Uzcátegui-Liggett, *How Automated Content Moderation Works (Even When It Doesn't)*, MARKUP (Mar. 1, 2024, 8:00 PM), https://themarkup.org/automated-censorship/2024/03/01/how-automated-content-moderation-works-even-when-it-doesnt-work [https://perma.cc/VSJ5-AEFT].

139. *See App Review Guidelines*, APPLE DEV., https://developer.apple.com/app-store/review/guidelines/#user-generated-content [https://perma.cc/F644-VZSL] (last visited Dec. 22, 2024); *User Generated Content*, GOOGLE: PLAY CONSOLE HELP, https://support.google.com/googleplay/android-developer/answer/9876937 [https://perma.cc/9AYX-CUXH] (last visited Dec. 22, 2024).

140. *Harmful or Dangerous Content Policy*, GOOGLE: YOUTUBE HELP, https://support.google.com/youtube/answer/2801964 [https://perma.cc/H846-GNP4] (last visited Dec. 21, 2024).

141. *Medical Misinformation Policy*, GOOGLE: YOUTUBE HELP, https://support.google.com/youtube/answer/13813322 [https://perma.cc/6QPC-D5UV] (last visited Dec. 21, 2024).

142. Garth Graham & Matt Halprin, *A Long Term Vision for YouTube's Medical Misinformation Policies*, YOUTUBE: OFF. BLOG (Aug. 15, 2023), https://blog.youtube/inside-youtube/a-long-term-vision-for-medical-misinformation-policies [https://perma.cc/4ZTT-JLJQ].

But, though influencers sharing health-harming information are likely violating platforms' policies, that does not mean the offending content is removed promptly or even at all. Several variables contribute to this problem. One is resources. For companies that rely on humans to make content moderation decisions, there is an understandably high turnover in the jobs involving the systematic review of upsetting content.[143] Even the largest platforms struggle to combat misinformation.[144] Some social media companies, like X, lost dozens of content moderators to resignations and layoffs, reducing their capacity to take action against those spreading false information.[145] Automated processes are not a panacea either because they are not always effective and have significant limitations.[146] Groups spreading misinformation are also sophisticated and have developed tactics to evade content moderation that capitalize on flaws in social media architecture.[147] Further, sometimes platforms only respond by demonetizing, but not removing, content.[148] Others "shadow ban,"[149] which limits the reach and promotion of certain content without removing it. And finally, moderation and demonetization provide no recourse for those actually harmed by the content.

However, even these limited approaches to stemming the flow of health-harming speech are under siege, alongside content moderation more generally. Social media companies like Meta are showing increased reluctance to independently fact-check user posts.[150] States have pushed back on social media platforms' ability to engage in content moderation. Florida's Senate Bill No. 7072 would, among other

143. *See* Jacob Silverman, *I Was a Facebook Content Moderator. I Quit in Disgust*, NEW REPUBLIC (May 12, 2021), https://newrepublic.com/article/162379/facebook-content-moderation-josh-sklar-speech-censorship; Sara Ashley O'Brien, *Moderating the Internet Is Hurting Workers. How Can Companies Help Them?*, CNN: BUS. (Feb. 28, 2019, 12:46 PM), https://www.cnn.com/2019/02/28/tech/facebook-google-content-moderators/index.html [https://perma.cc/L7U2-PFTJ].

144. *See, e.g.*, Int'l Fact-Checking Network, *An Open Letter to YouTube's CEO from the World's Fact-Checkers*, POYNTER (Jan. 12, 2022), https://www.poynter.org/fact-checking/2022/an-open-letter-to-youtubes-ceo-from-the-worlds-fact-checkers [https://perma.cc/42DQ-JFNV].

145. Tiffany Hsu, *Sympathy, and Job Offers, for Twitter's Misinformation Experts*, N.Y. TIMES (Nov. 28, 2022), https://www.nytimes.com/2022/11/28/technology/twitter-misinformation-experts-hiring.html; Brandy Zadrozny & Jason Abbruzzese, *X Makes Cuts to Disinformation and Election Integrity Team*, NBC NEWS (Sept. 28, 2023, 12:05 PM), https://www.nbcnews.com/tech/tech-news/x-makes-cuts-disinformation-election-integrity-team-rcna117744 [https://perma.cc/2APA-EVQU].

146. *See* SPANDANA SINGH, EVERYTHING IN MODERATION: AN ANALYSIS OF HOW INTERNET PLATFORMS ARE USING ARTIFICIAL INTELLIGENCE TO MODERATE USER-GENERATED CONTENT 17–20 (2019), https://d1y8sb8igg2f8e.cloudfront.net/documents/Everything_in_Moderation_2019-07-15_142127_tq36vr4.pdf [https://perma.cc/G5TH-ERC2].

147. *See* David A. Broniatowski et al., *The Efficacy of Facebook's Vaccine Misinformation Policies and Architecture During the COVID-19 Pandemic*, SCI. ADVANCES, Sept. 15, 2023, at 1, 10.

148. *E.g.*, James Hale, *YouTube Is a 'Major Conduit of Online Disinformation,' 80+ Fact-Checking Orgs Say in Letter to Susan Wojcicki*, TUBEFILTER (Jan. 12, 2022), https://www.tubefilter.com/2022/01/12/youtube-fact-checking-organization-letter-susan-wojcicki [https://perma.cc/6LAU-C888].

149. Shadow banning refers to "action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform." S. 7072, 27th Leg., Reg. Sess. § 4.1(f) (Fla. 2021).

150. Joel Kaplan, *More Speech and Fewer Mistakes*, META (Jan. 7, 2025), https://about.fb.com/news/2025/01/meta-more-speech-fewer-mistakes.

provisions, limit platforms' ability to censor, shadow ban, or deplatform a user.[151] Texas's House Bill No. 20 prohibits censorship of a "user's expression, or a user's ability to receive the expression of another person" based on viewpoints, with limited exceptions for content like that which "directly incites criminal activity or consists of specific threats of violence" or "is unlawful expression."[152] It is unclear whether health-harming advice would be uniformly exempted, especially given the frequent overlap of certain health and political or religious beliefs.

The future of these two laws is uncertain. The Eleventh Circuit held that social media companies are private actors with First Amendment rights and that Florida's limitations on content moderation are unconstitutional.[153] By contrast, the Fifth Circuit observed that the First Amendment does not include a "corporation's *unenumerated* right to *muzzle* speech" and reversed a district court's injunction on the Texas law.[154] In August 2023, the Solicitor General urged the Supreme Court to resolve, among other questions, whether Texas and Florida's content moderation restrictions comply with the First Amendment.[155] However, the Court only vacated the judgments and remanded the cases in July 2024,[156] leaving open questions about how legislative approaches like this will ultimately fare.

2. Public Mechanisms

Protecting the public from false or misleading content is not solely the responsibility of platforms via content moderation. It is also an important function of the state and federal government. Governments are aware of the harms posed by influencer conduct, and various attempts have been made to curb influencer behavior or remediate harms through existing regulatory schemes. These include targeted efforts by state attorneys general, the FDA, and the FTC. They also include suits brought by private citizens in federal and state courts.

One mechanism deployed against influencers is state consumer protection laws. Influencer Brittany Dawn Davis settled with the Texas Attorney General in 2023 for allegedly violating the Texas Deceptive Trade Practices–Consumer Protection Act (DTPA) and the Texas Business and Commerce Code.[157] Davis sold thousands of fitness packages, claiming to offer personalized nutritional guidance and individualized coaching from her website, posting content on Facebook, YouTube, Twitter, Pinterest, and a personal blog—all of which cross-linked.[158] She also held herself out as having personal experience and expertise in

151. S. 7072, 27th Leg., Reg. Sess. § 4.2(d).

152. H.B. No. 20, 87th Leg., 2nd Sess. § 7 (Tex. 2021).

153. NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1203 (11th Cir. 2022).

154. NetChoice, LLC v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022).

155. *See* Brief for U.S. as Amicus Curiae at 13, Moody v. NetChoice, LLC, 603 U.S. 707 (2024) (No. 22-277).

156. Moody v. NetChoice, LLC, 603 U.S. 707, 745 (2024).

157. Agreed Final Judgment & Permanent Injunction at 1, State v. Davis, No. DC-22-01388 (Tex. Dist. Ct. Dall. Cnty. filed June 1, 2023) [hereinafter Agreed Final Judgment & Permanent Injunction].

158. Plaintiff's Original Petition at 3–4, State v. Davis, No. DC-22-01388 (Tex. Dist. Ct. Dall. Cnty. filed Feb. 1, 2022) [hereinafter Original Petition].

eating disorders and knowingly accepted clients with eating disorders.[159] The plans were not personalized, and she had no such expertise.[160] Many clients reportedly suffered extreme hunger, and at least one allegedly nearly passed out from inadequate nutrition.[161] The settlement required Davis to pay $400,000 in penalties and restitution and permanently forbade her both from offering or selling personalized plans unless she provided them herself and from holding herself out as having eating disorder expertise she did not possess.[162] However, it did not address any consumer's physical harms.

In *State v. Davis*, Texas filed suit on behalf of a class of consumers. However, individual consumers can also bring cases under the Texas DTPA.[163] Although the Texas DTPA does not bar claims for damages from a personal injury claim, it limits them to economic damages.[164] Non-economic damages, which are common in personal injury claims, are "beyond the scope of the statute."[165] More generally, state unfair and deceptive consumer practices laws vary significantly: some do not permit individuals to bring suit, some only apply to specific types of commercial entities and commercial exchanges, and others have limitations that complicate consumer protection law as a pro forma remedy for individuals injured by influencer speech.[166]

The FTC can also police influencer content as part of its consumer protection mission, under truth-in-advertising laws and standards and the Endorsement Guides.[167] The FTC has used this power to go after marketers—like Teami, a marketer of teas and skin care products—for making deceptive health claims, as well as the influencers who spread those claims.[168] The claims included Teami tea's ability to treat cancer, reduce serum cholesterol, unclog arteries, decrease migraines, treat colds, prevent flu, produce weight loss, and burn body fat.[169] However, the FTC's issue with influencers was not their health claims or physical harm to consumers but that their posts lacked clear disclosure about their

159. *Id.* at 7–8.

160. *See id.* at 3, 7.

161. *Id.* at 6–7.

162. Agreed Final Judgment & Permanent Injunction, *supra* note 157, at 4–7.

163. *See* Tex. Bus. & Com. Code § 17.50(a).

164. *See* Perez v. Am. Med. Sys. Inc., 461 F. Supp. 3d 488, 499 (W.D. Tex. 2020) (defining economic damages as "compensatory damages for pecuniary loss, including costs of repair and replacement," and not including "exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society" (citing Tex. Bus. & Com. Code § 17.45(11))).

165. *Id.* at 500.

166. *See* CAROLYN CARTER, NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 33–40 (2018), https://www.nclc.org/resources/how-well-do-states-protect-consumers [https://perma.cc/EP66-S3WS].

167. *See* Roberts, *supra* note 54, at 101–03, 117.

168. Press Release, Fed. Trade Comm'n, Tea Marketer Misled Consumers, Didn't Adequately Disclose Payments to Well-Known Influencers, FTC Alleges (Mar. 6, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/03/tea-marketer-misled-consumers-didnt-adequately-disclose-payments-well-known-influencers-ftc-alleges [https://perma.cc/U5TN-GQZ4].

169. Complaint for Permanent Injunction and Other Equitable Relief at 16–17, FTC v. Teami, LLC, No. 20-cv-00518 (M.D. Fla. Mar. 5, 2020).

financial relationships with Teami.[170] More recently, the FTC sent letters to influencers warning them to disclose financial relationships with the American Beverage Association and the Canadian Sugar Institute after promoting the safety of aspartame and sugar-containing products.[171] As these examples show, the FTC largely focuses on disclosure of direct commercial conduct, and it rarely pursues influencers.[172]

The FTC and FDA have overlapping interests and authority in addressing labeling, advertising, and endorsing, including influencer misinformation that can cause injury to consumers.[173] However, they have agreed that the FDA has primary responsibility for misinformation involving prescription drugs, and the FTC has primary responsibility for the "truth and falsity of all advertising," excluding labeling, of other foods, drugs, devices, and cosmetics.[174] Yet both agencies primarily focus on adequate disclosures as far as influencers are concerned: the FDA with balanced information on risks and benefits, and the FTC with the veracity of health claims and clear disclosure of sponsored content.[175] However, when it comes to influencers, the sheer volume and dynamic nature of user-generated content create an impossible task of sifting through all posts to ensure compliance.[176] Both agencies have rulemaking authority and can theoretically change their approach to social media influencers. However, given recent decisions[177] and the current composition of the Supreme Court, these pivots from their historical purview may be difficult, if not impossible, in the absence of clear congressional intent.[178]

---

170. *See, e.g.*, Letter from Richard A. Quaresima, Fed. Trade Comm'n, to Adrienne Eliza Houghton, Warning to Prominently Disclose Paid Endorsements (Mar. 5, 2020), https://www.ftc.gov/system/files/documents/cases/1823174teamiwarningletters.pdf [https://perma.cc/4HVE-GTBU] [hereinafter Letter from Richard A. Quaresima].

171. Press Release, Fed. Trade Comm'n, FTC Warns Two Trade Associations and a Dozen Influencers About Social Media Posts Promoting Consumption of Aspartame or Sugar (Nov. 15, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-warns-two-trade-associations-dozen-influencers-about-social-media-posts-promoting-consumption [https://perma.cc/YLG9-MHGN].

172. *See* Neil Feinstein & William Murphy, *Online Influencers Create Challenging "Fyre" to Contain*, 35 COMMC'N L. 38, 40 (2020).

173. *See* Raqiyyah Pippins et al., *All Eyes on Influencers: FDA and FTC Examination of Endorser Advertising Signals Global Focus on Social Media*, ARNOLD & PORTER: ADVISORIES (Feb. 25, 2020), https://www.arnoldporter.com/en/perspectives/advisories/2020/02/all-eyes-on-influencers [https://perma.cc/7KWK-JVK8].

174. Memorandum of Understanding Between the Fed. Trade Comm'n and the Food & Drug Admin. (May 14, 1971), https://www.fda.gov/about-fda/domestic-mous/mou-225-71-8003 [https://perma.cc/G67X-K865].

