FREE SPEECH, BREATHING SPACE, AND LIABILITY INSURANCE

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An important piece of the "speech-tort" picture has been almost completely missing from doctrinal and policy analysis: the role played by liability insurance in protecting speech. In New York Times Co. v. Sullivan*, the Supreme Court began adopting First Amendment restrictions on liability for defamation and the other speech torts—false light, intentional infliction of emotional distress, and public disclosure of private information. The Court's purpose was to create "breathing space" for valuable speech by precluding liability for some speech that has no constitutional value in itself.*

However, there is a little-known but highly important liability insurance regime that also affords breathing space, more broadly than the constitutional rules, by insuring against liability for unprotected speech and the costs of defending virtually all speech-tort suits, regardless of their validity. There have been decades of extensive legal scholarship about the First Amendment's restrictions on speech-tort liability. Yet this scholarship has largely ignored the fact that all the liability for the speech torts that the First Amendment does permit can be, and often is, covered by liability insurance. In addition, Supreme Court Justices Thomas and Gorsuch recently have separately criticized existing constitutional limitations on liability for defamation as too broad without any mention of the widespread existence and availability of insurance protecting against liability for defamation. The Justices' criticisms of defamation law have garnered a lot of attention and a barrage of responses, which have also omitted any reference to the possible relevance and significance of liability insurance to the debate about the proper scope of liability for defamation.

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This Article takes insurance against speech-tort liability out of the shadows, bringing First Amendment theory and doctrine into the orbit of thinking about liability insurance and its operation in practice. The Article identifies and analyzes the sources and scope of the coverage that insurance provides against speech-tort liability, combining insights about the complex and intertwined consequences of the threat of speech-tort liability with what we know about how liability insurance both creates breathing space and attempts to mitigate excess risk-taking by those who are insured. The Article argues that, whether the end result is to change the law or simply to provide a firmer and more knowledgeable foundation for maintaining the law as it now stands, proponents of reform should either invoke the availability of liability insurance in support of their position or explain why their analyses ignore it. And opponents of reform should explain why they maintain their support of the status quo in spite of the availability of liability insurance. Finally, the Article considers the relevance of liability insurance to different theories of tort liability and analyzes the principal possible alternative to the current constitutional limits on liability, a negligence standard, concluding that such a standard would have considerable deficiencies.

INTRODUCTION

The proper scope of liability for defamation—impugning the reputation of an individual or organization—has become a salient public issue. The First Amendment provides considerable protection against liability for defamation (and certain other speech-related torts)[1] in order to provide "breathing space"[2]—an extra margin of protection designed to

[1] As I explain below, these torts are false light, intentional infliction of emotional distress ("IIED"), and public disclosure of private facts. See infra Section II.A.

[2] See infra Section II.B.

ensure that free speech is not unduly deterred by the threat of liability.[3] Regardless of these protections, there are still suits for defamation, brought not only by private individuals, but also by, and against, public officials and public figures.[4] These suits receive high-profile attention. Such suits often not only seek personal vindication and compensation for reputational harm, but today, they also figure in the political process; they are moves in a larger set of thrusts and parries occurring outside the direct confines of tort litigation. But the law of defamation should be a law for all seasons, not one bent to suit transient political passions.

Into this picture have come two Justices of the Supreme Court. In judicial opinions, Justice Thomas and Justice Gorsuch have separately criticized existing constitutional limitations on liability for defamation as too broad, Justice Thomas on originalist grounds[5] and Justice Gorsuch because of the quick and easy harm to reputation that can occur in the world of digital media.[6] Both Justices contend, in effect, that the Constitution should authorize more liability for defamation than it currently permits. In response, a number of established First Amendment scholars have defended existing precedent,[7] and one of the country's

[3] See Leslie Kendrick, Speech, Intent, and the Chilling Effect, 54 Wm. & Mary L. Rev. 1633, 1636–37 (2013) (explaining that protecting negligent false statements from liability provides constitutional "breathing space"); Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect," 58 B.U. L. Rev. 685, 710–18 (1978) (describing the role of a constitutional "buffer zone" in minimizing the chilling of protected activities).

[4] See, e.g., US Dominion, Inc. v. Fox News Network, LLC, 293 A.3d 1002 (Del. Super. Ct. 2023) (voting machine manufacturer against a television broadcaster based on conduct of various news anchors). The parties later reached a settlement for $787.5 million. David Folkenflik & Mary Yang, Fox News Settles Blockbuster Defamation Lawsuit with Dominion Voting Systems, NPR (Apr. 18, 2023, 4:35 PM), https://www.npr.org/2023/04/18/1170339114/fox-news-settles-blockbuster-defamation-lawsuit-with-dominion-voting-systems [https://perma.cc/DTD5-TLCE]. See generally Freeman v. Giuliani, 691 F. Supp. 3d 32 (D.D.C. 2023) (election workers against a media personality), *judgment entered*, No. 21-cv-03354, 2023 WL 9783148 (D.D.C. Dec. 18, 2023), *appeal dismissed*, No. 24-7021, 2025 WL 634800 (D.C. Cir. Feb. 26, 2025); Carroll v. Trump (Carroll I), No. 20-cv-07311, 2024 WL 97359 (S.D.N.Y. Jan. 9, 2024) (writer against Donald Trump); Carroll v. Trump (Carroll II), No. 22-cv-10016, 2023 WL 3000562 (S.D.N.Y. Mar. 20, 2023) (same); Depp v. Heard, No. CL-2019-0002911, 2022 WL 2342058 (Va. Cir. June 24, 2022) (actor against another actor).

[5] McKee v. Cosby, 139 S. Ct. 675, 675–76 (2019) (Thomas, J., concurring in the denial of certiorari).

[6] Berisha v. Lawson, 141 S. Ct. 2424, 2427–28 (2021) (Gorsuch, J., dissenting from the denial of certiorari).

[7] See, e.g., Matthew L. Schafer, In Defense: *New York Times v. Sullivan*, 82 La. L. Rev. 81, 96–97, 158–60 (2021) (critiquing Justice Thomas's and Justice Gorsuch's historical analyses and arguing that overturning *Sullivan* would have a chilling effect on the speech of news

leading organizations supporting media rights has issued a 196-page white paper seeking to demonstrate that reform of existing limits on liability is unnecessary and ill-advised.[8]

The two Supreme Court Justices, as well as the First Amendment scholars and media-support organizations opposing them, however, are guilty of a significant analytical and practical omission. They have failed to recognize that the media, other kinds of organizations, and most individuals have, or can obtain,[9] insurance against liability for defamation and other speech-related torts.[10] Alongside the constitutional regime affording breathing space for the exercise of protected free-speech rights, then, there is a little-known liability insurance regime that also affords breathing space for speech and provides broader protection than what the Constitution provides. It does so by indemnifying speakers against liability not only for harm caused by unprotected speech but also for the cost of defending against suits alleging liability for speech that turns out to have been protected or not to have been tortious.[11] That is, liability

organizations); Lili Levi, Disinformation and the Defamation Renaissance: A Misleading Promise of "Truth," 57 U. Rich. L. Rev. 1235, 1285–87 (2023) (arguing that Justice Thomas's historical justification for dispensing with *Sullivan* is inadequate and that Justice Gorsuch's concerns about disinformation online are narrow compared to the sweeping effects that reconsidering *Sullivan* could have on free speech); Matthew L. Schafer & Jeff Kosseff, Protecting Free Speech in a Post-*Sullivan* World, 75 Fed. Commc'ns L.J. 1, 35–36 (2022) (questioning Justice Thomas's use of the "PizzaGate" conspiracy theory as an example in favor of loosening liability standards, noting that the theory was spread by anonymous posters on message boards, actors for whom there would likely be little effective legal consequence); Lyrissa Lidsky, Untangling Defamation Law: Guideposts for Reform, 88 Mo. L. Rev. 663, 676 (2023) (arguing that reconsidering *Sullivan* would likely not have a substantial effect on the disinformation Justice Gorsuch is most concerned with, which does not usually come from mainstream news organizations).

[8] See generally Media L. Res. Ctr., *New York Times v. Sullivan*: The Case for Preserving an Essential Precedent (2022) [hereinafter MLRC], https://medialaw.org/wp-content/uploads/2023/01/nytsullivanwhitepaper.pdf [https://perma.cc/B7L4-UH3T].

[9] It is probably the case that some small media organizations cannot easily obtain, or cannot easily afford, Media Liability insurance, although I have found no quantitative data confirming this. See, e.g., Christina Koningisor & Lyrissa Lidsky, First Amendment Disequilibrium, 110 Va. L. Rev. 1, 29–31 (2024) (discussing the financial pressures that media organizations face); Elise Czajkowski, Why Media Liability Insurance Is Key to Making Sure Your Newsroom Continues to Exist, Inst. for Nonprofit News, https://inn.org/research/case-studies/why-media-liability-insurance-is-key-to-making-sure-your-newsroom-continues-to-exist/ [https://perma.cc/5D47-K9Z9] (last visited Apr. 3, 2025) (recounting difficulties and costs small media organizations face in connection with defamation suits and insurance).

[10] The MLRC white paper does include a half-sentence reference to "rising libel insurance rates." Richard Tofel & Jeremy Kutner, A Response to Justice Gorsuch, *in* MLRC, supra note 8, at 79, 83.