175. *See, e.g.*, Lesley Fair, *FTC-FDA Warning Letters: Influential to Influencers and Marketers*, FED. TRADE COMM'N: BUS. BLLOG (June 7, 2019), https://www.ftc.gov/business-guidance/blog/2019/06/ftc-fda-warning-letters-influential-influencers-and-marketers [https://perma.cc/9C8A-C4T2] (illustrating FTC and FDA disclosure-focused actions in the context of online sellers of nicotine-laced liquids).

176. *See* Zuppello, *supra* note 116.

177. *See generally* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (overruling Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

178. *See* West Virginia v. EPA, 597 U.S. 697, 735 (2022) (holding that Congress must provide clear authorization for an agency to regulate issues of major economic and political significance).

Concerns about the limits of agency authority extend beyond scholarly concerns about the future of the administrative state.[179] They were also the recent subject of litigation. At the district court level, *Apter v. Department of Health & Human Services* called into question the scope of agency authority to address health misinformation.[180] This included whether the FDA could tweet, "You are not a horse" in response to ivermectin misinformation, because the tweet and other public statements were allegedly made *ultra vires* in violation of the FDA's enabling act and the Administrative Procedure Act.[181] The three doctors bringing suit argued that the FDA interfered with their medical practice and did not have express authority to recommend against off-label uses of drugs—like Ivermectin—which are approved for human use.[182] The Supreme Court also granted certiorari for *Murthy v. Missouri*. As Justice Alito characterized it, *Murthy* involved "what two lower courts found to be a 'coordinated campaign' by high-level federal officials to suppress the expression of disfavored views on important public issues."[183] Those disfavored views included COVID-19 health misinformation.[184] At issue was whether the federal government was coercing, threatening, or pressuring—sometimes called "jawboning"[185]—social media companies to censor protected free speech.[186] The Court ultimately disposed of the case on procedural grounds, holding that none of the plaintiffs had established standing against any defendant.[187] As a result, the limits of government authority to engage with social media platforms to address the spread of health misinformation remain unclear.

Overall, existing laws and regulations appear primarily concerned with remedying lack of disclosure or false or deceptive business practices, not addressing the physical harm influencer speech can, and does, cause. Difficulties arise when agencies attempt to address misinformation beyond traditional means, like letters to influencers.[188] The challenges faced by the FTC, the FDA, and other regulatory agencies in trying to retrofit existing laws to new technologies and behaviors, and thus engage with the growing problem of social media misinformation, illustrate that existing approaches are insufficient and that the future of even those limited approaches is uncertain.

In the face of these regulatory limits, it is unsurprising that consumers have begun to turn to private law as a possible mechanism to remedy harms suffered

179. *See* Lisa Heinzerling, *How Government Ends*, BOS. REV. (Sept. 28, 2022), https://www.bostonreview.net/articles/how-government-ends.

180. Apter v. Dep't of Health & Hum. Servs., 80 F.4th 579, 583 (5th Cir. 2023).

181. *Id*. at 585.

182. *See id*.

183. Murthy v. Missouri, 144 S. Ct. 7, 7 (2023) (Alito, J., dissenting from grant of application for stay).

184. *See id*. at 8.

185. Genevieve Lakier, *Informal Government Coercion and the Problem of "Jawboning,"* LAWFARE (July 26, 2021, 3:52 PM), https://www.lawfaremedia.org/article/informal-government-coercion-and-problem-jawboning [https://perma.cc/HL22-TNCX].

186. *Murthy*, 144 S. Ct. at 8.

187. Murthy v. Missouri, 603 U.S. 43, 56 (2024).

188. *See* Letter from Richard A. Quaresima, *supra* note 170.

from influencer misinformation. Specifically, lower courts are beginning to see negligence claims against influencers, with consumers filing negligence actions against brands that use social media to advertise[189] and, ironically, brands suing influencers.[190] Relevantly, followers are beginning to sue influencers for negligence.[191] The novelty of these negligence claims, with the harms occurring through the mechanism of online speech, raises two distinct issues for courts: first, whether it is appropriate to impose a duty of care in negligence on influencers vis-à-vis their followers, and second, whether the First Amendment imposes an obstacle to tort liability for influencers whose speech causes physical harm.[192]

II. INFLUENCER DUTIES IN NEGLIGENCE

Regardless of what some health influencers suggest, putting essential oils in your eyes can cause tissue corrosion, scarring, or blindness.[193] "Detoxing" with turpentine[194] can be fatal.[195] Even if social media health advice does not directly hurt someone, decisions to forgo life-saving, sustaining, or improving treatments or medications can mean their conditions deteriorate or, at best, fail to improve. Influencer health misinformation can cause real physical harm, and no amount of sternly worded agency letters or platform shadowbans will ever compensate injured individuals for what they have lost. But negligence liability can. This Part focuses exclusively on what duties influencers who disseminate health misinformation that results in physical harm owe to their followers. Section II.A grounds

189. Verified Complaint at 4, 14–16, Gordon v. Zuckerbrot, No. 158720-2022 (N.Y. Sup. Ct. Oct. 12, 2022).

190. Zuckerbrot v. Lande, 167 N.Y.S. 3d 313, 318–19 (N.Y. Sup. Ct. 2022) (involving a defamation and product disparagement claim against an Instagram influencer).

191. Pop v. LuliFama.com, No. 22-cv-2698, 2023 WL 4661977, at *2 (M.D. Fla. July 20, 2023) (involving complaint filed against influencer for negligence); *see also* Voytko-Best, *supra* note 35 (discussing the settlement of *In re Fyre Festival Litigation*, 399 F. Supp. 3d 203 (S.D.N.Y. 2019), a negligence claim against influencer Kendall Jenner).

192. *See* N.Y. Times v. Sullivan, 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute."); *see also* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) ("[I]n granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and . . . therefore, the action of the state courts cannot stand."); Nathan B. Oman & Jason M. Solomon, *The Supreme Court's Theory of Private Law*, 62 DUKE L.J. 1109, 1112 (2013) (stating that "the Supreme Court's theory of private law . . . [is] one that follows the dominant view of private law as a species of government regulation" but arguing that this rationale should be limited to private law actions where speech suppression is directly implicated).

193. *See Essential Oils Safety — Why It Is Important and How to Stay Safe*, ORGANIC AROMAS, https://organicaromas.com/pages/essential-oils-safety [https://perma.cc/Z5NS-V6QY] (last visited Dec. 23, 2024).

194. *See* Andrew Kaufman (@AndrewKaufmanMD), X (Nov. 20, 2023, 3:30 PM) [https://perma.cc/LS92-SB3S].

195. *Turpentine Oil: A New Health Craze with Serious Safety Concerns*, NATMED: NEWS (Mar. 2019), https://naturalmedicines.therapeuticresearch.com/news/news-items/2019/march/turpentine-oil-a-new-health-craze-with-serious-safety-concerns.aspx [https://perma.cc/2HAY-FR5Z].

influencer duties in doctrine, arguing that under existing jurisdictional rules, influencers owe a duty of care to their followers. Section II.B examines the question of public policy, outlining three justifications that support the imposition of duties on influencers.

A. GROUNDING INFLUENCER DUTIES

To hold an influencer liable for negligence, a follower must demonstrate that the claim's four fundamental elements are satisfied. At its simplest, this means a follower needs to show that the influencer owed them a duty of care, breached that duty, and that the breach caused them to suffer damages.[196] While novel and tricky questions relating to the plausibility of influencer negligence are present in all elements of the cause of action, duty is the element that serves as the legal gatekeeper for negligence claims.[197] Consequently, we focus exclusively on doctrinal justifications for influencer duties.

Courts are slowly beginning to see followers bring negligence cases against influencers, though suits have largely been centered on financial misrepresentations and economic harms. When not stuck winding through the slog of pretrial motions in lower courts, these cases have, thus far, largely resulted in dismissals and settlements.[198] Courts have not yet decided whether influencers owe a duty to avoid sharing health misinformation with their followers. Without specific guidance, we must turn to doctrinal rules and analogous legal precedent to surmise whether an influencer would owe such a duty.

As with most common law standards, whether a duty of care exists is jurisdiction dependent. The jurisdictional approaches to imposing a duty range on a spectrum from weak (where a defendant is least likely to owe a duty to a plaintiff) to strong (where a defendant is most likely to owe a duty to a plaintiff). The weakest rules impose a duty if the risk to the plaintiff (or class of plaintiffs) was foreseeable.[199] Further along the spectrum, some jurisdictions' rules impose duties where the risk was foreseeable (i.e., the plaintiff or class of plaintiffs need not be foreseeable).[200] Finally, some jurisdictions apply the strongest general duty rule,

196. *See* John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 658 (2001) ("A prima facie case of negligence has four elements: duty, breach, causation, and injury. . . . [A] person suing for negligence alleges that the defendant owed her a duty of reasonable care and injured her by breaching that duty. Every state adheres to the four-element account, with perhaps two exceptions.").

197. We also set aside questions about the reasonableness of a person following an influencer's health-related recommendations or advice, as well as the question of whether a higher level of culpability—e.g., intent, or recklessness—could apply to influencer misinformation. In future work we plan to examine the remaining elements of the negligence cause of action in the context of follower–influencer litigation, as well as the possibility of negligent misrepresentation actions against influencers.

198. *See* Pop v. Lulifama.com, No. 22-cv-2698, 2023 WL 4661977, at *7 (M.D. Fla. July 20, 2023) (dismissing plaintiff's complaint against influencer for negligence); *see also* Voytko-Best, *supra* note 35 (discussing the settlement of a negligence claim against influencer Kendall Jenner).

199. *See, e.g.*, Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (holding that duty of care is conditioned on the foreseeability of the risk to the plaintiff or class of plaintiffs).

200. *See, e.g.*, Brown v. Kerr, No. 2009-CA-000943, 2010 WL 1404785, at *4 (Ky. Ct. App. Apr. 9, 2010) (holding that duty of care is conditioned on the foreseeability of the risk of harm).

imposing a duty whenever the defendant engaged in risk-creating conduct.[201] Under the strongest general duty rule, neither the risk nor the plaintiff need be foreseeable. The simple fact that the defendant engaged in the conduct is sufficient to impose a duty.

On a strict application of doctrinal approaches, it seems clear that an influencer will owe a duty of care under even the narrowest conception of duty: a foreseeable risk to a foreseeable plaintiff. As outlined in Part I, the goal of the social media influencer is to persuade individuals who have opted in to their content to engage with content or engage in commercial transactions. A reasonable person in an influencer's position can foresee the possibility that their actions could affect their followers, making them identifiable potential plaintiffs. Similarly, it is difficult to imagine how an influencer could plausibly argue that a reasonable person could not have foreseen that their decision to spread health misinformation to their followers could result in injury. For example, an influencer who encouraged their followers to consume borax[202] could have foreseen that their actions would injure those followers, as well as the nature of the potential injuries.[203]

Yet, the application of default duty rules is deceptively simple. In practice, judicial determinations of whether a defendant owes a duty to a plaintiff inevitably include judicial assessment of whether public policy weighs for or against the imposition of a duty.[204] This is particularly true in negligence claims based solely on the defendant's speech.[205] In these cases, physical harm only results when the listener–plaintiff credits the speech. In other words, the court is being asked to impose a legal duty to take care with respect to speech alone on the basis that the speech could ultimately cause harm if the plaintiff follows the advice.

---

201. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7(a). Several states follow this broad formulation for determining whether a duty of care is owed, including Iowa and Nebraska. *See* Thompson v. Kaczinski, 774 N.W.2d 829, 838 (Iowa 2009); Bell v. Grow with Me Childcare & Preschool LLC, 907 N.W.2d 705, 714–15 (Neb. 2018).

202. *See* Ohlheiser, *supra* note 2.

203. *See* Niels Hadrup et al., *Toxicity of Boric Acid, Borax and Other Boron Containing Compounds: A Review*, REGUL. TOXICOLOGY & PHARMACOLOGY, 2021, at 3–4.

204. *How* public policy is considered and framed depends on the jurisdictional rule. In jurisdictions that adhere to duty rules that require assessment of foreseeability, policy considerations are inevitably intertwined with questions of foreseeability. *See, e.g.*, *Palsgraf*, 162 N.E. at 104; Monk v. Temple George Assocs., 869 A.2d 179, 184–85 (Conn. 2005); A.L. v. Harbor Developmental Disabilities Found., 321 Cal. Rptr. 3d 575, 585 (2024). In jurisdictions that follow the strongest duty rule—duty owed when a person engages in risk-creating conduct—questions of public policy are necessarily disaggregated from the application of the duty rule and overtly considered. The latter approach reflects that proposed in the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7(b) ("In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification."); *see also* Michael D. Green, *Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts (Spring 2010)*, 37 WM. MITCHELL L. REV. 1011, 1016, 1018 (2011) (discussing the value of courts explicitly disaggregating and considering duty as doctrine and duty as policy).

205. *See* Bambauer, *supra* note 38, at 349.

Negligence speech-torts, then, raise difficult policy-based questions relating to the allocation of responsibility to take due care, particularly given that responsibility is a necessary precondition to liability.[206] Courts have been reluctant to allocate responsibility for harms caused by negligent speech in the absence of a relationship between the speaker–defendant and the listener–plaintiff.[207] Underlying these decisions are what can best be termed shadow Speech Clause concerns. For example, in a series of cases involving broadcasters and publishers, lower courts have held that speakers who disseminate information to a broad audience owe no duty of care to listeners, even when severe and permanent injuries result from the speech.[208] The generalized broadcast of information to an open audience raised concerns that imposing a duty would result in the suppression of speech.[209] Conversely, where a relationship exists between the speaker and listener, courts have held that the shadow Speech Clause concerns are less salient. As a matter of tort doctrine, then, when such a relationship exists, courts have been amenable to allocating responsibility to the speaker–defendant for harms to the listener–plaintiff resulting from the speech.

In such a relationship, tort law assigns a defendant responsibility for speech harms through one of two doctrinal mechanisms. First, courts have applied ordinary duty rules where the speech is consciously communicated to a listener or group of listeners, and that speech is likely to induce listener reliance.[210] Here, courts have variously held that by disseminating the speech in question, the defendant engaged in risk-creating conduct, the risk of harm from the speech was foreseeable, or the risk of harm to the listener–plaintiff(s) was foreseeable.[211] Second, courts have held that the speaker–defendant has an affirmative duty to act in the interests of another when in a "special relationship" with the

206. *See* Joseph Raz, *Responsibility and the Negligence Standard*, 30 OXFORD J. LEGAL STUD. 1, 4 (2010) (discussing the various ways responsibility is relevant to negligence).

207. Courts have been willing to impose liability absent a relationship where the speech is directed to a specific individual. *See* Bambauer, *supra* note 38, at 349 n.14 ("While the defendant's driver was under no obligation to give the plaintiff any signal at all, when he undertook to do so a duty devolved upon him to exercise ordinary care to see that the way was clear ahead for the plaintiff's car to pass safely, and whether he did so under the circumstances is a question for the jury's determination." (quoting Shirley Cloak & Dress Co. v. Arnold, 92 Ga. App. 885, 892 (1955); citing Miller v. Watkins, 355 S.W.2d 1, 3–4 (Mo. 1962))).

208. *See, e.g.*, Jaillet v. Cashman, 189 N.Y.S. 743, 744 (N.Y. Sup. Ct. 1921), *aff'd*, 235 N.Y. 511 (N.Y. 1923) (finding no duty for economic loss when plaintiff relied on bad investment advice published in newspaper); MacKown v. Ill. Publ'g & Printing Co., 6 N.E.2d 526, 530 (Ill. App. Ct. 1937) (finding no duty rule for injuries sustained when plaintiff relied on bad medical advice published in newspaper); Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1034 (9th Cir. 1991) (finding no duty when plaintiffs became severely ill after relying on an encyclopedia containing misinformation about the safety of certain mushrooms).

209. Courts either consider speech questions as part of the duty analysis without raising the First Amendment or alternatively sidestep duty and consider speech concerns as an exclusively constitutional question. *See generally* Sacks, *supra* note 37 (reviewing judicial decisions concerning speech-based negligence claims).

210. *See* Bambauer, *supra* note 38, at 353.

211. *See supra* notes 199–201 and accompanying text.

listener–plaintiff—a relationship typically described as fiduciary in nature.[212] Yet, the boundary between these two categories is fuzzy, and scholars have acknowledged that ordinary duty rules can be sensitive to the tortfeasor–victim relationship, yet not dependent on its existence.[213]

As outlined in Part I, influencers and followers are not strangers on the internet. Instead, influencers are speakers who profit from deliberately disseminating information to their followers, all of whom have opted in to the content. Influencers make content in response to how followers engage—creating the type of content followers like and posting it at the time of day they are most likely to see it—to maximize that engagement. Further, the relationship between an influencer and their follower can become parasocial.[214] Because an influencer's carefully crafted persona encourages these relationships, followers feel like they are interacting with a friend.[215] The strength of these parasocial relationships is amplified by the fact that, by design, social media relationships involving two-sided, genuine friendships function the same way as one-sided, parasocial relationships. In other words, a follower in a parasocial relationship with an influencer engages with the influencer exactly as they would their closest friend.[216] Influencers manipulate followers through sophisticated marketing practices, carefully curating their networks to maximize connections and engagement for commercial gain.[217]

The nature of the influencer–follower relationship supports the application of ordinary duty rules in negligence. The influencer consciously communicates to listeners in a manner that is not only likely to induce listener reliance but, in fact, has the purpose of inducing reliance for the speaker's commercial gain. The context surrounding an influencer's messages often creates implied claims of expertise and special knowledge, granting their speech an extraordinary ability to influence their followers' behaviors.[218]

Beyond the standard duty analysis, the misalignment of the interests of the influencer and follower sitting alongside the influencer's inducement and the

212. *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965). Recognized categories of special relationships include: (1) carrier–passenger, (2) innkeeper–guest, (3) invitor–invitee or possessor of land open to the public and one lawfully upon the premises, (4) employer–employee, (5) school–student, (6) landlord–tenant, and (7) custodian–ward. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 408 (2d ed. 2024).

213. *See* Goldberg & Zipursky, *supra* note 196, at 708 (arguing that the "existence of a relationship between defendant and plaintiff at the time of the conduct in question may bear on the existence and scope of the defendant's duty to the plaintiff").

214. *See supra* notes 18–21 and accompanying text (discussing the parasocial nature of influencer–follower relationships).

215. Hyosun Kim, *Keeping Up with Influencers: Exploring the Impact of Social Presence and Parasocial Interactions on Instagram*, 41 INT'L J. ADVERT. 414, 419 (2022).

216. *See* Hanna Reinikainen et al., *'You Really Are a Great Big Sister' – Parasocial Relationships, Credibility, and the Moderating Role of Audience Comments in Influencer Marketing*, 36 J. MKTG. MGMT. 279, 281 (2020).

217. *See* Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 522–23 (2015) (defining manipulative marketing as "noninformational marketing that seeks to take advantage of consumers' cognitive weaknesses and biases").

218. *See supra* notes 50–64 and accompanying text; Reinikainen et al., *supra* note 216, at 281–82.

follower's reliance suggests an almost fiduciary relationship. The nature of the relationship means that a follower's reliance is based on a presumption that the influencer—as a friend or peer—has the follower's best interests at heart. Conversely, the influencer builds that exact presumption among their followers to maximize commercial gain. The follower, then, is uniquely vulnerable in the relationship, and the influencer uniquely benefits from it. As such, we can characterize the nature of the relationship between influencer and follower as one that is *almost* fiduciary in nature, where the concern is that the influencer will take advantage of the follower—a concern D. Gordon Smith has characterized as not about "inadvertent harm, but about self-interested behavior" that wrongs the follower.[219]

This fiduciary rationale arguably fits alongside the existing categories of recognized special relationships—carrier–passenger, innkeeper–guest, inviter–invitee, employer–employee, school–student, landlord–tenant, and custodian–ward.[220] In these categories, the need for and imposition of a duty recognizes the misalignment of information, power, or benefits between the parties. Lower courts have also recognized duties in the context of friendship. For example, in *Farwell v. Keaton*, a Michigan court held that the defendant owed a duty of care to the victim, his friend, as they were "companions on a social venture," which implied they would aid one another.[221] Tamar Frankel has characterized friendship as a "social relationship that might rise to the status of a fiduciary relationship."[222] She argues that this is especially so if a friendship "leads to abuse of trust in a business context."[223] In the fiduciary context, there is an obligation on one party to behave as if they have "adopt[ed] an other-regarding preference function."[224] To be clear, we are not arguing that the influencer–follower relationship is inherently a fiduciary one. Rather, we claim that the nature of the influencer–follower relationship, especially when it involves parasocial characteristics, has the hallmarks of those fiduciary-like relationships that underpin the recognized categories of special relationships in negligence duties.

Regardless of the nature of the doctrinal sorting, the characteristics of the influencer–follower relationship suggest that it is normatively sound to allocate responsibility to the influencer for harms resulting from speech directed to their followers. The intentional communication of health claims that an influencer

219. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1408 (2002).

220. *See* DOBBS ET AL., *supra* note 212, § 408.

221. 240 N.W.2d 217, 222 (Mich. 1976).

222. TAMAR FRANKEL, FIDUCIARY LAW 57 (2011).

223. *Id.*

224. Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1785 (2001); *see also* DOBBS ET AL., *supra* note 212, § 408 n.2 ("Whether the special relationship itself is the source of duty, or whether it is merely the language courts may use when they believe a duty should be applied, is a debated question."); W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 677 n.36 (2008) ("A determination that a 'special relationship' exists simply reflects a conclusion that, based on the factual context, an affirmative duty should be imposed.").

knows (or should know) lack sufficient scientific support fits squarely within the types of negligent speech that the common law sanctions. However, policy considerations involve more than judicial consideration of the relationship between a plaintiff and defendant. In deliberating on whether to impose a duty, courts ultimately make categorical decisions about which circumstances justify the courts intervening and imposing obligations.[225] In making these determinations about the assignment of responsibility in a duty inquiry, courts must balance the competing interests of the tortfeasor and the victim. In the context of influencer health misinformation, those competing interests involve a clash of fundamental interests—namely, the right of the follower to physical liberty and the liberty interests of the influencer to speak.[226] With this in mind, Section II.B examines the broader policy justifications that support courts imposing legal obligations on influencers.

B. JUSTIFYING INFLUENCER DUTIES

Imposing influencer duties requires identifying the circumstances that justify the courts intervening and imposing obligations on influencers vis-à-vis their followers. An underlying rationale for not imposing a duty is the concern that liability would have a "socially undesirable" outcome that outweighs the benefit to the victim.[227] This requires rationalizing the preferencing of the follower's right to physical liberty over the influencer's liberty interests to speak for commercial gain. Ultimately, judicial recognition of influencer duties is warranted due to the misalignment of the interests and incentives of influencers and followers and, consequently, the detrimental impact on individuals and society.[228] This Section offers three justifications for imposing a duty of care on influencers: (1) the social inutility of health misinformation, (2) the potential for influencer duties to prevent disproportionate harms against marginalized populations, and (3) the reduction in negative externalities that results from influencer duties.[229]

1. The Social Inutility of Health Misinformation

A duty of care for influencers is welfare-enhancing, meaning it improves a population's overall well-being by promoting beneficial social and economic outcomes.[230] Specifically, influencer duties address the social inutility of health

225. *See* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 WM. & MARY L. REV. 1159, 1181 (2000) (discussing the balancing approach courts have utilized when making decisions about which categories of speech can result in tort liability).

226. *See* Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 318–21 (1996) (discussing the balancing approach that courts have taken to determinations about the degree of care needed to avoid liability); *see also* Malloy & Krotoszynski, Jr., *supra* note 225, at 1181–83.

227. Stephen D. Sugarman, *Why No Duty?*, 61 DEPAUL L. REV. 669, 678 (2012).

228. *See* Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1020 (2014).

229. The first two justifications defend against suggested public policy limitations on duty in the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7(b).

230. *See Welfare Economics Explained: Theory, Assumptions, and Criticisms*, INVESTOPEDIA (June 26, 2024), https://www.investopedia.com/terms/w/welfare_economics.asp#toc-what-is-welfare-economics [https://perma.cc/JLQ6-6SF6].

misinformation by holding those who cause harm accountable for their speech. This can ultimately reduce health-harming content while providing remediation to those who have experienced physical harm. And, importantly, it can do so without sacrificing other positive aspects of health and wellness content online, such as the generation of helpful, health-promoting content and the development of empowering communities with shared health experiences.[231]

Harmful health misinformation lacks social utility. It benefits nobody. Regardless of its source, social media health information raises significant concerns.[232] The poor quality of information spans topics ranging from life-threatening diseases like cancer to more banal health-related information like dental care.[233] Sham interventions can range from applying castor oil topically to bleach enemas and can even be recommended for infants and children.[234] Such advice, once taken, has the potential to injure or kill. As a result, a key justification for tort liability is that it provides an important mechanism for followers to hold influencers accountable for this type of health-harming content. It provides remediation to those who suffer physical harm, and the threat of that accountability may ultimately lead influencers to be more circumspect with their content. These effects would ultimately improve health and, by extension, welfare.[235]

Importantly, tort liability for influencers can enhance welfare without sacrificing positive aspects of the health information ecosystem. Because this type of content shares space with other health content, any interventions targeting health misinformation generate legitimate worries about over-inclusivity to the detriment of beneficial health information.[236] Here, the specific concern would be that individuals would stop sharing all health information on social media and that, as a result, society would lose important sources of knowledge and empowered communities with shared health experiences; that, out of fear of being sued, individuals would cease to engage in otherwise beneficial activities, such as contributing their speech to the marketplace of ideas.[237]

However, this Article is not concerned with imposing liability on casual social media users or eliminating the robust and supportive communities that develop in online spaces. Instead, the benefit of influencer tort liability is that it is narrowly

---

231. *See* Fergie et al., *supra* note 43, at 50.

232. *See* Afful-Dadzie et al., *supra* note 53, at 4.

233. *Id.* at 10; *see also* Victor Suarez-Lledo & Javier Alvarez-Galvez, *Prevalence of Health Misinformation on Social Media: Systematic Review*, J. MED. INTERNET RSCH., 2021, at 1, 6.

234. *See supra* notes 1–6 and accompanying text.

235. Geoffrey Bannister & Alexandros Mourmouras, *Welfare Versus GDP: What Makes People Better Off*, IMF: BLOG (Mar. 7, 2018), https://www.imf.org/en/Blogs/Articles/2018/03/07/welfare-versus-gdp-what-makes-people-better-off [https://perma.cc/JEU9-VARL].

236. *See, e.g.*, Jonathon W. Penney, *Understanding Chilling Effects*, 106 MINN. L. REV. 1451, 1453–54 (2022) (discussing concerns over how regulation of online speech could result in chilling behavior). *Cf.* Jonathon W. Penney, *Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study*, INTERNET POL'Y REV., May 26, 2017, at 1, 1, 3 (measuring whether hypothetical regulation chills speech online).

237. *See* Mark A. Geistfeld, *Social Value as a Policy-Based Limitation of the Ordinary Duty to Exercise Reasonable Care*, 44 WAKE FOREST L. REV. 899, 900–01 (2009).

concerned with holding *influencers* accountable for spreading health misinformation that is not only capable of producing physical harm but that actually *does* produce physical harm.[238] Tort liability for influencers thus addresses something with no social value while leaving untouched lay opinions and online communities with profound social utility.

Further, tort liability for influencers would not target lay users of social media, like a distant friend or relative innocently repeating health misinformation on a personal Facebook page. Nor would liability be appropriate for individuals in groups with similar health experiences sharing personal anecdotes unsupported by scientific studies or tips about how to navigate a specific disease or condition. Instead, influencer liability specifically targets *influencers*—that is, content creators who share information for commercial gain.[239]

While sharing any type of health misinformation could cause some type of harm, be it financial or emotional, a benefit of the type of tort liability advocated for in this Article is that it would be limited to physical harms suffered by an identifiable plaintiff—not just the mere possibility of a hypothetical harm to a hypothetical person or some other type of intangible harm. This means that judicial recognition of negligence liability would not have to address claims concerning influencers who spread harmless (but incorrect) or beneficial (but unsubstantiated) information. This is a significant benefit of using a common law doctrine compared to other, blunter interventions like legislation and regulation. Instead of requiring the government to articulate broad rules concerning truth, falsity, and where lines of responsibility and liability should be drawn, tort law allows private parties to litigate these issues on a case-by-case basis with the help of specific evidentiary facts and dueling experts. In this way, negligence sidesteps more daunting epistemic concerns, recognizing that scientific truth is inherently complex and evolving.