[11] See infra Section II.A.

insurance provides protection against liability that the First Amendment permits, as well as the cost of defending against alleged liability. It also supplements the protection the Constitution provides by covering the legal costs that speakers would otherwise incur when they are sued and the speakers win.

What if you analyzed the impact of tort liability on the quality of medical care without taking into account the fact that health care providers typically are protected against liability by malpractice insurance?[12] What if you analyzed how the threat of liability for causing an automobile accident affects driving behavior without ever considering that liability insurance pays for virtually all individuals' automobile liability?[13] You would properly be thought to have ignored an important ingredient of any sensible analysis.[14]

Yet the constitutional theory of breathing space takes no account of the role that insurance against liability for defamation and other speech-related torts plays in the operation of free speech in theory and in practice. In fact, there have been decades of extensive legal scholarship and constitutional litigation about the First Amendment's restrictions on speech-tort liability. Most of this scholarship, and the courts, have wholly ignored the fact that all of the liability for the speech torts that the First Amendment does permit can be and often is covered by liability insurance.[15] As we will see below, how this all takes place is not an

[12] For work that addresses this issue, see generally Tom Baker, The Medical Malpractice Myth (2005); Frank A. Sloan, Randall R. Bovbjerg & Penny B. Githens, Insuring Medical Malpractice (1991); Paul C. Weiler et al., A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation (1993).

[13] See Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11, at 102–03 (2008) (illustrating how the ubiquity of automobile insurance has slowed automobile liability reform); Tom Baker, Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action, 12 Conn. Ins. L.J. 1, 11–12 (2005) (explaining the role of liability insurance in shaping tort doctrine); Nora Freeman Engstrom, Sunlight and Settlement Mills, 86 N.Y.U. L. Rev. 805, 815–16 (2011) (discussing how no-fault liability insurance could reshape tort law).

[14] See Kenneth S. Abraham & Catherine M. Sharkey, The Glaring Gap in Tort Theory, 133 Yale L.J. 2165, 2169 (2024).

[15] There have been at most a few dozen passing references to libel insurance in the law review literature over the decades, but almost no actual discussion of its significance. It would take too much detail to systematically prove this negative. A glance at two of the major First Amendment law casebooks, however, provides some confirmation. There is nothing in the table of contents or the index of either that refers to "insurance" or "liability insurance," and nothing in the text of either that I can find that mentions these subjects. See generally Noah R. Feldman & Kathleen M. Sullivan, First Amendment Law (8th ed. 2023); Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, The First

entirely simple matter, but it is not rocket science either. Courts and commentators should be able to understand it. In any event, its technicality and complexity are not a justification for ignoring it.

Whether the existing constitutional limits on liability for defamation and the other speech torts should be maintained is a multilayered issue that I do not claim, or even aim, to definitively resolve here.[16] The principal purpose of this Article is to give analysts and policymakers more sophisticated tools to employ in addressing that issue, though I also make some points regarding the difficulties that would be encountered if liability based on negligence were permitted across the board. My contention is not that the newly realized availability of liability insurance should necessarily make a difference in speech-tort law at the retail level, doctrine by doctrine. Rather, I contend that the invocation of breathing-space concerns in constitutional law, in common law adjudication, and in public debate should be influenced by the recognition that not only constitutional protections against liability, but also liability insurance, provide breathing space for speech.

My message, then, is that those who subscribe to Justice Gorsuch's position that proving actual malice, in practice, is too high a hurdle for defamation plaintiffs to overcome should either be invoking the availability of liability insurance in favor of their position or explaining why they are not doing so. And those who oppose that position and favor maintaining current First Amendment protections against liability should be explaining why they take this position, notwithstanding the breathing space that liability insurance provides.

In short, in light of the findings about liability insurance that I set out below, it seems clear that any analysis of First Amendment or tort liability issues that turns at least in part on breathing-space concerns should take the operation of liability insurance into account. I show how that can be

Amendment (4th ed. 2012). I have been able to find only two brief but actual *discussions* of defamation liability insurance in the law review literature, the most recent of them more than thirty years old. See Frederick Schauer, Uncoupling Free Speech, 92 Colum. L. Rev. 1321, 1339–43 (1992); Marc A. Franklin, Good Names and Bad Law: A Critique of Libel Law and a Proposal, 18 U.S.F. L. Rev. 1, 18–22 (1983). And roughly thirty-five years ago, part of one chapter in a book of essays made reference to and analyzed "trends in insurance premiums." See Henry R. Kaufman, Trends in Damage Awards, Insurance Premiums, and the Cost of Media Libel Litigation, *in* The Cost of Libel: Economic and Policy Implications 1, 11–15 (Everette E. Dennis & Eli M. Noam eds., 1989).

[16] For a recent argument that the protections provided to public figures should be reduced, see generally G. Edward White, Reconsidering the Legacy of *New York Times v. Sullivan*, 23 First Amend. L. Rev. 1 (2024).

done. Although liability insurance does not provide blanket protection, it is still a source of substantial breathing space. In addition, I explain why, at this point, we could use a much more complete understanding of the quantitative side of the issues that are relevant to the kind of analysis I am proposing. But we should not wait for perfect information about the incidence of insurance protection against speech-tort liability before taking the availability of this insurance into account. We should go with what data we have now. That is what I do here.

Part I identifies and analyzes the sources and scope of the coverage that insurance provides against speech-tort liability. Such insurance may be known to exist by a few judges and First Amendment scholars, but based on my own informal surveys, the availability, scope, and distribution of such insurance are only dimly understood at most. Perhaps even more surprising, insurance law scholars themselves (again, based on my own informal surveys) also have little awareness or understanding of the scope of speech-tort liability insurance. It is little wonder that there has been no scholarship integrating the two fields; the subject is largely opaque to most scholars in both.

Part II briefly identifies the elements of the traditional common law rules governing four speech torts—defamation, the main such tort, as well as false light, intentional infliction of emotional distress ("IIED"), and public disclosure of private facts—and also examines the particular restrictions on the scope of these liabilities that the Supreme Court has ruled apply to them as a matter of First Amendment law. The focus of this Part is not only the two sets of liability rules, but also what we know (and do not know) about suits and outcomes in speech-tort litigation, for most suits do not go all the way to verdict and judgment. This Part delineates the forms of speech-tort liability that are now precluded and those that remain constitutionally valid, which is an important step in the analysis, because the distinction between the two categories marks the boundary between the domains of constitutional protection from speech-tort liability and potential liability insurance indemnity against speech-tort liability.

Part III constitutes an effort to intervene in the two fields by combining insights about the complex and intertwined consequences of the threat of speech-tort liability with what we know about how liability insurance both creates moral hazard and attempts to neutralize it. This Part thereby identifies for the first time the critical issues for the integrated field. The results can be considered a benchmark in the development of an integrated

theory of the relation between free speech, breathing space, and liability insurance. It also provides a sharpened understanding of the manner in which these fields operate together in practice.

Finally, now that liability insurance has come out of the shadows, Part IV first considers the normative relevance of liability insurance to analysis of the speech torts. This Part argues that, regardless of the other debates in torts scholarship about "rights theory" versus consequentialism, in the field of speech torts, the consequentialist conception must prevail. This is because ensuring breathing space for speech is the most consequentialist of purposes. Second, this Part takes a look at what standard could then replace actual malice. It turns out that the alternatives—especially a negligence standard—have significant disadvantages. This insight suggests that evaluating the full mix of considerations relevant to the issue, including the availability of liability insurance, does not lead to a definitive conclusion, but only to a more sophisticated analysis of the advantages and disadvantages of the approach that has now been in place for over fifty years.

I. LIABILITY INSURANCE AND THE SPEECH TORTS

The unrecognized source of breathing space afforded to the broad area of speech rights associated with the speech torts is not the First Amendment, but the insurance markets. Liability insurance is barely visible to First Amendment and torts scholars, most insurance law scholars, and to the courts. Yet it is a major source of financial protection against speech-tort liability and of the legal costs of defending against alleged speech-tort liability, regardless of whether the speech-tort liability at issue is constitutionally protected, unprotected, groundless, imposed by judgment, or the subject of settlement. These costs—both for liability and legal defense against both valid and groundless suits—are potentially major expenditures whose prospect might have a chilling effect on speech, were it not for the breathing space provided by the assurance that a liability insurer will pay all or a good portion of them.

The details of First Amendment doctrine relevant to the speech torts are set out later, in Part II. In order to understand how liability insurance protects against the portion of liability that the First Amendment permits and against the costs of defending against allegations of liability that might or might not be constitutionally permitted, one concept is central and is essentially all that is necessary to understand how liability insurance functions in this area. This is the notion of actual malice,

defined as knowledge of the falsity of a statement or reckless disregard of whether the statement is true or false.[17] This notion, along with the familiar concept of negligence (in certain cases), marks the boundary between constitutionally permitted and unpermitted liability for defamation and IIED.[18] For the tort of public disclosure, the concept of newsworthiness marks that boundary in most cases.[19]

There are several separate sources of insurance against speech-tort liability. The first and principal source typically is called "Media Liability" insurance and is purchased, as the name indicates, by media organizations that have reason to think they may be exposed to speech-tort liability.[20] The second source of insurance is provided by the standard Commercial General Liability ("CGL") insurance policies routinely purchased by U.S. businesses.[21] Some Homeowners and personal Umbrella policies contain analogous coverage of individuals.[22] The third source of insurance is the municipal and police liability insurance policies that protect governmental entities against liability for violation of an individual's civil rights,[23] which may sometimes involve or allegedly be accomplished in part through committing one of the speech torts. And the fourth source is employment liability insurance that, among other things, covers employment discrimination, which again sometimes involves or is allegedly accomplished by committing one of the speech torts.[24] These

[17] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[18] See infra Subsections II.B.1–2.

[19] See infra Subsection II.B.3.

[20] See 2 Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 17.3, at 17-4 (3d ed. 2001). Insurance industry websites also refer to and describe this form of coverage. See also Media Liability Coverage, Int'l Risk Mgmt. Inst., https://www.irmi.com/term/insurance-definitions/media-liability-coverage [https://perma.cc/VSF2-FMUJ] (last visited Apr. 3, 2025) ("Media liability coverage is a type of errors and omissions (E&O) liability insurance designed for publishers, broadcasters, and other media-related firms.").

[21] See Ins. Servs. Off., Inc., Commercial General Liability Coverage Form, CG 00 01 04 13, *in* Kenneth S. Abraham & Daniel Schwarcz, Insurance Law and Regulation: Cases and Materials 467, 472, 481 (7th ed. 2020) [hereinafter Abraham & Schwarcz, Insurance Law and Regulation] (setting out a sample CGL insurance policy providing "Personal and Advertising Injury" coverage that includes coverage of liability for defamation and invasion of privacy).

[22] See, e.g., Chubb, Masterpiece Excess Liability Coverage, Form No. 5400045, at W-2 to -3 (Aug. 23, 2021) (on file with the author) (covering liability for "libel, slander, defamation of character, or invasion of privacy").

[23] Kenneth S. Abraham, Police Liability Insurance After Repeal of Qualified Immunity, and Before, 56 Tort Trial & Ins. Prac. L.J. 31, 33–34 (2021).

[24] See, e.g., Okla. Att'ys Mut. Ins. Co., Employment Practices Liability Endorsement, at § II.G.6, https://cdn.prod.website-files.com/679927afc5d9cecc8f8816a5/6799a64314657321695dab4d_EPL_Policy_Wording1.pdf [https://perma.cc/472K-8YNT] (last visited Apr. 3,

policies tend to cover liability for defamation and invasion of privacy, among other things, arising out of law enforcement or employment relations, respectively. Other kinds of liability insurance policies may provide this sort of "ancillary" coverage as well.

A. Media Liability Insurance

The origins of Media Liability insurance lie in a 1930 letter from William Allen White, the legendary editor of the (Kansas) *Emporia Gazette*, to the Employers Reinsurance Corporation, encouraging it to market insurance against liability for libel.[25] Apparently, the Employers Reinsurance Corporation did so, and other insurers began to offer coverage in the following decades.[26]

Today, this form of liability insurance is purchased either as a freestanding policy or as a part of the coverage provided by broader policies, typically "Cyber Liability" policies, even though the media liability coverage portion of these policies is not limited to cyber-related tort liability. As indicated below, the policies cover speech-tort liability, sometimes with the exception of IIED.

Media Liability insurance is easily available and provides broad liability protection. My own informal research showed that large media organizations retain a significant amount of self-insured risk through a deductible or self-insured retention ("SIR"),[27] but frequently purchase coverage in excess of this self-insured layer. What might be called "medium-size" media organizations tend to purchase coverage subject to much smaller self-insurance, but often enough to handle most routine liability—for example, on the order of magnitude of $500,000 to $1 million in self-insurance. Very small media organizations—small-town

2025) (covering liability arising from allegations of "libel, slander, defamation of character or any invasion of right of privacy" made by an employee against an employer).

[25] Richard A. Ek, Libel Insurance, *in* Law of Mass Communications: Freedom and Control of Print and Broadcast Media 666, 668 & n.7 (Harold L. Nelson & Dwight L. Teeter, Jr., eds., 2d ed. 1973).

[26] Id. at 668–70.

[27] A deductible is "the amount the insurer will deduct from the loss before paying up to its policy limits." Deductible (DED), Int'l Risk Mgmt. Inst., https://www.irmi.com/term/insurance-definitions/deductible [https://perma.cc/8AEW-33ZS] (last visited Apr. 3, 2025). A self-insured retention is a "dollar amount specified in a liability insurance policy that must be paid by the insured before the insurance policy will respond to a loss." Self-Insured Retention (SIR), Int'l Risk Mgmt. Inst. (emphasis omitted), https://www.irmi.com/term/insurance-definitions/self-insured-retention [https://perma.cc/B8A4-ZEZU] (last visited Apr. 3, 2025).

weekly newspapers, for example—either do not purchase insurance or, when they do, have deductibles of between $5,000 and $10,000.[28] Similarly, as with deductibles, my own informal research determined that the amount of coverage purchased seems to vary with the policyholders' size, with limits as low as $1 million and as high as $20 million for a primary policy, and excess coverage for liability above that amount purchased by large organizations. Premiums for coverage undoubtedly vary. Over the long run, the more lawsuits there are and liability there is, the higher premiums will be for any given amount of coverage. In this sense, premiums that policyholders consider "high" are likely to reflect the protection that Media Liability insurance provides.

Exactly what percentage of media organizations purchase coverage has not been determined, but one prominent researcher estimates that annual premium volume may be over $300 million.[29] Based on publicly available data about various forms of liability insurance, I estimate that roughly 70% of this sum, or at least $224 million, is spent annually on defense and indemnity.[30] This is a significant amount of liability insurance protection and therefore provides a significant amount of breathing space for policyholders' activities.

1. The Affirmative Grant of Coverage

The policies cover a number of different forms of speech-tort liability: defamation; invasion of privacy, including public disclosure of private facts; and (sometimes) IIED.[31] Like most liability insurance policies,

[28] The first blogger-specific Media Liability insurance was offered in 2008. See David Ardia, New Insurance Program for Bloggers Offered by the Media Bloggers Association, Digit. Media L. Project (Sept. 23, 2008, 4:32 PM), https://www.dmlp.org/blog/2008/new-insurance-program-bloggers-offered-media-bloggers-association [https://perma.cc/JS6T-G6F9]. I am indebted to Leslie Kendrick for this reference.

[29] Richard S. Betterley, The Betterley Report: Intellectual Property and Media Liability Insurance Market Survey—2023, at 7 (2023), https://www.irmi.com/online/products/the-betterley-report/intellectual-property-and-media-liability-insurance.

[30] For example, the combined ratio—or ratio of indemnity and defense payments ("loss adjustment" expenses to premiums)—for "Other Liability," a general category, in a prominent source of insurance data in 2022 was 74.8% for occurrence policies. See A.M. Best Co., Best's Aggregates & Averages (2023), https://www3.ambest.com/aggavg/toc/default.aspx?aaid=41. There is no reason to think that the combined ratio in Media Liability insurance varies significantly from this category. This means that 74.8% of the estimated $300 million in premiums, or roughly $224 million, was paid for indemnity and defense.

[31] See Sack, supra note 20, § 17.3.1, at 17-4; Betterley, supra note 29, at 7. For reasons I discuss in Part II, I consider false light to be a version of defamation for the purposes of analysis.

these policies not only provide indemnity (i.e., they pay judgments, as well as settlements to which the insurer consents), but also cover the legal costs of defending against suits, even those that are groundless, false, or fraudulent. Given that my informal research suggests that about 75% of media liability insurers' direct costs are for defense, this is highly valuable protection.[32] Most but not all policies include "defense within limits," which means that sums the insurer spends on defense erode the amount of coverage for indemnity, or liability payments.[33] But some policies cover "defense outside limits," meaning that coverage is not eroded by defense expenditures.[34] In addition, as I interpret them, most of the policies cover liability for punitive damages to the extent consistent with state law as it is in many states, at least for vicarious liability.[35]

Thus, this is broad coverage against speech-tort liability. It covers the costs of defending against suits that ultimately turn out to be invalid, including but not limited to those that are unable to surmount the constitutional obstacles to recovery, such as the failure to prove actual malice when that is required in either defamation or IIED actions or lack of newsworthiness in public disclosure suits. And the insurance protects against the common law speech-tort liabilities that can still be imposed, as well as the cost of defending against them, even if a suit is unsuccessful.

There is further protection under the law of insurance through what is typically termed the "duty to settle."[36] If an insurer receives a "reasonable" offer to settle a suit against its policyholder for a sum within the monetary limits of the policy, the insurer rejects the offer, and at trial there is a judgment for a sum in excess of those limits, the policyholder is not responsible for paying any part of the judgment. Rather, the insurer is liable even for the amount in excess of the policy limits as damages for breach of its duty to settle.[37]

[32] For an earlier estimate that as much as 80% of the dollars spent by insurers in libel cases goes to the costs of defense, see Kaufman, supra note 15, at 7. It is hard to know whether this estimate is too high, but my informal research suggests a 75% estimate, to be conservative. I know of no way to arrive at a precise figure.