Finally, zooming out from the specifics of influencer tort liability, chicken-little worries about the terrible unintended consequences of private law actions rarely come to pass. Analogous concerns were pervasive after *Tarasoff v. Regents of the University of California*[240] and the subsequent growth in states recognizing the duty of mental health professionals to warn known victims of serious threats by their patients.[241] Courts and scholars cautioned of a number of unintended consequences, including patients ceasing therapy or lying to their therapists, wrongful commitments to mental institutions, and excessive and unnecessary third-party warnings.[242] Similar stories can be told concerning market-share liabilities,

238. The criteria that a factfinder would use to determine whether an individual constitutes an influencer would track the characteristics outlined *supra* Part I. The extent to which the individual's social media activity is commercialized will likely be of central importance.

239. *See* Skalbania, *supra* note 104, at 669–70 (collecting and synthesizing different definitions of the term "influencer").

240. 551 P.2d 334, 340 (Cal. 1976).

241. Sugarman, *supra* note 227, at 681.

242. *Id.* at 681–82.

loss of chance, and increased-risk doctrine.[243] These fears, as a whole, never bore out.[244] Given the negligible risk that liability for health-harming misinformation on social media might stifle the generation of some amount of health-benefiting information, it hardly seems to justify a determination of no duty in light of the significance of the problem.

2. The Social Utility of Influencer Duties

A second justification for imposing a duty on influencers is that it is socially useful. One important function of duty doctrines is to encourage acts or omissions that result in external benefits. While judicial policy considerations at the duty phase predominantly focus on balancing the plaintiff's and defendant's private interests, duty choices have costs, benefits, or both that implicate interests beyond the parties to the litigation.[245] Assigning responsibility and, consequently, liability to a defendant via a duty of care often implicates the interests of third parties and society more generally. In other words, imposing a duty on a defendant constrains the behavior of other similarly situated individuals and implicates the rights of other interests in the community. Consequently, tort law recognizes that just and fair victim compensation also depends on a judgment about whether the resulting societal gain justifies the loss to others.[246]

As described above, duties for influencers are supported by the social inutility of health misinformation—ratcheting down the negative impacts of misinformation for both the plaintiff and society more generally. But in addition to decreasing the negative consequences of influencer health misinformation, duties also have positive effects. There are clear positive effects for followers: duties will encourage influencers to take care when posting health information and will alter the nature of influencer dissemination of health information.[247] Perhaps equally importantly, though, the positive effects of influencer duties flow upstream. Influencers are advertisers whose purpose is to monetize their social networks.[248] Influencers disseminate misinformation either at the behest of a brand or because it will drive engagement and lead to monetization.[249] Duties on influencers can

243. *See, e.g.*, Logan L. Page, Note, *Write this Down: A Model Market-Share Liability Statute*, 68 DUKE L.J. 1469, 1479–82 (2019) (discussing the history of market-share liability and concerns); Mark. A. Geistfeld, *Duty-Preserving Tort Rules as an "Old Category" for Justifying the Loss-of-Chance Doctrine in Medical Malpractice Cases*, 73 DEPAUL L. REV. 427, 429–31 (discussing the history of loss-of-chance liability).

244. *See* Page, *supra* note 243, at 1479–81; Geistfeld, *supra* note 243, at 430.

245. *See* Paul F. Macri, *How the Law Court Uses Duty to Limit the Scope of Negligence Liability*, 53 ME. L. REV. 503, 504–06 (2001) (discussing how courts consider public policy, among other factors, when making duty determinations); W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1878 (2011) (same).

246. *See* Geistfeld, *supra* note 237, at 909.

247. *See* Israel Gilead & Michael D. Green, *Positive Externalities and the Economics of Proximate Cause*, 74 WASH. & LEE L. REV. 1517, 1527–28 (2017).

248. *See* Rieder et al., *supra* note 42, at 2–3 (finding sources of revenue to include "direct revenue from advertising, but also various kinds of affiliate marketing, product placement, paid sponsorships, appearance fees, and other sources of income that are hard to measure").

249. *See supra* notes 76–86, 95–102, and accompanying text.

efficiently deter influencers and any partner brands from engaging in misinformation and will likely ensure that loss spreads through inevitable (and already emerging) insurance markets.

Of course, the imposition of duties can have costs with significant upstream and downstream societal effects. Consider the context of social host liability. Beginning in the early 1980s, a number of state courts held that "a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the . . . guest."[250] In holding that social hosts owed a duty to take care when serving alcohol in private gatherings, courts not only weighed the liberty interests of the defendant as social host against the plaintiff's interests in physical security but also the burden that social host duties and liability imposed on the interests of other third-party actors.[251]

Though imposing social media influencer liability for health misinformation resulting in physical harm would create other third-party effects, those indirect effects would be beneficial and fair. A duty would directly impose a cost on influencers—to take in, assess, and validate information before posting it. Indirectly, brands and advertisers that engage influencers in their marketing campaigns could also bear the cost of assessing and validating information prior to engaging influencers to advertise their product or idea. Brands could also be more vigilant in monitoring how influencers recommend products, even in the absence of a formal brand partnership. A duty on influencers, then, maximizes social welfare by deterring both direct and third-party commercial actors from disseminating health misinformation.

In addition, influencer duties will likely lead to the development of new insurance markets. We see this starting to emerge in the context of influencer insurance.[252] This type of insurance is sold to businesses that work with influencers and influencers themselves, protecting them from liabilities incurred in the course of business.[253] Though liabilities associated with fraudulent behavior (such as the intentional spreading of medical information that the speaker knows is false) would likely not be covered,[254] injuries resulting from merely negligent behavior would be within the scope of coverage. Recognizing tort liability for influencers

250. *See, e.g.*, Kelly v. Gwinnell, 476 A.2d 1219, 1224 (N.J. 1984). *Kelly v. Gwinnell* is a seminal case with respect to social host liability. *See* Geistfeld, *supra* note 237, at 907.

251. *See* Geistfeld, *supra* note 237, at 908–09.

252. *See* Tyler Crawford, *What Insurance Does a Social Media Influencer Need?*, FULLSTEAM INS. (Apr. 26, 2022), https://www.fullsteam.io/insights/what-insurance-does-a-social-media-influencer-need [https://perma.cc/QG32-FF4D].

253. *See id.*; Jeff Hirsch, *Why Social Media Influencers Need Insurance*, FOUNDER SHIELD (Sept. 19, 2024), https://foundershield.com/blog/influencer-insurance [https://perma.cc/K44G-H2JA].

254. Commercial general liability policies typically exclude coverage for injuries that result from oral or written publication of information that the insured knows to be false. *See, e.g.*, N.H. Ins. v. TSG Ski & Golf, LLC, 673 F. Supp. 3d 1191, 1195 (D. Colo. 2023); Wackenhut Servs., Inc. v. Nat'l Union Fire Ins., 15 F. Supp. 2d 1314, 1318 (S.D. Fla. 1998).

who negligently spread health-harming misinformation can provide remediation for those harmed by injurious speech. Further, if these cases grow in popularity, they could cause insurers to exempt certain risky content from coverage and ultimately help limit its creation and proliferation.

3. Influencer Duties as a Social Equalizer

Finally, imposing duties on influencers is justified because it responds to systemic discrimination in patient care and the heightened potential for influencer misinformation to impact vulnerable groups.[255] An overwhelming number of studies have demonstrated the pervasive and persistent problems of racism, sexism, and ableism in health care.[256] Perhaps as a result of these systemic problems, members of disadvantaged groups have been found to place greater confidence in the validity of health information that they receive from non-traditional sources.[257] Health-harming misinformation may pose greater threats to these groups as they are both more likely to believe guidance they receive through alternative channels[258] and less likely to have access to healthcare providers that could provide corrective guidance.[259] Tort liability could help counteract these threats by deterring the spread of misinformation over social media and, in doing so, have democratizing effects.

Searching for health information online, including via social media platforms and other user-generated online information sites, like Reddit, is extremely common.[260] People seek health information online, including on social media, for many reasons, such as convenience, anonymity, and time efficiency.[261] This makes sense, given that social media has considerable advantages over healthcare systems and organizations in light of its ubiquity, penetration, and impact on health behaviors and choices.[262] These online friend networks can also help people find the most up-to-date information without needing to return to a doctor's office or consult experts.[263] When these individuals turn to their social networks for health purposes, several studies show that they do so to find information—including crowd diagnoses or second opinions—and to find support in online

255. *See supra* notes 7–14 and accompanying text.

256. *See id.*; *see also* Jerry L. Weaver & Sharon D. Garrett, *Sexism and Racism in the American Health Care Industry: A Comparative Analysis*, 8 INT'L J. HEALTH SERVS. 677, 677 (outlining the "extensive abuse, discrimination, and exploitation of women and . . . minorities at the hands of the American health industry").

257. *See* Naleef Fareed et al., *Differences Between Races in Health Information Seeking and Trust Over Time: Evidence from a Cross-Sectional, Pooled Analyses of HINTS Data*, 35 AM. J. HEALTH PROMOTION 84, 87 (2021).

258. *See id.* at 86.

259. *See* César Caraballo et al., *Trends in Racial and Ethnic Disparities in Barriers to Timely Medical Care Among Adults in the US, 1999 to 2018*, JAMA HEALTH F., Oct. 28, 2022, at 1, 9–11.

260. *See* Xiaoyun Jia et al., *Online Health Information Seeking Behavior: A Systematic Review*, HEALTHCARE, Dec. 16, 2021, at 1, 7.

261. *Id.* at 8.

262. *See* Raina M. Merchant, *Evaluating the Potential Role of Social Media in Preventive Health Care*, 323 JAMA 411, 411 (2020).

263. *See id.* at 412.

communities.[264] Underpinning the concept of duty is an assumption of rationality. In light of research about human behavior and social media,[265] searching online networks for health information has become an unquestionably rational behavior.[266]

But we might also assume that rational actors would seek more information when it comes to something as consequential as their health—that they would see a doctor instead of taking health advice from people on the Internet. Some do. As noted above, some individuals have ready access to trusted health care and professional advice and are able to inquire about health information that originates on social media before it can cause harm.[267] In fact, at least one study suggests that about half of people who seek health information online will later confirm that information with their healthcare provider.[268] However, health professionals do not always have the bandwidth to keep up with the nuances of the latest health crazes on social media to address them reactively or proactively.[269] Thus, even individuals with access to the best care possible will not always be able to leverage those resources to counteract influencer health misinformation.

More importantly, fact-checking with a trusted health professional or expert requires access to care and having a healthcare provider to begin with. Even if a follower is armed with the gold standard of health information, lack of access or trust could render that information functionally useless—especially if that information requires pharmaceutical or surgical intervention to act on.[270] Those with exposure to health-harming misinformation who also lack access to formal health care, including those already disadvantaged by biases and systems of oppression, will be left with only independent research and social networks with which to verify the information they see online.[271] These groups will then experience the compounding challenge of experiencing physical harms with limited avenues for recourse or recovery.

In light of the inbuilt institutionalization and subordination of women and people of color in health care, the seemingly irrational choice to follow influencer advice without speaking to a trusted expert is, in fact, rational. And when the formal healthcare industry fails them, it is certainly rational that they turn to friends.

---

264. Junhan Chen & Yuan Wang, *Social Media Use for Health Purposes: Systematic Review*, J. MED. INTERNET RSCH., May 12, 2021, at 1, 6.

265. *See supra* notes 58–64 and accompanying text.

266. *See* XUN WANG & ROBIN A. COHEN, NAT'L CTR. FOR HEALTH STAT., U.S. DEP'T OF HEALTH & HUM. SERVS., HEALTH INFORMATION TECHNOLOGY USE AMONG ADULTS: UNITED STATES, JULY-DECEMBER 2022, at 2 (2023), https://www.cdc.gov/nchs/data/databriefs/db482.pdf [https://perma.cc/BG8M-SCUN] (analyzing survey data establishing that most individuals in the United States search for health information online).

267. *See* Haupt, *supra* note 52, at 806.

268. Jia et al., *supra* note 260, at 8.

269. *See* Stephen Neely et al., *Health Information Seeking Behaviors on Social Media During the COVID-19 Pandemic Among American Social Networking Site Users: Survey Study*, J. MED. INTERNET RSCH., 2021, at 1, 2, 7.

270. *See* Merchant, *supra* note 262, at 412.

271. *See* Haupt, *supra* note 52, at 800.

Imposing a duty on influencers to avoid sharing health-harming misinformation with these and other groups counteracts this phenomenon by providing an avenue to recover financially for the health harms caused by influencer content, and by discouraging the creation of that content in the first place. As a result, imposing a duty on influencers can serve as a social equalizer.

* * *

Part II has outlined the strong doctrinal and policy justifications for holding influencers owe a duty of care to their followers. What is missing is a consideration of the influencer's interests. When influencers post social media content, they speak. Speech is a constitutionally protected interest.[272] The First Amendment, then, presents both as a policy trump card—cutting against the policy justifications for recognizing influencers' duties—and as a doctrinal trump card—obviating any duty the common law might impose on influencers. Indeed, the First Amendment has been deployed in these ways in a variety of related contexts where negligence has been alleged, including broadcasting and publishing. Yet, as we argue in Part III, the First Amendment is unlikely to provide a bar to recovery in the context of influencer speech.

III. THE FIRST AMENDMENT AND INFLUENCER SPEECH

When influencers suggest drinking bleach to cure diseases and create instructional content, they are speaking to their followers.[273] In circumstances like this, does the influencer's liberty interest to extol the benefits of consuming bleach outweigh the follower's right to physical liberty? The Supreme Court has not yet addressed the question of the applicability of the First Amendment to speech negligently causing physical harm.[274] Yet, prima facie, tort liability targeting influencers whose misinformation results in harm directly implicates the First Amendment. Section III.A focuses on the coverage of the First Amendment and categorizes negligently disseminated influencer misinformation as uncovered speech. It examines whether influencer misinformation could be categorized as misleading commercial speech or, alternatively, as a new, previously unrecognized category of uncovered speech. Section III.B concludes by suggesting that the physical nature of the harm indicates that, regardless of the level of scrutiny applied, the state's facilitation of negligence claims is sufficiently tailored to the remediation of that harm.

A. INFLUENCER SPEECH AS UNCOVERED SPEECH

Influencer liability in negligence directly confronts numerous aspects of speech sorting built into First Amendment jurisprudence. The baseline question is the threshold applicability of the First Amendment. This question asks whether the First Amendment provides coverage of negligent speech.[275] That a negligence

272. *See* U.S. CONST. amend. I.

273. *See supra* notes 1–4 and accompanying text.

274. *See* Sacks, *supra* note 37, at 1068, 1113; Han, *supra* note 41, at 496–97.

275. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 (2004) [hereinafter Schauer, *Boundaries*]

cause of action for influencers implicates speech does not necessitate applicability of the First Amendment. Indeed, many speech-activities have not been subject to constitutional scrutiny despite at least facially implicating the First Amendment.[276] What is clear is that some instances of speech-activities are covered by the First Amendment, and some are not.[277] What is less obvious, however, is how to distinguish between covered and uncovered speech.[278] The Supreme Court's discussion of Speech Clause coverage in *United States v. Stevens* suggests a pragmatic response: covered speech is what the Court says it is.[279] That is, certain speech is presumed uncovered, but, in practice, it remains uncovered simply because the Court has not yet considered it.[280] Indeed, the Court in *Stevens* indicated that the First Amendment presumptively covers all speech unless it falls within a "well-defined and narrowly limited"[281] category excluded from First Amendment coverage or a litigant presents "persuasive

(stating that whether the First Amendment shows up is a question that is "rarely addressed, and the answer is too often simply assumed," and outlining the myriad speech-activities that are ostensibly not covered by the First Amendment). *See generally* Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. F. 346 (2015) [hereinafter Schauer, *Out of Range*]; Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318 (2018); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 88–92, 134–35 (1982); Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285 (1982); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) [hereinafter Schauer, *Categories*] (examining the question of coverage under the First Amendment); Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073 (2017).

276. The Court's existing Speech Clause jurisprudence recognizes a limited subset of categories of uncovered speech including: obscenity, *Miller v. California*, 413 U.S. 15, 23–24 (1973), fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942), copyright, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559–60 (1985), child pornography, *New York v. Ferber*, 458 U.S. 747, 764 (1982), perjury, *United States v. Alvarez*, 567 U.S. 709, 746–47 (2012) (Alito, J., dissenting), fraud, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), and defamation, *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). *See generally* Schauer, *Out of Range*, *supra* note 275; Shanor, *supra* note 275; Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

277. *See* Schauer, *Boundaries*, *supra* note 275, at 1783–84 (citing David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957 (2002)); *see also* Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 WASH. & LEE L. REV. 161, 166–68 (1990); David A. Anderson, *Torts, Speech, and Contracts*, 75 TEX. L. REV. 1499, 1499 (1997) (claiming that some torts present no First Amendment problems, "primarily because the speech is false," including "products liability and professional malpractice cases alleging injury caused by erroneous information, deceit, and negligent misrepresentation").

278. *See* Shanor, *supra* note 275, at 340; Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1654–55 (2009) (arguing that "First Amendment law's handling of civil liability is incoherent" and surveying caselaw and scholarship to determine that there are "five approaches for determining when and how the First Amendment should apply to civil liability").

279. *See* 559 U.S. 460, 472 (2010).

280. *See id.*

281. *Id.* at 468–69 (quoting *Chaplinsky*, 315 U.S. at 571).

evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."[282]

The sorting of speech as speech covered by the First Amendment or speech outside the scope of the First Amendment significantly impacts the outcome of any challenge to constraints on speech. Speech sorting at the coverage stage determines what "protection" speech is afforded; that is, the level of scrutiny applied to any constraint on speech. The question of protection is often described as binary, where low-value speech—or uncovered speech—is afforded only rational basis review, the lowest level of constitutional scrutiny.[283] Conversely, high-value speech—or covered speech—is subject to strict scrutiny and will only survive if the restriction is narrowly tailored to a compelling government interest.[284] The sorting is critical because, as many have noted, "almost all laws fail strict scrutiny and almost all laws pass" lower levels of review.[285]

---

282. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011); *see also* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). Some scholars question the broad scope of the Court's statement with respect to speech coverage. *See, e.g.*, Shanor, *supra* note 275, at 340 (arguing the Court's historical and traditional categories "do[] not account for the far greater range of regulations of what is colloquially understood as speech or expression that have long not been subject to First Amendment challenge, let alone strict review"). Others, however, pursue a similar functional approach as we take here. *See generally, e.g.*, Helen Norton, *What Twenty-First-Century Free Speech Law Means for Securities Regulation*, 99 NOTRE DAME L. REV. 97 (2023) (arguing that it is important to take seriously the Court's threat to the regulatory state generally, and the securities law framework specifically, and suggesting analyzing securities law as uncovered speech based on history). For concerns about "First Amendment Lochnerism" and the capacity of the Court to dismantle the administrative state through the Speech Clause, see, for example, Nathan Cortez & William Sage, *The Disembodied First Amendment*, 100 WASH. U. L. REV. 707, 711 (2023) (arguing that "[c]orporations have seized on the First Amendment's deregulatory potential, challenging a wide variety of laws on free speech grounds"); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 195–96 (2014); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 182–90 (2016); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 2001, 2003 (2016); Koppelman, *supra* note 40, at 665 ("Chief Justice Roberts announced that there would henceforth be no new categories of unprotected speech.").

283. *See* Schauer, *Out of Range*, *supra* note 275, at 347; Lakier, *supra* note 276, at 2168, 2171. These categories are considered "low value" either because they are particularly harmful or removed from the core constitutional values of speech and thus less worthy of heightened protection. *See id.*

284. Lakier, *supra* note 276, at 2171. Commercial speech complicates this binary frame, given that the Court has ostensibly applied intermediate scrutiny rather than strict scrutiny. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). However, in its recent applications of intermediate scrutiny in commercial speech cases, the Court appears to be moving toward a standard of review that more closely resembles strict scrutiny. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011); *Reed*, 576 U.S. at 163; Nat Stern, *The Stubborn Survival of the* Central Hudson *Test for Commercial Speech*, 45 SEATTLE U. L. REV. 647, 669–70 (2022).

285. Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 238 (2012); *see also* Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (claiming that strict scrutiny is "'strict' in theory and fatal in fact"). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 812–13 (2006) (finding that lower federal courts upheld more than 30% of government restrictions assessed under strict scrutiny).

This Section suggests that two plausible avenues exist for a claim that negligently provided health misinformation of influencers is uncovered speech. First, influencer speech could be considered misleading commercial speech. However, the hybrid nature of influencer communication complicates the sorting of influencer speech as commercial speech. A second path for influencer speech as uncovered speech is that negligent misinformation is a previously unrecognized category of uncovered speech.

1. Misleading Commercial Speech

Commercial speech is covered by the First Amendment; false or misleading commercial speech is not.[286] Whether commercial speech is misleading necessarily presupposes that the speech is capable of categorization as "commercial speech." Yet, despite the constitutional significance of categorization, the Court has not clearly articulated the divide between commercial and non-commercial speech. Instead, as Nat Stern observes, it "has recited various descriptions, indicia, and disclaimers without settling upon a precise and comprehensive description."[287]

The Supreme Court has said that at its narrowest, commercial speech is speech that does "no more than propose a commercial transaction."[288] More broadly, the Court has indicated that whether speech is commercial depends on the following three factors: (1) whether the communication is an advertisement, (2) whether it concerns a product, and/or (3) whether the speaker has an economic motivation.[289] The value of commercial speech lies in providing consumers with access to information that enables them to make informed economic decisions.[290] As such, courts view constraints on commercial speech with suspicion, and heightened scrutiny is applied. However, these values are applicable only when the

286. *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 785 (2018) (Breyer, J., dissenting); *In re* R. M. J., 455 U.S. 191, 203 (1982); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762, 771 (1976); *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563; *Sorrell*, 564 U.S. at 579; *Reed*, 576 U.S. at 178 (Breyer, J., concurring in judgment). Misleading commercial speech is not typically framed as uncovered speech. Instead, the traditional framing sorts speech as either commercial or non-commercial, noting that commercial speech is covered by the First Amendment but protected at a lower level of scrutiny (i.e., intermediate scrutiny), *unless* that speech is misleading or deceptive, in which case rational basis review applies. *See Va. State Bd. of Pharmacy*, 425 U.S. at 771–72; Steven H. Shiffrin, *Qualified Absolutism, Categorical Balancing, and New Categories*, 85 ALB. L. REV. 37, 85–86 (2021).

287. Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 56 (1999) (noting that the "absence of a clearer demarcation between commercial and noncommercial expression is routinely denounced by commentators and sometimes within the Court itself").

288. Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 385 (1973) (discussing advertisements that "d[o] no more than propose a commercial transaction").

289. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–67 (1983). *But see* Margaret Whelan, Note, *Common Sense and Commercial Speech*, 48 U. PITT. L. REV. 1121, 1139 (1987) (describing *Bolger*'s approach to disaggregating commercial and non-commercial speech as "unworkable"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 897 (2d ed. 1988) (describing *Bolger*'s approach to disaggregating commercial and non-commercial speech as "perplexing").

290. *See* Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2648 (2008).

commercial information is truthful. When commercial speech is false or misleading, the societal benefits of commercial speech wane and constraints on that speech are only subject to rational basis review.[291]

At first glance, it is plausible that directly commercialized influencer speech could be commercial speech.[292] Jane Bambauer suggests that in the direct commercial context, influencers are advertisers ("peddlers"): "commercial speaker[s] whose statements are directed at potential customers."[293] In these instances, courts could categorize influencers' negligent misinformation as misleading commercial speech uncovered by the First Amendment and subject to rational basis review.[294]

However, this simple categorization obfuscates the complexities of influencer speech, even direct commercial speech. As we outlined in Part I, the value of influencer marketing is that it offers something more than a simple commercial shill and is typically not perceived as advertising by consumers.[295] Influencers do not simply "share" the formal advertising of the brand with their networks. Instead, they often generate their own creative content to promote a brand—Instagram posts, reels, or carefully created YouTube videos that ostensibly tell a story about the influencer's life and opinions but subtly peddle products, information, or both.[296] As a result, even when influencers are mere "peddlers," there is typically a hybridity to their speech that encompasses both commercial and non-commercial content. Consequently, influencer speech does not necessarily present "a clean distinction between the market for ideas and the market for goods and services."[297]

The hybrid nature of influencer speech implicates both speaker-based and listener-based concerns. From the perspective of the speaker—the influencer—even where content is directly commercialized because of the contractual relationship between the influencer and brand, that content is creative, threading brand and promotional messages through artistic expression. Bolstering this point, influencers have been included as members and recognized as creators, entertainers, and artists by the Screen Actors Guild (SAG-AFTRA), a union for "the faces and voices that entertain and inform America and the world."[298]

---

291. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566; Alexander Tsesis, *Marketplace of Ideas, Privacy, and the Digital Audience*, 94 NOTRE DAME L. REV. 1585, 1621 (2019).

292. *See supra* notes 76–102 and accompanying text (discussing the types of influencer speech, ranging from directly commercialized speech to non-commercial speech).

293. Bambauer, *supra* note 20, at 101.

294. In a number of lower court cases, social media posts that directly advertise a product have been held to be commercial speech for constitutional purposes. *See, e.g.*, H.I.S.C., Inc. v. Franmar Int'l Imps., Ltd., No. 16-cv-0480, 2022 WL 104730, at *5 (S.D. Cal. Jan. 11, 2022) (finding that a Facebook post including a photograph of a woman holding the product at issue with a caption stating the product is a "great holiday gift" is commercial speech because the image is trying to sell the product).

295. *See* Ye et al., *supra* note 59, at 160.

296. *See* Silberberg, *supra* note 119, at 2059.

297. Stern, *supra* note 287, at 143 (quoting Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 2 (1979)).

298. *See Mission Statement*, SAG-AFTRA: ABOUT, https://www.sagaftra.org/about/mission-statement [https://perma.cc/DP44-AT8S] (last visited Dec. 26, 2024); *see also Influencer Agreement Fact Sheet*, SAG-AFTRA, https://www.sagaftra.org/influencer-agreement-fact-sheet [https://perma.cc/4TLS-56TB] (last visited Dec. 26, 2024).

Even a single post on an influencer's social network can advertise a product, create artistic content, and include opinions and non-commercial elements (i.e., intra-post hybridity), complicating the categorization of influencer speech as constitutional commercial speech. The principal rationale for the constitutional distinction between commercial and non-commercial speech is rooted in foundational speech values. Commercial speech is valuable because it communicates information about goods or services.[299] Non-commercial speech, on the other hand, is valued for its role in promoting public discourse, either to engage in democratic self-governance by proposing and debating ideas,[300] discover truth, or foster individual expressions of autonomy.[301] Some scholars have called this "an integral part of the development of ideas, of mental exploration and of the affirmation of self."[302] These divergent values explain why commercial speech and non-commercial speech are afforded different levels of protection.[303]

Attempts to categorize influencer speech as commercial speech assume that the influencer's creative content and opinions can be meaningfully separated and differentiated from the commercial content.[304] The Supreme Court has recognized the possibility of hybrid speech and attempted to disaggregate speech in various contexts. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court held that a commercial product linked to a public debate did not merit full First Amendment protection.[305] In *Bolger v. Young Drug Products Corp.*, the Court held that informational pamphlets that both promoted the use of contraceptives to prevent pregnancy and disease and discussed "important public issues" were commercial speech.[306] The pamphlets were advertisements that referred to an advertiser's specific product; thus, an economic motivation for

299. Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1979 (2015); *see also* Piety, *supra* note 290, at 2648.

300. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16–17 (1948); *see also* Stromberg v. California, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

301. *See* Strauss, *supra* note 40, at 348, 353.

302. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963); *see also* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 92 (2012) (discussing various possible meanings of "autonomy").

303. However, some scholars argue commercial and non-commercial speech values are not separable. *See, e.g.*, Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 81 (2007) (claiming that speech concerning commercial goods and services shares "identical normative concerns about self-development and self-determination" with political speech).

304. *Cf.* Zahr K. Said, *Mandated Disclosure in Literary Hybrid Speech*, 88 WASH. L. REV. 419, 421, 432 (2013) (arguing in the context of hidden sponsorship in literature that advertising cannot be "meaningfully discerned and separated from communicative content . . . when advertising occurs in expressive or artistic content").

305. 447 U.S. 557, 563 n.5 (1980) (holding that speech relating to public policy "made only in the context of commercial transactions" is commercial speech and that "direct comments on public issues" constitute non-commercial speech).