[33] See, e.g., Phila. Ins. Cos., Professional Liability Insurance Policy, PI-PLSP-002, at 6, https://www.phly.com/Files/CoverProPolicyPI-PLSP-002%20_08-07_36-10901.pdf [https://perma.cc/J6WK-BDPN] (last visited Apr. 3, 2025).

[34] AXIS Pro Media/Pro. Ins., Multimedia Liability—Occurrence, AXIS 1010202 0120, at 1–2, 10 (on file with author).

[35] See, e.g., Phila. Ins. Cos., supra note 33, at 2 (expressly defining covered damages to include "punitive" damages).

[36] See Restatement of Liab. Ins. § 24, at 211–15 (Am. L. Inst. 2019).

[37] Id. § 27(1), at 255.

I doubt that many Media Liability insurance policyholders know about the precise contours of this duty to settle. The existence of the duty therefore cannot provide anything like conscious reassurance and the corresponding breathing space such reassurance would provide. But it seems likely that the duty to settle, and the additional settlements that it undoubtedly encourages,[38] reinforce policyholders' general sense that their insurance can and will protect them not only by defending them and paying judgments, but also by funding settlements of suits that may or may not be valid. That, too, contributes to breathing space.

2. The "Bad Acts" Exclusions

Media Liability insurance policies contain a series of exclusions from coverage, but the only such provisions relevant to the current analysis are variously worded exclusions (depending on the policy) applicable to a "dishonest, fraudulent . . . or malicious act . . . or omission,"[39] an "intentionally dishonest"[40] act, those committed by the insured while "knowing" an act was "wrongful,"[41] or some combination thereof. Industry insiders refer to these provisions in conversation as the "bad acts" exclusions.

Such exclusions are standard fare in many different kinds of liability insurance policies.[42] They are designed to combat the most egregious forms of "moral hazard"—the tendency of insured parties to exercise less care to avoid causing an insured loss than they would exercise in the absence of insurance against the loss.[43] Thus, a policyholder cannot punch someone in the nose or commit fraud and expect to be insured against liability for doing so because policy provisions exclude coverage of

[38] See Kenneth S. Abraham, Distributing Risk: Insurance, Legal Theory, and Public Policy 193 (1986).

[39] See, e.g., Phila. Ins. Co., supra note 33, at 4.

[40] Travelers Indem. Co., CyberRisk Coverage, CYB-16001 Ed. 01-19, at 12, 14 (2019), https://asset.trvstatic.com/download/assets/cyb-16001.pdf/b7c7e0b463c911eeb7b206b700163137 [https://perma.cc/5DD3-X4E3].

[41] AXIS Pro Media/Pro. Ins., supra note 34, at 6.

[42] See, e.g., Chubb Grp. of Ins. Cos., Directors & Officers and Entity Securities Liability Insurance, 14-02-18480 (June 2012), *in* Abraham & Schwarcz, Insurance Law and Regulation, supra note 21, at 576, 577 (excluding coverage of liability "based upon, arising from or in consequence of: (1) any deliberate fraud . . . or any knowing and willful violation of any statute or regulation").

[43] See Abraham & Schwarcz, Insurance Law and Regulation, supra note 21, at 8.

liability for injury that is (in this or varying wording) "expected or intended."[44]

There is an interesting and important twist on this form of exclusion in the Media Liability insurance setting, however, because, in my experience, both policyholders and insurers seem to understand that, notwithstanding the "bad acts" exclusions, the basic coverage provided by Media Liability insurance includes coverage against liability for defamation committed with actual malice in the *New York Times Co. v. Sullivan*[45] sense. Yet the term "actual malice" can mean "knowledge of the falsity" of a statement, in addition to reckless disregard of a statement's truth or falsity. In tort law parlance, if a party acts with knowledge that there is a "substantial certainty" that conduct will cause harm, and the conduct does cause harm, then the party is treated as having intended to cause harm, regardless of whether that party desired the harm to occur.[46] For example, if I shoot at a target with the intent to hit the target, knowing that an individual is near the line of fire and highly likely to be hit, then I am treated as having intended that harm if it occurs.

There is therefore in theory a question whether Media Liability insurance exclusions for "intentional wrongdoing" apply when the knowledge prong of actual malice (as distinguished from the "reckless disregard" prong) is proved in a defamation suit. If a defendant makes a statement knowing that it is false and that it will harm the plaintiff's reputation, does the defendant "intend" this harm in the tort liability sense, and has the defendant therefore committed "intentional wrongdoing" within the meaning of the "bad acts" exclusions? Similarly, there is a question whether the variously worded "dishonesty" exclusions apply when the defendant makes a defamatory statement with knowledge that the statement is false. Making a statement that a party knows is false may seem, on its face, to involve "dishonesty."

I cannot rule out the possibility that one or more media liability insurers will eventually take the position that these exclusions preclude coverage of liability for actual malice, but there are no reported cases on the issue that I can find, and I think that insurers will lose if they try to do that. It is true that, taken literally, both the intentional wrongdoing and dishonesty exclusions could apply to some forms of actual malice, and

[44] See, e.g., Ins. Servs. Off., Inc., Commercial General Liability Coverage Form, supra note 21, at 468.

[45] See 376 U.S. 254 (1964).

[46] See Kenneth S. Abraham, The Forms and Functions of Tort Law 27 (6th ed. 2022).

perhaps all. However, there is an established principle that an interpretation that would emasculate the coverage provided by an insurance policy should not be adopted.[47] You cannot give coverage with one hand and take almost all of that coverage back with the other hand.

This principle does not squarely apply here, but it almost does. Media Liability insurance policies do not expressly cover liability for actual malice. But their affirmative grant of coverage contemplates it. Media Liability policies simply provide affirmative coverage of liability for "defamation" without qualification. So an insurer's purported application of an intentional harm or dishonesty exclusion to a garden-variety actual malice allegation in a defamation action would not be verbally outlandish because it would not wholly emasculate an express, affirmative grant of coverage.

Nonetheless, in my opinion, the courts would not apply these exclusions to garden-variety actual malice because such an interpretation would emasculate much, though obviously not all, of the coverage that policyholders would firmly expect their Media Liability insurance policies to provide. That kind of application of a "bad act" exclusion would be totally inconsistent with policyholders' understanding of what their policies cover. Any media policyholder seeking coverage of liability for defamation would be surprised to find that its insurer applied these terms to the principal form of liability for defamation that the policyholder is likely to face, since liability for defaming a public official or public figure cannot constitutionally be imposed in the absence of actual malice. In my opinion, that is why some industry insiders refer to these as "bad acts" exclusions; it is an effort to distinguish the conduct to which the exclusion would apply—publication of material with an actual intent to cause harm—from legitimate, well-intentioned journalism that happens to result in constitutionally permitted liability and that policyholders expect to be covered. As I discuss below, "bad acts" exclusions are much more likely to come into play in suits against individual, non-media defendants.[48]

[47] See, e.g., Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 284–85 (Ariz. 1987) (rejecting an interpretation of a policy that would "defeat[] the reasonable expectations of the insured" by terminating coverage for one spouse); Morgan ex rel. Clark v. Am. Fam. Mut. Ins. Co., 336 F. App'x 644, 645 (9th Cir. 2009) (invalidating a policy provision that "eviscerates" coverage).

[48] See infra Subsection I.B.2.

An interpretation that affords coverage of liability for actual malice is especially persuasive given the easy availability of alternative policy language, such as the corresponding exclusion in CGL policies (described in the next Section),[49] which applies to statements made "with knowledge of [their] falsity."[50] Media Liability insurance policies' failure to employ this easily available language in their exclusions while using other, ambiguous language would count strongly against an insurer's argument that its policy precluded coverage of liability for any statement made with actual malice.

In summary, an organization that purchases Media Liability insurance likely has coverage against liability for any of the speech torts, unless it commits one of those torts with the specific intent and purpose of causing harm to the individual seeking recovery for harm caused by the organization's statement. Such a policyholder also has coverage for the cost of defending against a suit seeking to impose such liability, even if the suit is unsuccessful, including if it is unsuccessful because constitutional limits preclude liability.

This insurance protection applies regardless of any constitutional protection against speech-tort liability that may be afforded to the defendant in any particular situation. In effect, on top of any breathing space that is provided by First Amendment limits on liability and on the scope of liability, it is possible to purchase insurance against virtually all the liability that remains. This too is breathing space—indeed, potentially more powerful and more protective breathing space than is provided by the First Amendment.

B. Other Forms of Insurance

Both commercial and personal general liability insurance policies provide coverage of some speech-tort liability. CGL policies limit this coverage to a greater extent than Media Liability insurance policies. The limitations in the personal liability insurance policies vary.

1. CGL Policies

Most businesses in the United States purchase CGL coverage. The principal purpose of CGL insurance policies is to cover conventional tort

[49] See infra Subsection I.B.1.

[50] See Ins. Servs. Off., Personal Injury Endorsement, HO 24 82 04 02, at 1 (2001) (on file with the author).

liability for bodily injury and property damage. But CGL policies also provide some ancillary coverage of liability for nonphysical losses under what the policies call "Personal and Advertising Injury" coverage.[51] Included in this category is coverage of liability for "[o]ral or written publication, in any manner, of material that slanders or libels a person" or that "violates a person's right of privacy."[52]

Three exclusions, however, narrow this coverage considerably. First, there is no coverage for media or internet-type businesses.[53] They need to buy Media Liability insurance for their speech-tort liability protection. Second, there is no coverage of liability arising out of statements made by or at the direction of the insured party with knowledge of the falsity of the statement.[54] Third, there is no coverage of liability for loss caused by an act with knowledge that the act would "violate the rights of another" and "would inflict" a covered injury.[55]

Consequently, no media company would have coverage of speech-tort liability under its CGL insurance policy, although virtually no such company would need that coverage because it could purchase Media Liability insurance. Non-media companies would have coverage of some speech-tort liability under their CGL policies, but not for defamation of public officials or public figures (because of the knowledge-of-falsity exclusion), public disclosure of private information that the non-media company knew would be tortious, or IIED because it involves intent to cause harm, although there might be coverage if the company made a statement without knowledge of its falsity but only with reckless disregard of its truth or falsity.

Putting all this together, non-media companies have coverage of liability for defamation as long as they did not have knowledge of falsity in making a defamatory statement, and for public disclosure as long as they did not have knowledge that what they were disclosing was newsworthy. And they have coverage against the cost of defending suits alleging such liability. Most non-media companies would have little need for coverage against liability for actual malice anyway because they would rarely have occasion to make statements about public officials or

[51] Ins. Servs. Off., Inc., Commercial General Liability Coverage Form, supra note 21, at 472.
[52] Id. at 472, 481.
[53] Id. at 472–73.
[54] Id. at 472.
[55] Id.

public figures, and they would rarely have occasion to make disclosures of private information that they knew were offensive to disclose and not newsworthy. What non-media companies do have under their CGL policies is coverage against liability for merely negligent defamation and merely negligent public disclosure liability, or strict liability where it is in force.

2. Homeowners and Umbrella Liability Insurance Policies

Homeowners (and Renters) policies provide general liability insurance, and Umbrella policies provide liability insurance in excess of the coverage provided by Homeowners (and Renters) policies, as well as some additional liability insurance that these policies do not provide. The speech-tort coverage these policies provide, if any, varies.

Some Homeowners policies provide no speech-tort coverage;[56] others provide coverage similar to what CGL policies, as described above, provide, with similar exclusions.[57] Similarly, most Umbrella policies cover speech-tort liability, but some contain exclusions analogous to those included in CGL policies,[58] while others contain more limited exclusions similar to the "bad acts" exclusions in Media Liability insurance,[59] and therefore (for the same reasons noted earlier) cover liability for actual malice in the absence of an intent to cause harm. In suits against individual defendants rather than media organization defendants, these kinds of exclusion seem more likely to come into play. For example, there were reports that in the defamation suit by Johnny Depp against Amber Heard, Heard's insurers may have raised that possible defense to coverage.[60]

[56] See, e.g., Ins. Servs. Off., Homeowners 3—Special Form, HO 00 03 05 11 (2010), *in* Abraham & Schwarcz, Insurance Law and Regulation, supra note 21, at 200, 216–19 (setting out the liability insurance provisions of a sample Homeowners policy).

[57] See Ins. Servs. Off., Personal Injury Endorsement, supra note 50, at 1; see also FC&S Eds., Personal Injury Coverage Analysis, HO 24 82 (Apr. 27, 2022), https://www.propertycasualty360.com/fcs/2022/04/27/personal-injury-coverage-analysis-ho-24-82/ [https://perma.cc/Q5C8-5P87] (describing Personal Injury Endorsement HO 24 82 04 02).

[58] See, e.g., Ins. Servs. Off., Personal Umbrella Insurance Policy, DL 98 01 10 06 (2006), *in* American Institute for Chartered Property Casualty Underwriters / Insurance Institute of America, The CPCU Handbook of Insurance Policies 84, 87 (8th ed. 2008).

[59] See Chubb, supra note 22, at W-11.

[60] See Bethany L. Barrese, Insurance Coverage for Intentional Damages: Did Amber Heard Intend to Defame Johnny Depp?, Saxe, Doernberger & Vita, P.C. (July 22, 2022), https://www.sdvlaw.com/publications/insurance-coverage-for-intentional-damages-did-amber-heard-intend-to-defame-johnny-depp/ [https://perma.cc/6746-B4D3]; see also Complaint ¶¶ 3–6, Depp

Most individuals probably have little, if any, awareness of the speech-tort liability insurance provided by their Homeowners and/or Umbrella policies. Consequently, these policies (like CGL policies) probably provide little conscious reassurance of coverage and little corresponding breathing space. But policyholders' general awareness that their liability insurance provides broad insurance against various forms of tort liability may provide some background reassurance that would not otherwise exist and therefore some additional, if vague, breathing space to individuals who publicly speak or write about matters of public concern in their personal capacity.

3. Employment Liability Insurance, Law Enforcement Liability Insurance, and Hybrid Suits

Other forms of liability insurance also often cover liability for defamation and invasion of privacy. Here I note just two. Employment Practices Liability insurance covers an employer's liability to its employees for various employment-related wrongs, including employment discrimination under Title VII.[61] These policies also typically cover liability for speech torts committed in the course of employment discrimination or independently as part of the employment relationship.[62] What might be called a "hybrid" Title VII suit, for example, might not only allege employment discrimination, but also include a separate count alleging common law defamation or invasion of privacy arising out of employment. This count could be covered.

Similarly, Law Enforcement Liability insurance covers the liability of police departments and/or municipalities for wrongs committed in the course of law enforcement activities and tends to include coverage of liability for defamation and invasion of privacy arising out of these

v. Heard, 102 Va. Cir. 324 (2019) (No. CL-2019-2911) (alleging that Heard knew of the falsity of her statements regarding Depp and published them with "actual malice").

[61] See, e.g., Okla. Att'ys Mut. Ins. Co., supra note 24.

[62] See, e.g., Chubb Grp. of Ins. Cos., Employment Practices Liability Policy, Form 17-02-1345, at 1–2, https://web.archive.org/web/20231210160637/http://www.hedgefundinsurance.com/Publications/Chubb%20EPL%20policy%20form.pdf [https://perma.cc/M6NJ-WWAP] (covering liability for "wrongful act[s]," broadly defined, and excluding (in relevant part) only a "deliberately fraudulent act or omission"); Great Am. Ins. Grp., Employment Practices Liability Solution, D 71102, at 2, 7, https://www.abais.com/docs/default-source/small-business/epl/epli-policy-specimen.pdf [https://perma.cc/V6A8-BMPW] (same).

activities.[63] One of the principal forms of liability that these policies cover is imposed under 42 U.S.C. § 1983 for violation of an individual's civil rights. These entities and individual officers have "qualified immunity" against such liability,[64] but when such immunity is not available, this insurance kicks in.[65] Again, what might be called a "hybrid" Section 1983 suit might also include a separate count alleging common law defamation or invasion of privacy arising out of an alleged civil rights violation. This could be covered.

Neither employment nor law enforcement speech-tort liability would be subject to any constitutional protection, unless the plaintiff was a public official or public figure, or else the subject involved was a matter of public concern.[66] And neither employers nor law enforcement personnel would typically even consider their speech rights in a manner that would implicate breathing-space concerns. So these forms of insurance lie far away from the central First Amendment considerations that touch on breathing-space issues. Nonetheless, one of the effects of insurance against liability for defamation and invasion of privacy, sitting in the background of all sorts of activities, is to keep concerns about these forms of liability largely out of mind because insurance takes care of them in the rare circumstances in which such liability is alleged or imposed. That is a form of quietly afforded breathing space provided by such insurance.

[63] See, e.g., Ins. Servs. Off., Law Enforcement Liability Coverage Part, APL01050915, at 1–2, https://www.jwfspecialty.com/wp-content/uploads/2018/06/Law-Enforcement-Liability-Coverage-Part.pdf [https://perma.cc/37VE-J74S] (covering liability for "law enforcement wrongful acts," broadly defined, and excluding (in relevant part) only a "fraudulent, malicious, [or] dishonest[] act, error or omission"); Nationwide Mut. Ins. Co., Federal Employee and Military Police Officer Professional Liability Master Insurance Policy, FGS-P-1, at 1, 6, 9, https://www.geba.com/wp-content/uploads/2020/10/Federal-Employee-and-Miliary-Police-Officer-Professional-Liability-Master-Insurance-Policy.pdf [https://perma.cc/S9EU-LJ48] (last visited Apr. 3, 2025) (covering "tort" liability that arises out of "professional services," broadly defined, and excluding (in relevant part) only damages "arising out of intentional misconduct willfully committed by or with the knowledge or consent of the insured" (emphasis omitted)).

[64] See Pierson v. Ray, 386 U.S. 547, 557 (1967).

[65] See Abraham, supra note 23, at 32 (describing characteristics of the current market for insurance against police liability).

[66] See infra Section II.B.

II. COMMON LAW SPEECH-TORT LIABILITY AND THE CONSTITUTIONAL REVOLUTION

The fact that all three speech torts[67] involve speech, or at least some species of communication (for example, photographs), links them together for my purposes here. The speech torts, however, each have different origins and elements and redress different harms and losses. It therefore makes sense to separately identify the key features of the common law rules that govern the speech torts, and then to identify the constitutional limitations on liability that have been superimposed on the common law causes of action in order to serve the breathing-space concern that lies behind the Supreme Court's partial constitutionalization of these torts. This Part does that and identifies some of the relevant consequences of that change: the proliferation of issues that may arise in litigation and the (limited) data we have about the scope and nature of defamation litigation.