306. 463 U.S. 60, 67–68 (1983).

mailing the pamphlets existed.[307] In *Board of Trustees of the State University of New York v. Fox*, the Court held that Tupperware parties on university campuses were commercial speech despite the non-commercial aspects of the gatherings.[308] The Court stated that the non-commercial aspects of the speech were not "inextricably intertwined" with the commercial aspects and could be effectively promoted elsewhere.[309] Therefore, intermediate scrutiny applied.[310] Conversely, in *Riley v. National Federation of the Blind, Inc.*, the Court found that commercial and non-commercial speech were "inextricably intertwined," and so strict scrutiny applied.[311] Following this line of cases, it is plausible that the commercial and non-commercial content in at least some directly commercialized influencer posts could be disaggregated, but certainly not all.

However, even if a single, directly commercialized influencer post could be classified as commercial speech, the hybrid nature of influencer speech extends beyond single, directly commercialized posts. Influencers engage in multiple and varied speech acts on social media. While some speech acts are directly commercialized, others are indirectly commercialized or even non-commercial. The indirectly commercialized speech of influencers challenges constitutional categorization of commercial speech, which is predicated on transfers of payments between brands and influencers.[312] When influencers share products, views, and information, or monetize content through alternative strategies, their speech falls outside the scope of the "transfer model."[313] Instead of benefiting from a direct commercial relationship with a brand, influencers indirectly profit through increased engagement and the opportunities the engagement creates.[314] The anticipation of benefits is the predominant motive for indirect commercial content. This type of speech challenges even the broadest interpretation of the commercial speech doctrine. Capturing this indirect commercial content would require the Court to take an uncharacteristically expansive approach that would almost exclusively rest on the economic motives of the influencer.[315]

Further complicating the constitutional sorting of influencer speech is the non-commercial speech of influencers. This speech involves influencers sharing their everyday lives and happenings, opinions, and views. Yet, while this speech is

307. *Id.*

308. 492 U.S. 469, 474 (1989).

309. *See id.*

310. *See id.* at 475.

311. *See* 487 U.S. 781, 796 (1988) (finding that speech relating to funding as a requirement of statutory disclosure rules was commercial speech, that the speech relating to the charitable purposes was non-commercial speech, and that the mandatory disclosure inextricably intertwined the speech types).

312. *See* Said, *supra* note 304, at 438.

313. *See id.*

314. *See* Chavie Lieber, *How and Why Do Influencers Make So Much Money? The Head of an Influencer Agency Explains.*, VOX (Nov. 28, 2018, 6:00 PM) (explaining that creators can attract brands by demonstrating engagement rates and "guarantee[ing] . . . certain level[s] of interaction"), https://www.vox.com/the-goods/2018/11/28/18116875/influencer-marketing-social-media-engagement-instagram-youtube [https://perma.cc/3MCC-66QQ].

315. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983).

non-commercial in that it does not involve direct or indirect monetization, these non-commercial speech acts often prime the influencer's followers.[316] Recall that priming is a tool of strategic communication that influences how a follower will respond to subsequent information, in this case by interweaving authentic, non-commercial content with commercial content.[317] Despite the importance of priming speech for influencing followers to engage with commercial speech and ultimately in commercial conduct, it is difficult to see the Court perceiving non-commercial speech as anything but fully protected.

Yet, from the perspective of the listener—the follower—the inter-post hybrid nature of influencer speech often means that the marketing message is embedded, promoting a commercial product "by weaving the product into the [overall] program."[318] Indeed, influencers carefully craft their marketing appeals by deliberately deploying a variety of directly commercial, indirectly commercial, and non-commercial posts that often include emotional content and personal stories that, over time, can cultivate "friendships" and ultimately parasocial relationships. From the perspective of the listener, influencers are less like "peddlers" and more like "peers," the "social acquaintance[s] who provide[] information to a private audience rather than a public one."[319]

Our discussion of influencer Louise Roe in Section I.A.2 above illustrates the issue of inter-post hybridity.[320] Roe's Instagram account includes posts about a psoriasis medication called Otezla and links to the biotech company that produces it, Celgene.[321] Separately from these direct commercial posts, Roe's account also includes posts discussing her struggles with psoriasis and personal posts about her daily life, accompanied by pictures of a clear-skinned Roe on the beach, dressing up for dinner, and so on.[322] A typical follower is likely not influenced to purchase Otezla because of one of Roe's specific direct commercial posts. Instead, the follower is influenced to purchase Otezla because of all the preceding and subsequent posts about Roe, her life, and her implicit and explicit success in managing her condition. The combination of directly commercial and non-commercial posts influences the follower to click through to the Celgene website and seek out the product.

This inter-post hybridity again complicates the constitutional categorization of influencer speech in ways that directly implicate a tort-based remedy. The totality of the influencer's speech is important for negligence claims, where the success of a complaint can depend on the scope of an influencer's duty, which depends on what they have affirmatively communicated to their followers. For example, a follower will have a significantly stronger causation claim if the pleadings

316. *See* Luoma-aho et al., *supra* note 133, at 355.

317. *Id.*

318. Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43194, 43195 (proposed July 24, 2008).

319. *See* Bambauer, *supra* note 20, at 95, 101.

320. *See supra* notes 116–19 and accompanying text.

321. *See supra* notes 116–19 and accompanying text.

322. *See supra* notes 116–19 and accompanying text.

include the totality of the influencer's content rather than a single, directly commercialized post. Similarly, when rebutting the defense of comparative or contributory negligence on the part of the follower, the reasonableness of following the influencer's health advice is amplified when the factfinder accounts for the totality of the influencer's engagement with their followers. It may be that a single, directly commercialized influencer post is sufficient, but it is certainly a stronger case for followers harmed by health misinformation to rely on the entirety of the speech that influenced them and led to physical harm.

Consequently, the question becomes whether the Court's existing approach to hybrid commercial and non-commercial speech is sufficiently elastic to cover the aggregation of commercial and non-commercial influencer posts that influence a follower to purchase a product or follow advice. And, in the context of misleading commercial speech, the Court would need to grapple with how to manage a claim that an aggregation of both true and false posts constitutes misleading commercial speech warranting only rational basis review.

The Court's existing approach to hybrid speech indicates the difficulties with stretching the category of misleading commercial speech to cover an aggregation of influencer speech. Across the hybrid speech cases, the Court has ultimately withheld full First Amendment protections from hybrid speech whose non-commercial aspects could be severed from the commercial component.[323] In the context of influencers, however, the severability of the speech is difficult, if not impossible. Instead, the Court would need to extend the definitions of commercial speech and misleading speech to cover specific instances of non-commercial and non-misleading speech that form part of a larger pattern of conduct. The Court's increasingly blurred boundaries between commercial and non-commercial speech through the mechanism of the level of scrutiny applied and the increased solicitude to corporate speech indicate that this path is challenging.

Ultimately, then, influencer speech as commercial speech raises complicated boundary questions. For these reasons, we consider that a more plausible approach to the obstacles imposed by the First Amendment is to construe negligent misrepresentations leading to physical harm as a previously unrecognized category of uncovered speech.

2. Negligent Misinformation

The Supreme Court has never considered the application of the First Amendment to a negligence claim, but it has considered Speech Clause limitations in some tort contexts.[324] Across these cases, the Court has focused on the

323. *See* Stern, *supra* note 287, at 90.

324. *See* Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 TEX. L. REV. 813, 815 n.1 (2020) ("To oversimplify only slightly, the principal First Amendment limits apply only to the torts of defamation, intentional infliction of emotional distress, and the form of invasion of privacy known as public disclosure, and even then only when the plaintiff is a public official or public figure, or the suit involves a matter of public concern.").

context of the speech-tort, underscoring a consequentialism that recognizes that different tort actions implicate different types of harms. As a matter of historical treatment, the Court's existing categories of uncovered speech are determined by the nature of the harm the plaintiff seeks to redress through their tort claim.[325]

The nature of the harm implicated by the speech-tort serves a specific purpose for the Court's Speech Clause coverage inquiry.[326] What drives the Court's delineation of First Amendment proscribed and permitted tort claims appears to be the potential for the cause of action to be used as a mechanism for government abuse on matters of public concern.[327] In this regard, the Court uses the nature of the harm as a proxy variable for whether the government can operationalize a speech-tort as a vehicle for limiting speech.[328] As a result, the Court's jurisprudence shows a heightened willingness to extend Speech Clause coverage to intangible harms coupled with an equal unwillingness to extend that coverage to tangible harms.[329] The underlying rationale is that intangible harms are more amenable to capture, and conversely, the concrete evidence in cases involving tangible harm militates against insincere claims.

The Court has thus declined to exclude tort actions based on emotional harm from First Amendment coverage. In *Snyder v. Phelps*, for example, the Court was asked whether the First Amendment would permit a tort action by the family of a dead soldier for intentional infliction of emotional distress against a group that decided that the soldier's funeral was the appropriate forum for advancing their campaign against homosexuality.[330] The Court stated that while the protest was hurtful in an emotional sense, it was shielded from tort liability by the First Amendment.[331] The Court commented that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[332] Ultimately, the Court decided that the harm was caused by the message the protesters conveyed, "rather than any interference with the funeral

325. *See* Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 702–03 (2016); *see also* Norton, *supra* note 282, at 116, 126 (suggesting a functional approach to determining uncovered speech by examining why regulatory schemes were enacted and perpetuated).

326. *See* Goldberg, *supra* note 325, at 703; Shanor, *supra* note 275, at 346 (noting that the First Amendment analysis "often turns on understandings of the consequences of [the] speech"); Erica Goldberg, *Common Law Baselines and Current Free Speech Doctrine*, 66 VILL. L. REV. 311, 314 (2021) (arguing that "there is an unstated spectrum that prioritizes certain harms caused by speech over other types of harms when determining the scope of [the] First Amendment").

327. *See* Han, *supra* note 41, at 538; Strauss, *supra* note 40, at 366; Koppelman, *supra* note 40, at 692.

328. *But see* Cortez & Sage, *supra* note 282, at 759 ("The Supreme Court's free speech jurisprudence has become almost entirely untethered from the harms imposed by corporate speech.").

329. *Cf.* Koppelman, *supra* note 40, at 685–86 (arguing that psychic harms have failed because they failed to "establish a persuasive causal nexus" between the harm and the act, and that revenge pornography is not subject to First Amendment coverage based on the harm caused, but because "[t]here is a tight causal connection between speech and harm" because "[a] single posting to a website . . . ha[s] a permanently life-altering effect on its target, imposing a spoiled identity that it is impossible to ever escape").

330. 562 U.S. 443, 447 (2011).

331. *See id.* at 460–61.

332. *Id.* at 458 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

itself," and consequently, the First Amendment covered the speech at issue.[333] For the Court, the intangible nature of the harm, along with the public concern of the speech, evidenced a suspicion of government abuse.[334]

Similarly, in *Hustler Magazine, Inc. v. Falwell*, the Court held that the plaintiff could not recover for intentional infliction of emotional distress for a parody advertisement that appeared in Hustler Magazine.[335] The Court emphasized that the hurt the listener—here, the subject of the parody—felt was insufficient to overcome the importance of public debate about a public figure.[336] Again, the Court highlighted its suspicion of liability that could be used as a vehicle to limit speech, emphasizing the risk of government abuse and the chilling effect on speech.[337]

The heightened tangibility of reputational harm can explain the Court's greater willingness to recognize tort actions grounded in defamation, albeit in limited circumstances. For example, in *New York Times Co. v. Sullivan*,[338] while the Court recognized the harms of the defamatory speech, it expressed concern that a libel suit could be deployed as a vehicle of the state to suppress critical speech.[339] Ultimately, then, the Court held that defamatory speech is uncovered speech only in certain circumstances, modifying the cause of action to meet constitutional needs.[340]

Further along the harm spectrum, the Court has indicated that tort actions based on economic harm do not raise the same concerns as actions based on intangible harms or even reputational harm. In *Zacchini v. Scripps-Howard*, the plaintiff brought a tort claim based on a right to publicity after a broadcast network aired his entire "human cannonball" act on the freely available nightly news without consent.[341] The network argued that the First Amendment covered their broadcast and barred the plaintiff's tort action, claiming that imposing liability would chill speech of public concern and allow tort to be used as a tool of speech suppression.[342] Rejecting the claim, the Court held that the harm in this case was economic, a tangible harm rather than one "of mental distress."[343] For the Court, the tangibility indicated the plaintiff was not deploying tort to chill speech but to instead be compensated for the commercial benefit of broadcast.[344] Consequently, the Court held that imposition of liability in *Zacchini* would not violate the First Amendment.[345]

---

333. *Id.* at 457.

334. *See id.* at 458 ("Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.").

335. 485 U.S. 46, 57 (1988).

336. *See id.* at 53, 56.

337. *See id.* at 52.

338. 376 U.S. 254 (1964).

339. *See* Oman & Solomon, *supra* note 192, at 1131; Han, *supra* note 41, at 536.

340. *See* Sacks, *supra* note 37, at 1102.

341. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 563–64 (1977).

342. *See id.* at 570.

343. *Id.* at 573.

344. *See id.* at 573–74; *see also id.* at 578 ("Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it.").

345. *See id.* at 578–79. In this regard, the distinction is similar to that highlighted in *Cohen v. Cowles Media Co.*, where the Court held that the First Amendment did not apply to limit an action for breach of contract. 501 U.S. 663, 671 (1991) ("Cohen is not seeking damages for injury to his reputation or his

The Court's deployment of harm as a proxy for speech suppression can explain why First Amendment claims are infrequently raised before the courts in the context of negligence cases resulting in physical harm, despite negligence claims squarely implicating speech. Lower courts have recognized this distinction between tangible and intangible harms, where intangible harms trigger the First Amendment and tangible harms do not. A district court decision articulated the distinction, stating that "[i]f a party seeks damages for harm to reputation or state of mind, the suit can only proceed if that party meets the constitutional requirements of a defamation claim."[346] By contrast, it noted that "[i]f a party seeks damages for non-reputational harms, which include lost jobs and diminished employment prospects, then the First Amendment does not bar suit if the claims are brought under generally applicable laws."[347]

In those instances where defendants in negligence claims have raised a First Amendment defense, the presence of physical harm cuts against the premise that tort is being used surreptitiously to capture speech rather than to remediate harm caused. For example, in *Stricklin v. Stefani*, the Western District of North Carolina held that the plaintiff's negligence claim, pertaining to physical injuries resulting from Gwen Stefani's invitation for concertgoers to move toward the stage, was not barred by the First Amendment.[348] The court stated that the imposition of liability would not chill speech but instead "incentivize performers to abide by the safety precautions in place at concert venues and to maintain and promote order and safety."[349] Similarly, in *Weirum v. RKO General, Inc*., the California Supreme Court held that a radio station could be held liable for wrongful death based on its negligent speech.[350] The Court held that the First Amendment was not applicable, stating that "[t]he issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to [the] decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."[351] What *Stricklin*, *Weirum*, and cases like them have in common is not only their emphasis on the consequences of the speech as having significant negative social effects; they likewise indicate that the presence of physical harm suggests that negligence claims being captured to disrupt public speech is unlikely.