A. The Elements of the Speech Torts

Identifying the common law elements of the speech torts is important at the outset because some, but not all, of these elements have been modified by modern constitutional rules. The result is that certain common law elements have been preserved. In effect, limited restrictions on liability, operating only under specified circumstances, have been superimposed on the common law causes of action. Because there is considerably more common law doctrine governing defamation than the other two torts, and also considerably more constitutional law governing this cause of action, my description of defamation is a bit longer than my description of the other two.

1. Defamation and False Light

The common law of defamation was effectively governed by strict liability; it favored reputation at the expense of speech rights.[68] Most states have shifted to a negligence standard over the past few decades,[69]

[67] In Section II.A, I briefly describe the tort of false light. But because defamation and false light are very similar and subject to highly similar restrictions, I treat them together and refer hereafter to the "three" speech torts rather than to "four."

[68] Abraham, supra note 46, at 302.

[69] See Restatement (Third) of Torts: Defamation and Privacy § 1 cmt. i (Am. L. Inst., Preliminary Draft No. 4, 2024); see also 1 Sack, supra note 20, § 6.2, at 6-3 to -5.

but it is important to understand the state of the law before this shift because it was the context in which *New York Times Co. v. Sullivan*[70] was decided. Like defamation, false light also protected reputation, but it was not grounded on falsity. It was based instead on stating misleading, though perhaps literal, truths.

Defamation is an ancient tort, consisting of libel (for written and other permanent forms of speech) and slander (oral speech).[71] False light is of more recent vintage, applicable when a statement or portrayal is not literally false but gives a false impression.[72] It makes sense here to concentrate on defamation because false light is essentially a spinoff of defamation. To understand how the common law tort of defamation worked, it is necessary to appreciate two sides of the tort, corresponding to the prima facie case and what amounted to defenses, usually called "privileges."

A defamatory statement is one that tends to injure an individual's reputation.[73] There was no requirement at common law that the defendant intended to harm the plaintiff, was negligent, or even knew that the statement made about the plaintiff was false.[74] Even typographical errors could be a basis for recovery, and republication of defamatory statements made by a third party could result in liability by the republishing party.[75] Certain categories of false statements—especially written as opposed to oral statements, since the former were considered more harmful due to their more permanent nature—were actionable even without proof of any losses by plaintiffs. Damages were "presumed" in this sense.[76] Nor was the falsity of a defamatory statement an element of the plaintiff's prima facie case; truth was a defense, but it was just that—a defense that the defendant had to prove.[77] In short, there was in important respects what amounted to strict liability for defamation.[78] The idea was that the maker of a published statement faced liability for a statement that harmed another's reputation if the statement turned out to be false, regardless of

[70] 376 U.S. 254 (1964).

[71] Dan B. Dobbs, The Law of Torts 1120 (2000).

[72] Id. at 1208. In contrast to defamation, the statement or portrayal must be "highly offensive" to the reasonable person. Id.

[73] Id. at 1127.

[74] Id. at 1122–23.

[75] Id. at 1123.

[76] Id. at 1140.

[77] Id. at 1147.

[78] See 1 Rodney A. Smolla, Law of Defamation § 1:7, at 1-10 (2d ed. 2009).

blame. It was blameworthy enough to have risked the plaintiff's reputation by making the statement. Now that most states have adopted a negligence standard, however, there is less protection of reputation at the expense of speech.

Even when there was strict liability, however, there were countervailing factors that complicated the picture and provided some protection against liability for speech that turned out to be false, thereby protecting even some false speech. First, defamation was actionable only for making a false statement of *fact*; there could be no liability for expressing an *opinion* or an *idea*, unless the opinion or idea presupposed a defamatory matter of fact.[79]

Second, there were both absolute and conditional privileges. As Professor William Prosser described the state of defamation law in 1955—shortly before the Supreme Court entered the field—there was an absolute privilege against liability for statements made in legislative, administrative, or judicial proceedings.[80] And there were two important "conditional" privileges. One was a "common interest" privilege that applied to defamatory statements made between parties who had a common legitimate interest in communicating about the subject matter of the statement.[81] Examples included most legitimate business communications—employee evaluations, letters of recommendation, and credit reports—but also extended to communications within religious, professional, social, and philanthropic organizations, as well as statements made among members of a family about matters of legitimate concern, such as a family member's potential spouse.[82]

There was also a "fair comment" privilege for statements made about matters of public interest, including reports to proper authorities and discussions of public affairs.[83] The majority of the courts held that this privilege extended only to the expression of opinions, not to statements of fact.[84] But there was a distinct minority position that applied the privilege to statements of fact as well.[85] Under this position, false

[79] See Dobbs, supra note 71, at 1151.

[80] William L. Prosser, Handbook of the Law of Torts § 95, at 606–13 (2d ed. 1955).

[81] Id. at 618–19.

[82] Id.

[83] Id. at 606, 619–21; see also Frank Thayer, Fair Comment as a Defense, 1950 Wis. L. Rev. 288, 288–89 (using the phrase "fair comment").

[84] Prosser, supra note 80, § 95, at 621–22.

[85] See, e.g., Coleman v. MacLennan, 98 P. 281, 281–82 (Kan. 1908); Snively v. Record Publ'g Co., 198 P. 1, 5 (Cal. 1921); Scripps v. Foster, 3 N.W. 216, 218 (Mich. 1879); Charles

statements made about public officials or matters of public concern were subject to a conditional privilege.

What made the common interest and fair comment privileges conditional rather than absolute was that they protected the maker of a defamatory statement from liability unless the statement had been made with knowledge that it was false, or with reckless disregard for the truth or falsity of the statement.[86] This would later be called "actual malice" by the Supreme Court,[87] but it was not given that term at common law. Terminology aside, the standard protected anyone who had an honest belief in the truth of what they said about matters of public concern or that were the subject of the common interest or fair comment privileges. These privileges could only be defeated by something like the state of mind ("scienter") required to commit fraud.[88]

In sum, liability for defamation at common law was strict in a variety of ways, but it was also subject to significant limitations. Truth was a defense regardless of injury to reputation. The expression of opinion or ideas was not actionable unless the expression presupposed facts that were false. There was a conditional privilege to make false statements about matters of common interest, which could be defeated only if the statement was made with knowledge of its falsity or reckless disregard of its truth or falsity. And in some states, there was no liability for making false statements of fact about matters of public interest or concern unless the maker of the statement knew they were false or had no idea whether they were true or false.[89]

2. Intentional Infliction of Emotional Distress

In contrast to defamation, a second speech tort is a creature of early twentieth-century development.[90] IIED redresses harm arising out of "extreme and outrageous conduct" that intentionally "causes severe emotional distress."[91] Although in principle the conduct in question need

Parker Co. v. Silver City Crystal Co., 116 A.2d 440, 445 (Conn. 1955); Clancy v. Daily News Corp., 277 N.W. 264, 269–70 (Minn. 1938).

[86] Restatement (Second) of Torts § 600 (Am. L. Inst. 1977).

[87] See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[88] Cf. Dobbs, supra note 71, at 1158 (noting that the privilege could be defeated through a showing of "spite," "ill-will," or "improper purpose").

[89] See Prosser, supra note 80, § 95, at 622; *Snively*, 198 P. at 5–6.

[90] See Prosser, supra note 80, § 11, at 38 (observing that IIED was only recognized as a standalone cause of action in the early to mid-twentieth century).

[91] Restatement (Second) of Torts § 46 (Am. L. Inst. 1965).

not consist of speech, it very often does. Cruel practical jokes,[92] harassment of women travelling unchaperoned on trains,[93] and similarly objectionable behavior that did not fit neatly into an existing tort, such as assault or false imprisonment, were the early bases for development of this cause of action.

3. Public Disclosure of Private Facts

Also in contrast to defamation, the tort of public disclosure emerged clearly only in the first half of the twentieth century.[94] The conduct the tort redresses was conceptually what Samuel Warren and Louis Brandeis were concerned about in their seminal article on invasion of privacy.[95] This tort redresses the loss that occurs when there is disclosure of information about an individual under circumstances that are "highly offensive to a reasonable person" and not of "legitimate concern" to the public.[96] Obviously, the more legitimate it is for the public to be concerned with a piece of information about an individual, the less offensive it is for the statement to be publicly revealed. It may also be the case that, the more offensive the information is, if it appeals to prurient interest, the less the statement is of legitimate concern to the public. All this is obviously a matter of social context, which may or may not vary with the time and place.

B. The Introduction of First Amendment Limits on Liability

Sixty years ago, the Supreme Court began to create wholly new constitutional law by holding that the First Amendment requires limits on the extent to which speech tort liability may be imposed.

[92] See, e.g., Nickerson v. Hodges, 84 So. 37, 38–39 (La. 1920).

[93] See, e.g., Gillespie v. Brooklyn Heights R.R. Co., 70 N.E. 857, 858 (N.Y. 1904).

[94] See Abraham, supra note 46, at 312 (describing *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940), a leading case in the early development of the tort of public disclosure); see also William L. Prosser, Privacy, 48 Calif. L. Rev. 383, 392–98, 392 n.84 (1960) (cataloging early cases involving public disclosure of private information and noting that the doctrine's first "real" application was in a 1927 case, *Brents v. Morgan*, 299 S.W. 967 (Ky. 1927)).

[95] Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 195–97 (1890).

[96] Restatement (Second) of Torts, supra note 86, § 652D.

1. Defamation

Until 1964, the U.S. Supreme Court had not applied the First Amendment to speech torts, which involved private rather than public law. That changed in *New York Times Co. v. Sullivan*.[97] The plaintiff in that case was a law enforcement official in Alabama. He was implicated, though not named, in an advertisement in the *New York Times* referring to officials' involvement in regulating civil rights demonstrations. He alleged that the advertisement libeled him and sued for $500,000, which the jury awarded him. The highly pro-plaintiff common law rules were applied to his suit, both at trial and on appeal to the Supreme Court of Alabama, which affirmed.[98] The case then was appealed to the U.S. Supreme Court.[99]

The Court reversed, holding that the First Amendment places limits on the scope of liability for defamation of a public official such as L.B. Sullivan.[100] The test is whether the defendant had knowledge of the falsity of the allegedly defamatory statement or made the statement with reckless disregard for its truth or falsity. The Court termed these states of mind "actual malice."[101] And actual malice has to be shown by clear and convincing evidence, not merely a preponderance of evidence.[102]

Thus, the Court held that constitutional protection against liability for defamation does not always turn only on whether a defamatory statement was factually accurate. Even false statements of fact that adversely affect the reputations of others are not actionable where public officials are concerned, absent a showing of actual malice, the Court said, because "erroneous statement is inevitable in free debate."[103] Further, even some false speech "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"[104]

[97] 376 U.S. 254 (1964).

[98] Alabama defamation law adopted the conclusion in *Post Publishing Co. v. Hallam*, 59 F. 530, 540–42 (6th Cir. 1893), that criticism of public officials was privileged only if it was based on true underlying facts.

[99] See N.Y. Times Co. v. Sullivan, 371 U.S. 946 (1963) (granting certiorari).

[100] Neither the briefs of the parties or amici, nor the oral arguments, nor the opinions in the case made any reference to insurance against liability for defamation. See generally Docket, *Sullivan*, 376 U.S. 254 (No. 63-39); Oral Argument, *Sullivan*, 376 U.S. 254 (No. 63-39), https://www.oyez.org/cases/1963/39 [https://perma.cc/PQ6T-W9TM].

[101] See *Sullivan*, 376 U.S. at 279–80, 283.

[102] Id. at 285–86; see also White, supra note 16, at 8.

[103] *Sullivan*, 376 U.S. at 271.

[104] Id. at 271–72 (internal punctuation omitted) (citation omitted).

Breathing space in this sense helps ensure that public discourse can be "uninhibited, robust, and wide-open."[105] And the Court implied, without expressly saying so, that imposing the burden of proving the truth of a statement on defendants instead of requiring plaintiffs to prove falsity in "public official" defamation cases is incompatible with the First Amendment. That implication would subsequently be expressly confirmed.[106]

The decision was revolutionary. Much speech that previously fell outside First Amendment protection was now within it. Between 1964 and 1985, the Court extended this form of First Amendment protection to defamation actions in which defendants were various classes of "public figures."[107] It followed that the actual malice standard applied thereafter to different types of public figures.[108]

The Court also applied First Amendment protection, though at a less exacting level, to defamation suits by certain private figures during the same period that it was elaborating the scope of First Amendment protection in public figure cases. In *Gertz v. Robert Welch, Inc.*,[109] it held that in such cases, the First Amendment also constrains the scope of constitutionally permissible liability, but only by precluding strict liability.[110] In such private figure cases there could be no liability unless the defendant had been at least negligent in connection with the falsity of a defamatory statement.[111] In addition, "presumed" damages, which also

[105] Id. at 270.

[106] Since the plaintiff had the burden of proving actual malice after *Sullivan*, one prong of which was that the defendant had knowledge of the falsity of its statement, it was difficult to see how the plaintiff could meet that burden without proving falsity. The Court was later to make that conclusion explicit in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776–77 (1986).

[107] See Kenneth S. Abraham & G. Edward White, First Amendment Imperialism and the Constitutionalization of Tort Liability, 98 Tex. L. Rev. 813, 834–35 (2020) (describing the range of "public figures" against whom defamation actions became limited by First Amendment protections (citation omitted)).

[108] The categories of "public figures" are found in *Foretich v. Capital Cities/ABC Inc.*, 37 F.3d 1541, 1551–52 (4th Cir. 1994). These range from individuals who achieve "such pervasive fame or notoriety that they become public figures for all purposes and in all contexts," to those who "voluntarily inject themselves" or are drawn into "particular public controvers[ies]," to "'involuntary public figures,' who become public figures through no purposeful action of their own." Id. (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

[109] 418 U.S. 323 (1974).

[110] Id. at 347–48.

[111] Id. at 349.

were available in common law defamation actions where a plaintiff could show damage to reputation without any proof of out-of-pocket loss, are no longer available in the absence of actual malice as defined in *Sullivan*.[112]

Justice Lewis Powell began his opinion for the Court in *Gertz* by saying,

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. . . . But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. . . .
>
> Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . The First Amendment requires that we protect some falsehood in order to protect speech that matters.[113]

It is hard to know exactly what Justice Powell meant in this passage, but I think that he was saying that breathing space has to be provided, even for some factual "falsehood[s]" that are "inevitable in free debate" about matters of public concern.[114] Whether the Court expressly mentioned its concern for breathing space in its post-*Sullivan*, post-*Gertz* decisions varied.[115] Because some of the decisions focused on the status of the defendant or the reach of constitutional protection, they did not always make express reference to breathing space. But in my view, that concern was always implicit in the opinions, even when it was not expressed. It simply went without saying.

Once the Court's decades-long partial constitutionalization of defamation law had concluded, there was really only one category of defamation liability that was wholly outside of constitutional protection: suits by private individuals over matters of "private concern," in the *Gertz*

[112] Id.

[113] Id. at 339–41.

[114] Id. at 340–41.

[115] Compare Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986) (invoking "breathing space" for speech on matters of public concern as a rationale for shifting the burden of proving falsity to plaintiffs in defamation suits), with Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) (failing to invoke "breathing space" concerns while clarifying the scope of "public figures" for the purposes of the actual malice standard).

sense of the term.[116] This includes suits against both media and non-media defendants.[117] But it is the rare case in which a traditional media defendant makes a statement about a private individual concerning a matter of purely private concern, for such statements are unlikely to be commercially published. Consequently, for practical purposes, what is left outside of constitutional protection is gossip over the backyard fence (figuratively speaking), the equivalent to such gossip in social media, and statements made in the course of business about commercial matters.

The states' shift of their common law standard from strict liability to negligence, even in cases not subject to *Gertz*, in the decades following these decisions seems to me to be evidence of the gravitational pull of the breathing-space concern.[118] As a result of the need to change the way they applied the common law to cases now governed by the constitutional rules, the states came to appreciate the value of speech in ways that they had not done before and therefore weighed that value more heavily than they had done in the past, even when not constitutionally required to do so.

2. IIED

IIED also was partially constitutionalized in a fashion similar to defamation in the decades following *New York Times Co. v. Sullivan*. In a 1988 suit, the Supreme Court ruled that a parody of the prominent evangelist minister Jerry Falwell in *Hustler* magazine—which qualified as sufficiently extreme and "outrageous" to meet the Virginia standard for intentional infliction of emotional distress—was subject to the First Amendment in Falwell's suit alleging IIED.[119] The Court stated that the parody amounted to comments about a public figure and was therefore subject to *Sullivan* and its progeny.[120] A statement inflicting emotional distress under such circumstances was actionable only if made with actual

[116] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) ("It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.' . . . In contrast, speech on matters of purely private concern is of less First Amendment concern." (citations omitted)).

[117] Six members of the Court in *Dun & Bradstreet* concluded that there was no distinction between media and non-media defendants for purposes of the constitutional protections against defamation liability. See id. at 783–84 (Brennan, J., dissenting).

[118] See Restatement (Third) of Torts, supra note 69, § 1 cmt. i.

[119] Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 57 (1988).

[120] Id. at 47–48, 56–57.

malice.[121] The Court subsequently went further and applied the principle to statements made about private individuals addressing matters of public concern.[122]

Unlike defamation and (as we will see next) public disclosure, there certainly was only one thing in common law IIED jurisprudence up to this point that reflected analogous kinds of limitations on liability. This was the requirement that the defendant's conduct be "extreme and outrageous" to warrant the imposition of liability.[123] This requirement reflected the way that common law, non-First Amendment free speech values simply trumped the interests that IIED protected. The constitutional decisions on IIED might well be seen to represent much more of a break with its common law past than the decisions that partially constitutionalized defamation and public disclosure.

3. Public Disclosure

The public disclosure tort also was made subject to First Amendment protection. Often, the facts disclosed were already in the public record, in which case the First Amendment precluded liability. Such cases involved naming rape victims in a television news report or a newspaper story[124] or the radio broadcast of an illegally wiretapped telephone conversation.[125] When the facts disclosed were not already in the public record, the Court applied a balancing test, taking into account the plaintiff's interest in seclusion, dignity, and autonomy and the public's right to know, and applying, as the test, whether the private information revealed was "newsworthy" or of "public significance."[126]

[121] Id. at 56.