However, some lower courts have suggested that physical harm alone is insufficient to militate against the possibility of negligence actions being used to suppress speech. These courts emphasize that, in addition to physical harm, the harm must occur in a context where the listener and speaker have some form of relationship, the speech causing harm attempts to provide direction to a limited audience, and the speech itself must not be of a nature that warrants higher levels of

state of mind. He sought damages in excess of $50,000 for breach of a promise that caused him to lose his job and lowered his earning capacity.").

346. Steele v. Isikoff, 130 F. Supp. 2d 23, 29 (D.D.C. 2000); *see also* Solove & Richards, *supra* note 278, at 1681 (citing *Steele*).

347. *Steele*, 130 F. Supp. 2d at 29.

348. 358 F. Supp. 3d 516, 530 (W.D.N.C. 2018).

349. *Id.*

350. 539 P.2d 36, 40 (1975).

351. *Id.*

protection (e.g., speech on public affairs).[352] For example, courts have rejected negligence claims against broadcasters for harms resulting from mimicking content broadcast to the general public.[353] These decisions reflect a concern that despite the presence of serious physical harm, tort claims could be deployed to suppress unpalatable speech.[354] The generalized broadcast of the speech, the lack of specificity of the speech, and the limited nature of the listener–speaker relationship indicate that any negligently caused physical harm was a consequence of the mental sensitivity of the particular viewer. In other words, these cases look more like cases of emotional harm than the standard negligence case involving physical harm, and the imposition of liability would result in suppression of speech based on emotional and mental fortitude.[355] Similar distinctions based on context and the listener–speaker relationship exist in tort claims against publishers and authors for negligent instructions.[356]

Misinformation causing physical harm is a good case for tort liability that should be recognized as uncovered First Amendment speech. The physical injury serves as a sufficient proxy to indicate that the cause of action is not being brought to suppress speech generally or a particular viewpoint specifically. In *Zacchini*, the tangibility of the harm was a key indicator that tort was deployed to result in compensation rather than to chill speech.[357] Likewise, followers harmed by influencer speech do not seek to enjoin the speech but simply to be compensated for any harm that results from an influencer's negligent dissemination of misinformation.[358] The presence of physical harm acts to counterbalance fear that a tort action is being used to suppress speech.[359]

---

352. *See* Shanor, *supra* note 275, at 344, 346; Sacks, *supra* note 37, at 1118.

353. *See, e.g.*, Olivia N. v. Nat'l Broad. Co., 126 Cal. App. 3d 488, 492, 494 (1981) (rejecting the negligence claim of a minor against a broadcaster after her rapists conspired to reenact an artificial rape scene from a movie aired by the broadcaster); Zamora v. CBS, 480 F. Supp. 199, 200, 205 (S.D. Fla. 1979) (involving a television broadcaster that was sued under a negligence theory of liability for broadcasting violent crimes on television after the "listener," a minor, shot and killed his neighbor).

354. *See Olivia N.*, 126 Cal. App. 3d at 494.

355. *See id.*

356. *See, e.g.*, Herceg v. Hustler Mag., Inc., 814 F.2d 1017, 1019 (5th Cir. 1987); Byers v. Edmondson, 826 So. 2d 551, 556 (La. Ct. App. 2002). Note that *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991), where a plaintiff became severely ill after relying on an encyclopedia containing misinformation about the safety of certain mushrooms, might have been informative here. However, the case was decided on tort grounds (public policy basis for no duty for publishers) rather than First Amendment grounds. *Id.* at 1037. Nevertheless, even though physical harm was present, and the speech that caused the harm involved misinformation rather than issues of public debate or unpalatable content, the case arguably fits the *Olivia N.* line of cases rather than the *Weirum*-type cases given the broad audience for the speech, the lack of a close speaker–listener relationship, and the lack of direction or suggestion given by the speaker to the listener. *But see* Dorit Rubenstein Reiss & John Diamond, *Measles and Misrepresentation in Minnesota: Can There Be Liability for Anti-Vaccine Misinformation That Causes Bodily Harm?*, 56 SAN DIEGO L. REV. 531, 539–40, 575 (2019) (arguing that many of the same policy arguments applying to publishers likewise apply to authors).

357. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977).

358. *See id.* at 578.

359. When considering the Court's spectrum of harms in the context of First Amendment coverage, there is significant overlap with the Court's consideration of the state's interest in harm protection when

In addition to the presence of physical harm, the relational context of the influencers and followers is significantly tighter than in the general broadcasting and publishing context. In broadcasting and publishing cases, lower courts appear concerned that speech might be chilled if liability for the content of a general broadcast is imposed for harm caused to one of any innumerable members of the public.[360] The relationship between influencers and followers, however, is narrower than that of public broadcasters to the public at large. As discussed earlier, the influencer–follower relationship is grounded in friendship, broadly speaking. Followers need to opt into an influencer's social network, and they do so because they share interests with and trust the influencer, seeing them as a friend or, at least, a credible source of information.[361] In the context of influencers, the connection between the speaker and listener is one of closeness and proximity compared to the broadcasting and publishing context. When influencers speak, then, their speech is directed at an audience that has opted in to their content, and their speech is tailored in response to that audience's unique engagement trends.[362]

Yet, if underlying concerns about private law being captured as a vehicle for speech suppression are driving judicial determinations of coverage, the broad scope of influencers' "directions" to their followers suggests influencer liability poses a greater risk of chilling speech than in other contexts. In the lower court cases outlined above, the "directive" nature of the speech involved either a single speech act or repeated speech acts of a similar nature. The radio station in *Weirum* made multiple broadcasts about an isolated activity.[363] Gwen Stefani made a single statement encouraging concert-goers to move closer to the stage.[364] Even the speech acts implicated in the mimicry cases involved a single broadcast.[365] However, as described above, influencers engage in hybrid speech: speech that encompasses commercial directives, indirect commercial conduct, and non-commercial speech.[366] Indeed, it is the influencer's careful cultivation of hybrid content that ensnares followers into relationships of trust and reliance and drives the monetary value of influencer marketing. It is the aggregate of influencer speech that "directs" the follower to observe the influencer's suggestions.

This aggregation of multiple speech acts amplifies the possibility that core speech might be implicated in a negligence claim against an influencer, suggesting a greater

considering the application of the standard of review. For a discussion of the state's interest in harm prevention, see *infra* notes 378–86 and accompanying text.

360. *See supra* notes 352–56 and accompanying text.

361. *See supra* Part I.

362. It is also worth noting that contrary to the broadcasting and publishing cases, influencers create their own content (i.e., they are content originators) rather than disseminate the content of others. Lower courts and commentators suggest that there is a distinction between disseminators and originators of content for the purposes of both First Amendment analysis and the extension of tort liability. *See, e.g.*, Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approac*h, 34 ARIZ. L. REV. 231, 275 (1992).

363. *See supra* notes 350–51 and accompanying text.

364. *See supra* notes 348–49 and accompanying text.

365. *See supra* notes 353–56 and accompanying text.

366. *See supra* notes 318–19 and accompanying text.

risk of tort liability impermissibly chilling or suppressing speech. The example of influencer Louise Roe illustrates this.[367] Disaggregating Roe's speech acts, it is possible to see not only commercial Instagram posts (both direct and indirect) but also posts that share her opinions and views about skincare and skin conditions. Viewing influencer speech in a disaggregated form highlights the possibility that a negligence action could chill speech by ex post limiting speech on matters of public concern, namely public health.[368]

Speech on public concerns[369] is entitled to "special protection."[370] The Court has held that whether speech is a private or public concern is to be determined by the "content, form, and context" of the speech, where the totality of the circumstances drives the analysis and no factor is dispositive.[371] In *Snyder*, the Court considered that, accounting for the totality of the circumstances, the Westboro protest implicated speech on matters of public concern in a public place and in a manner designed to reach "as broad a public audience as possible."[372] Conversely, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court held that the dissemination of a false credit report was speech of private concern.[373] The Court explained that the speech was "solely in the individual interest of the speaker and its specific business audience."[374]

Considering the totality of the circumstances, influencers should be viewed as private speakers who speak directly to a limited, private audience rather than a broad, public audience. The speech takes place in a private forum where participation requires both influencer and follower to actively opt in to the platform. Regardless of whether it contains opinions and views, influencer speech is generally directed towards monetization.[375] The speech is in the interest of the influencer and is designed to build relationships to influence the behavior of a specific audience for commercial gain.

Ultimately, where influencer misinformation negligently causes physical harm to their followers, the aggregation of influencer speech evidences that the totality

367. *See supra* notes 116–19 and accompanying text.

368. *See* San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam) (noting that "the boundaries of the public concern test are not well defined").

369. *See* Connick v. Myers, 461 U.S. 138, 146 (1983) (describing speech that can be "fairly considered as relating to any matter of political, social, or other concern to the community"); *Roe*, 543 U. S. at 83–84 (identifying speech that "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public").

370. *Connick*, 461 U.S. at 145; *see also* Rankin v. McPherson, 483 U.S. 378, 387 (1987) ("The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.").

371. *See* Snyder v. Phelps, 562 U.S. 443, 454 (2011); *see also* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

372. 562 U.S. at 450–51, 454–55.

373. 472 U.S. at 762.

374. *Id.*; *see also Roe*, 543 U.S. at 84 (holding that videos of a government employee engaging in sexually explicit acts did not address a matter of public concern as they "did nothing to inform the public about any aspect of the [employing agency's] functioning or operation").

375. *See* Rieder et al., *supra* note 42, at 2–3.

of the speech is on matters of private concern. This moderates the concerns about negligence liability chilling speech. The First Amendment does not value all speech equally, and where speech concerns purely private issues, speech protections are less rigorous. Limitations on private speech do not threaten the "free and robust debate of public issues," and any threat of tort liability does not pose a risk to public debate in "a reaction of self-censorship."[376] In the context of tort claims involving negligent misinformation—where the speech results in physical harm, stems from a sufficiently narrow relationship between speaker and listener, and is on matters of private concern—the coverage of the First Amendment should not be extended.

B. FIRST AMENDMENT PROTECTION OF INFLUENCER SPEECH

A lot rests on categorizing influencer speech as uncovered or covered speech and as commercial or mixed speech. While courts will scrutinize the law for its constitutional viability regardless of whether the speech is covered or uncovered by the First Amendment, the nature of that judicial scrutiny will depend on the ultimate constitutional sorting.[377] This Part sidesteps a final determination of the appropriate level of scrutiny for influencer speech. Instead, it suggests that regardless of the applicable standard of review, where influencer speech causes physical harm, the state's interest in facilitating a private law remedy for redress of that harm will always be sufficient for constitutional purposes.[378]

The state's interest in prevention or remediation of physical harms caused by influencer speech must be coupled with regulation that is "well-designed to advance that interest."[379] It is at this juncture that the distinction between ex ante government regulation in the form of legislation and ex post government "regulation" in the form of forum provision is squarely implicated. The Court has consistently stated that state facilitation of private common law claims through state courts is to be treated the same as where the government regulates conduct ex ante, at least for First Amendment purposes.[380]

Tort law is grounded in the theory of harm prevention and compensation for injury. Across the multitude of tort causes of action, it has been argued that the underlying principle of liability is the causing of harm without justification or excuse.[381] At its zenith, tort law aims to protect persons' bodily integrity from

376. *Dun & Bradstreet, Inc.*, 472 U.S. at 760 (quoting Harley-Davidson Motorsports v. Markley, 568 P.2d 1359, 1363 (Or. 1977)); *see also* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 56 (1988).

377. *See* Schauer, *Out of Range*, *supra* note 275, at 347; Lakier, *supra* note 276, at 2168.

378. *See* Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1967–68 (2004).

379. Tushnet, *supra* note 275, at 1076.

380. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); Oman & Solomon, *supra* note 192, at 1112.

381. *See* Arthur Ripstein, *Theories of the Common Law of Torts*, STAN. ENCYCLOPEDIA PHIL. (June 2, 2022), https://plato.stanford.edu/entries/tort-theories [https://perma.cc/MZ9K-8GNL] ("All members of a civilised commonwealth are under a general duty towards their neighbors to do them no hurt without lawful cause or excuse. The precise extent of the duty, as well as the nature and extent of the recognised exceptions, varies according to the nature of the case." (quoting English legal scholar Sir Frederick Pollock)).

interference by establishing foundational norms of conduct.[382] In the context of negligence, the basic norm "requires that people exercise appropriate care around the bodies and property of others."[383] The elements of a negligence cause of action capture the premise that one person should realize that their conduct "involves a risk of causing harm to some interest of another, such as the interest in bodily security, which is protected against unintended invasion."[384] Tort law acts to deter or compensate those individuals who have been harmed by the conduct of another.

Yet, harm can also be justified.[385] The question proposed influencer liability raises is whether the First Amendment can justify the harm caused by influencer speech. We argue that where influencer speech negligently causes physical harm, the state's interest in harm prevention—either by the deterrence effect of tort liability or by aligning harms with compensation—is compelling.[386]

As outlined in this Part, the Supreme Court's speech-tort jurisprudence has consistently recognized a spectrum of harms that the state can vindicate through tort liability. In the context of speech-torts, the baseline appears to be reputational harm. While the Court has been reluctant to concede a general state interest in protecting against emotional harm, it has recognized an interest in reputational harm. In *Gertz v. Robert Welch, Inc.*, the Court noted that the "compensation of individuals for the harm inflicted on them by defamatory falsehood" is a legitimate state interest underlying state libel laws.[387] For the Court, this interest "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[388] Similarly, in *Rosenblatt v. Baer*, the Court emphasized the state's interest in the social values of tort liability.[389] Writing about damage to reputation, the Court stated that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation."[390]

As highlighted above, the Court has indicated that the state's interest in harm prevention is linked with its tangible nature. In *Zacchini*, the Court held that the state's provision of a remedy for the plaintiff's right to publicity protects

382. Tort law protects other interests as well, including emotional and economic interests. For the purposes of this Article, we are focused on physical harm.

383. *See* Ripstein, *supra* note 381.

384. RESTATEMENT (SECOND) OF TORTS § 289 cmt. b (1965).

385. Tort law recognizes that there might be social or economic benefits from allowing one person to harm another in certain circumstances. *See* Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3–4 (1894).

386. *See* Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L. J. 142, 144–45 (2011) ("Tort law aligns these elements to ensure that a defendant's liability is limited to the harms encompassed by the duty. Liability cannot be predicated on harms *outside* of the duty, as there is no legal basis for the imposition of such liability. The elements, therefore, must be partially aligned in the sense that the duty must encompass a harm in order for it to be compensable with the damages remedy.") (emphasis in original).

387. 418 U.S. 323, 341 (1974).

388. *Id.* (citing Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

389. *See* 383 U.S. at 86.

390. *Id.*

individuals' economic interests because it "goes to the heart of [an individual's] ability to earn a living."[391] The Court likened a violation of the right of publicity to the prevention of charging an admission fee for a performance.[392] The Court held that the state has a greater interest in protecting proprietary interests than emotions or reputation.[393] It specified that "[t]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."[394]

While the Court has not directly examined the state's interest in prevention of physical harm in its speech-tort jurisprudence, it has indicated that the greater includes the lesser. If deterrence of harm to property interests is a sufficient state interest, then deterrence of physical harm to individuals is also likely a sufficient state interest. The Court in *Gertz* highlighted this point, specifying that protecting life itself is an important interest primarily left to the states.[395] Further, prioritizing the state's interest in protecting an individual from physical harm—or at least facilitating a forum to remediate damage caused by physical harm—is normatively sound. The idea that personal physical liberty is a compelling state interest maps onto both the Constitution's fundamental protection of personal liberty, where physical liberty is primary, and the values embedded in tort law itself.[396]

---

391. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977).

392. *See id.* at 575–76.

393. *See id.* at 576.

394. *Id.* (second alteration in original) (quoting Harry Kalven, Jr., *The Right of Privacy in Tort Law – Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331 (1966)); *see also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 543, 564, 569 (1985) (examining a claim of misappropriation of the publication of Gerald Ford's memoirs by a competing magazine from the one he had a contract with and holding the state had an interest in maintaining an action for tortious interference with contract and a statutory action for copyright infringement and that the economic loss suffered by the plaintiff was a sufficient interest to justify any limitations on speech).

395. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)); *see also* Tennessee v. Garner, 471 U.S. 1, 21 (1985) (noting that while "burglary is a serious crime . . . it is [not] so dangerous as automatically to justify the use of deadly force," because the crime is a "property" crime rather than a crime against another person); Brown v. Martinez, 361 P.2d 152, 155–58 (N.M. 1961) (stating that human life is more important than property rights and consequently that the use of deadly force against watermelon thieves on defendant's property was actionable in tort); Volokh, *supra* note 378, at 1967–68; State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (holding that an award of punitive damages would be less likely to violate the Due Process Clause where the harm being remedied was physical harm to a person rather than economic harm); Farmer v. United Bhd. of Carpenters & Joiners of Am., Loc. 25, 430 U.S. 290, 302–03 (1977) (finding a substantial state interest in "protecting the health and well-being of its citizens"); Davis v. Balson, 461 F. Supp. 842, 870 (N.D. Ohio 1978) ("The state's interest in protecting the safety and welfare of its citizens cannot be challenged."); Mattis v. Schnarr, 547 F.2d 1007, 1018–19 (8th Cir. 1976), *vacated on procedural grounds*, 431 U.S. 171 (1977) (holding that the state interest in protecting the lives and health of its citizens outweighs the Due Process Clause); Herceg v. Hustler Mag., Inc., 814 F.2d 1017, 1026 (5th Cir. 1987) (Jones, J., concurring in the decision and dissenting in part) ("[N]o federal court has held that death is a legitimate price to pay for freedom of speech.").

396. *But see* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1206–12 (2005) ("The First Amendment requires us to run certain risks to get the benefits that free speech provides, such as open discussion and criticism of government action, and a culture of artistic and expressive freedom.

Yet, cutting against this conception of the state interest as harm prevention and harm remediation is the Court's growing conception of private law claims as pseudo-state regulation. Starting with *New York Times v. Sullivan*, the Court has conceptualized state facilitation of private law remedies, like damages, as including a form of "governmentally imposed sanctions."[397] In *Hustler Magazine*, for example, the Court claimed that the state's interest in facilitating the private right of action of intentional infliction of emotional distress imposed a "sanction in the form of damages"[398] to "prevent[] emotional harm."[399] In *Snyder v. Phelps*, however, the Court seemingly pivoted to a conception of the state interest in speech-tort cases as purely regulatory. For the Court, the existence of the tort of intentional infliction of emotional distress was regulatory, and the majority's conceptualization of tort law was that it did "little more than seek[] to punish and suppress distressing speech."[400]

The framing of the state interest is critical: the Court has equated state regulation of speech with the suppression of speech. If the state's interest in providing a forum for private law redress for physical harm is regulatory, then its real interest is to limit and deter speech. Under this framing, the state's interest will never be sufficiently compelling to outweigh the interest in speech.[401]

Yet, as Nathan Oman and Jason Solomon have argued, the cases where the Court has imposed a regulatory motive in the speech-tort context have typically involved lawsuits where suppression of speech was an underlying driver of the legal action.[402] In *New York Times Co. v. Sullivan*, a public official challenged a paid advertisement describing Alabama as unwilling to comply with various desegregation orders.[403] The Court described the effect of the $500,000 damages award as one that would impose a "pall of fear and timidity."[404] Even in *Snyder v. Phelps*, it is possible to characterize the cause of action as at least facilitating suppression of the speech that gave rise to the claim of intentional infliction of emotional distress.

However, it is a difficult leap to claim that the state's facilitation of a private remedy for negligence resulting in physical harm is motivated by the desire to punish or suppress speech. The tort of negligence has a long history.[405] By the eighteenth century, negligence as a theory of liability developed with references

These risks may include even a mildly elevated risk of homicide . . . . [This] is part of the price we pay for the First Amendment . . . .").

397. Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 51–52 (1988).

398. *Id.* at 52.

399. *Id.* at 46.

400. Oman & Solomon, *supra* note 192, at 1134.

401. *See* Snyder v. Phelps, 562 U.S. 443, 460–61 (2011); Oman & Solomon, *supra* note 192, at 1142.

402. *See* Oman & Solomon, *supra* note 192, at 1131.

403. *See* 376 U.S. 254, 256–57 (1964).

404. *Id.* at 278.

405. *See* Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 LAW Q. REV. 184, 191 (1926) ("[I]n one form or another a fair amount of negligence in the sense of doing what a reasonable man would not do, or not doing what he would do, was covered by medieval law.").

to principles that are familiar in the contemporary context.[406] Social policies that focused on public and individual safety, as well as principles of morality mandating the avoidance of unnecessary harm, were reflected in common law actions.[407]

Underpinning the development of negligence was the theory that individuals who have been harmed should be compensated as a matter of corrective justice regardless of what impact that compensation might have on future actors.[408] Negligence, then, has a twofold foundation relevant for our claim: the cause of action is dependent on harm suffered by one person and is justified by the need for individualized justice (i.e., compensation).[409] This account is rooted in the historical understanding of negligence as obligational, where a person is obliged to take care with respect to the person or property of a particular person or class of persons, not society at large.[410]

---

406. Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1199 (1990).

407. *Id.* at 1169, 1173 ("EVERY man ought to take reasonable care that he does not injure his neighbor; therefore, wherever a man receives any hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly, the law gives him an action to recover damages for the injury so sustained." (quoting SIR FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 35 (1768))).

408. Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 250 (1996); *see also* Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 408 (1989) (arguing that the adjudication of a negligence claim for physical injury is not "to promote an independently justifiable goal, such as deterrence, compensation, or wealth maximization"); Richard W. Wright, *Right, Justice and Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 159, 173, 176 (David G. Owen ed., 1995) (arguing for a norm of individual freedom and, consequently, corrective justice); Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J. L. & PUB. POL'Y 583, 588–91 (1993) (arguing that negligence should only be concerned with two parties, the one who was harmed and the one who caused the harm).

409. *See* John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 516 (2003) ("[T]ort . . . provide[s] redress for[] injurious wrongs . . . ."); JULES L. COLEMAN, RISKS AND WRONGS 198 (1992) ("At the core of tort law is a certain practice of holding people liable for . . . wrongful losses . . . ."); Kenneth S. Abraham, *What Is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172, 177 (1992) ("[T]ort liability is imposed only when the defendant's actions have caused physical harm to the plaintiff . . . .").

410. *See* Yehuda Adar & Ronen Perry, *Negligence Without Harm*, 111 GEO. L.J. 187, 197–98 (2022); *see also* TIMOTHY MURRAY, 1 CORBIN ON CONTRACTS: FORMATION OF CONTRACTS § 1.2 (Matthew Bender & Co. 2018) (1950) ("If a duty (obligation) exists, it is a duty to some person who has a right against the one subject to the duty . . . . These two correlative terms express a legal relation . . . ."). The individualized and obligational nature of negligence has strong foundations in American jurisprudence. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99–100 (N.Y. 1928) (stating that negligence generally, and the element of duty of care specifically, rests on "the invasion of a legally protected interest, the violation of a right," and that a plaintiff must demonstrate "'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial"); *see also* Donoghue v. Stevenson [1932] AC 562 (HL) 580 (expressing that negligence and the duty of care required to support a negligence cause of action are based on "some general conception of relations" rather than any broader societal obligation). But there is historic support for the idea that negligence, through the imposition of a duty of care, serves as a societal deterrent. *See Palsgraf*, 162 N.E. at 101–05 (Andrews, J., dissenting) ("Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone."); *see also* Adar & Perry, *supra*, at 201–02 (discussing the abolition of a duty of care).

Consequently, it is difficult to imagine that negligence in this context can be framed as a state's proactive imposition of ex ante regulatory constraints on speech.[411] Instead, the state's maintenance of courts where individuals can seek remedies via a negligence cause of action seeks to make the plaintiff whole, not limit the speaker's capacity to engage in speech in the future. Arguably, the maintenance of a common law cause of action to compensate for physical harm is tailored to the state's interest in harm prevention and remediation. The ex ante nature of the remedy limits the regulatory consequences of damages for physical harm. As in *Zacchini*, the imposition of liability does not seek to prevent future conduct but instead compensate for past conduct.[412] Of course, a damages award against a speaker for harmful speech has a regulatory effect, and there is potential for chilling influencer speech. However, this is more akin to burden-shifting, where the burden of the speech is shifted to the speaker. Similarly, concerns about the jury engaging in viewpoint discrimination because of the nature of the speech are lessened in the context of negligence liability for physical harm. To the extent that liability for physical harm chills speech by virtue of its consequences, the answer is not to value speech over redress for physical harm.

CONCLUSION

Social media influencers are a critical information resource for many American consumers, particularly on matters relating to health and wellness. Individuals seeking advice from others with similar health experiences inevitably find a supportive community on social media and a trusted friend in social media influencers. But influencers are not friends or peers. They are peddlers whose apparent authenticity is carefully curated to maximize financial gain. Monetization relies on engagement, including likes, shares, views, comments, and subscriptions. Novelty or shock value frequently drives this engagement. In this environment, health misinformation thrives. Consequently, individuals who turn to influencers for health information—many out of desperation for answers that have eluded them in more traditional healthcare settings—may suffer physical harm after following dangerous advice.

Despite acknowledgment among public officials that health misinformation is an important societal problem, mechanisms to remediate harms suffered by following influencer health misinformation have proven elusive. This Article proposed that tort liability—specifically negligence—can help fill this gap. Far from a radical solution, extending negligence liability to influencers who cause physical harm is an incremental step in the evolution of the common law. Imposing a

411. In addition to remediation, deterrence is also a goal of tort law. However, as scholars have noted, deterrence is more commonly associated with corporate defendants, where there is a clear asymmetry of information between the tortfeasor and the victim. *See* Wendy Wagner, *When a Corporation's Deliberate Ignorance Causes Harm: Charting a New Role for Tort Law*, 72 DEPAUL L. REV. 413, 434 (2022) (discussing the role of tort law in deterring corporate tortfeasors and noting that regardless of the theory adopted for tort claims, the "underlying thrust of tort law is to hold wrongful defendants responsible for remedying private harms caused by their behavior").

412. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573–74 (1977).

duty on influencers to take care vis-à-vis their followers simply recognizes the special (and specially curated) relationship between influencer and follower. Further, influencer duties make sense: the traditional interests undergirding negligence law—deterrence of socially undesirable behaviors, compensation of unjustly injured individuals, and internalization of conduct's negative externalities—are advanced by recognizing tort liability for influencers profiting off harmful misinformation.

Yet, negligence liability for influencers implicates competing interests. On the one hand, a strong liberty interest in physical integrity and the right to be free from physical harm. On the other, the influencer's significant and constitutionally protected interest to speak. However, not all speech is valuable, and not all speech is covered by the First Amendment. This Article argued that influencer health misinformation resulting in physical harm is neither valuable nor constitutionally covered. Instead, misinformation negligently disseminated by influencers to their network of followers is a category of speech uncovered by the First Amendment. And while health misinformation may be limited as a consequence of influencer duties, there is little risk that negligence claims will be deployed as a vehicle to circumvent constitutional protections. The presence of physical harm, the influencer–follower relationship, and the directive nature of influencer speech all act as necessary limitations on negligence claims against influencers, collectively ensuring litigation is brought to remediate harm rather than suppress speech.

Tort liability for influencers will not fully solve the problem of influencer health misinformation. But by recognizing influencer duties in negligence—and acknowledging the low value of health misinformation—courts can build a more robust remedial regime for physical harms caused by misinformation. In so doing, private law can provide a constitutionally sound foundation for future legislative and regulatory efforts to regulate—and remediate harms caused by—influencer misinformation.