[122] Snyder v. Phelps, 562 U.S. 443, 460–61 (2011). This case involved signs displayed in the vicinity of a funeral for a soldier killed in Iraq which condemned "Fag Troops," asserted that "Priests Rape Boys," and contained the message "Thank God for Dead Soldiers." Id. at 448, 454. Because the statements were about matters of public concern (and apparently, because they contained no statements that could reasonably be understood to be statements of fact subject to a falsity test), they were constitutionally protected from IIED liability. Id. at 454–55.

[123] See supra note 91 and accompanying text.

[124] Cox Broad. Corp. v. Cohn, 420 U.S. 469, 471–74 (1975) (television news report); Fla. Star v. B.J.F., 491 U.S. 524, 527 (1989) (newspaper article).

[125] Bartnicki v. Vopper, 532 U.S. 514, 517–19 (2001).

[126] *Fla. Star*, 491 U.S. at 532–33 (favoring the approach of balancing "sensitiv[e] and significan[t]" First Amendment concerns against privacy rights over "hold[ing] broadly that truthful publication may never be punished consistent with the First Amendment"); Time, Inc. v. Hill, 385 U.S. 374, 383 (1967) (reasoning that the privacy rights of individuals who are not

The Supreme Court obviously was going further in protecting speech than the common law courts in such cases had done. The imposition of liability in common law public disclosure cases had reflected the common law courts' application of the requirement that the facts of a disclosure be "of legitimate concern to the public" to be privileged.[127] In contrast, the Supreme Court held that the disclosure must be neither newsworthy nor of "public significance" to fall outside of First Amendment protection. Although there is no case law on the matter, in principle a subject may be newsworthy even when it is not of "legitimate" concern—that is how our current culture often works. But the two requirements are analogous and serve roughly the same function—providing that disclosure of wholly private matters remains subject to liability while ensuring that there would be no liability where a disclosure involves information connected to the public's right to know about matters of public concern. The Supreme Court simply weighed "newsworthiness" more heavily than some courts in common law cases had done. The overall purpose and interest-reconciling structure of both the common law and the new constitutional privilege were closely analogous.

C. Consequences

Despite the application of *Sullivan* and subsequent cases to defamation and other speech torts over the decades, there are limits to the constitutionalization of the free speech torts. There are still substantial areas of speech-tort liability that are subject to common law liability without any protection by constitutional rules and that therefore are potentially protected only by liability insurance.

First, there still is liability for defamation of public officials and public figures for statements made with actual malice. There is also liability for defamatory statements about private figures regarding matters of public concern if the defendant was at least negligent with respect to the falsity of the statement. Damages in both types of cases may be presumed

"newsworthy" may preclude protection of "factual reporting" regarding such individuals (quoting Spahn v. Julian Messner, Inc., 221 N.E.2d 543, 545 (N.Y. 1966), *vacated*, 387 U.S. 239 (1967))); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) ("[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.").

[127] See Restatement (Second) of Torts, supra note 86, § 652D cmt. b (noting the common law restriction on liability for matters of "proper public interest").

whenever a statement is made with actual malice. And there is traditional common law liability for defamatory statements made about private individuals regarding matters that are not of public concern, though sometimes conditional privileges protect against liability for such statements if they were not made with actual malice.

Second, under IIED, there may still be liability if the speech involved is about a public official or figure but involves a false statement of fact made with actual malice. When the speech is about a private individual but involves a matter of public concern, there may be liability if the statement is made negligently but without actual malice. But it is also possible to read the cases to say that when speech is about a matter of public concern, there is absolute protection against liability for IIED, though I doubt that.[128]

Finally, under the tort of public disclosure, there is still liability when a statement is not "newsworthy"—certainly not the clearest of standards—though we know from the Supreme Court cases that there is pretty nearly complete protection for statements reporting what is in public records.[129]

Therefore, what protection those who do commit such actionable torts receive, and what "breathing space" may be provided to these statements, is not the province of the First Amendment, but of liability insurance. And just as importantly, the costs of defending against any of these suits—both those that fall within constitutional protection and those that fall outside of it—are the province of either defendants' own liability insurance or, failing that, defendants' own assets.

The new constitutional protections against speech-tort liability undoubtedly discouraged some potential suits because of the new obstacles to recovery—that was part of their point, after all—though so much else has changed over the decades that it is difficult to say how many suits were never even brought because of the new protections. But

[128] In *Snyder v. Phelps*, the Court suggested that while there are time, place, and manner restrictions for where and when public speech may occur, the content of speech regarding matters of public concern "cannot be restricted simply because it is upsetting or arouses contempt." 562 U.S. 443, 456, 458 (2011). The subjective nature of content standards poses a threat to free speech, and "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." Id. at 458 (alteration in original) (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).

[129] See *Cox*, 420 U.S. at 494–96 (noting that the First and Fourteenth Amendments preclude liability for publication of information contained in official court records).

the new rules also affected what takes place when a suit is brought. Although logically and necessarily the new rules imposed less liability, they nonetheless produced a whole new set of issues that often have to be litigated in any suit that is brought. The data about exactly what effect the new rules had on litigation dynamics, however, is incomplete. I first identify the new litigation dynamics and then present the data available about these developments.

1. The New Litigation Dynamics

The decisions in *Sullivan* and *Gertz* produced a proliferation of new issues that had the potential to complicate litigation.[130] First, in some cases, there must be proof of actual malice or negligence that would not have been required in the past. Second, in such cases, there may have to be litigation about whether the statement was "of and concerning" the plaintiff.[131] Third, because in some cases damages can no longer be presumed, proof of actual damages must occur where it was not necessary in the past.[132] Fourth, there may have to be litigation about whether the plaintiff is a public figure because *Sullivan* applies not only to public officials but also to public figures, including "limited-purpose" public figures.[133] Fifth, there may have to be litigation about whether an allegedly defamatory statement is about a matter of public concern, even if the plaintiff is a private party. Finally, if the statement is about a matter of public concern, there may have to be litigation about whether the defendant was negligent in not verifying the accuracy of the false statement.

In addition, in cases where proof of actual malice is necessary, media defendants may dispute the defamation allegation more vigorously than in the past because an actual malice allegation calls their professional

[130] This recognition became evident at least as long ago as the 1980s. See Randall P. Bezanson, Gilbert Cranberg & John Soloski, Libel Law and the Press: Myth and Reality 204–06 (1987). For a more recent analysis, see Kendrick, supra note 3, at 1668–70.

[131] *New York Times Co. v. Sullivan* made it clear that this was an issue of constitutional concern and that the burden of proof on this issue was evidence of "convincing clarity." 376 U.S 254, 285–86, 288 (1964).

[132] See supra note 76 and accompanying text.

[133] See Foretich v. Cap. Cities/ABC, Inc., 37 F.3d 1541, 1551–52 (4th Cir. 1994) (describing the development of the test for determining whether an individual is a "limited-purpose" public figure).

competence and integrity into question.[134] And because defendants therefore sometimes contest some allegations more vigorously than they would have done in the past, plaintiffs may be more persistent than they would have been in the past because they win by losing: they get a forum in which they can establish that a defamatory statement was false, whereas in the old world of essentially strict liability for defamation, defendants would sometimes acknowledge falsity without contesting it in a highly visible manner, as is now more likely.[135]

A common factor linking all these new developments is that they increase the cost of litigating those defamation suits that are still brought.[136] These costs increase for both plaintiffs and defendants. But for defendants, the prospect that it will now cost more to defeat suits alleging actual malice therefore has reduced breathing space rather than increased it. Ironically, then, the prospect that a potential defendant will face increased costs of litigation if a defamation suit is brought against it has had just the opposite of the effect that the Supreme Court was seeking in introducing the new First Amendment protections.[137]

The main reason is that, under the American rule governing litigation costs, each party pays its own costs regardless of which party wins.[138] For this reason, even a media organization that expects to win a defamation suit brought against it, and therefore expects not to face any actual liability, still may shy away from making a statement that could elicit an unsuccessful suit, and thus have its speech chilled, because it will still incur potentially substantial defense costs. Exactly how the prospect of possibly facing fewer suits because of the new constitutional protections but incurring more defense costs in any suits that are brought would "net

[134] At least this was the view several decades ago. See Mark S. Nadel, Refining the Doctrine of *New York Times v. Sullivan*, *in* The Cost of Libel: Economic and Policy Implications, supra note 15, at 157, 157–58.

[135] See Bezanson et al., supra note 130, at 93–94.

[136] See Michael Norwick, The Empirical Reality of Contemporary Libel Litigation, *in* MLRC, supra note 8, at 97, 105–06 (noting causes of the high cost of litigating defamation cases). For example, even four decades ago, it was estimated that the cost of defending a libel suit brought against CBS by retired General William Westmoreland was $6 million. Kaufman, supra note 15, at 9.

[137] It is true in theory that the costs saved on litigating suits that were not brought because of constitutional obstacles could outweigh the increased costs of litigating suits that still were brought, but this seems unlikely, given the proliferation of issues and the data set out below.

[138] See John F. Vargo, The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice, 42 Am. U. L. Rev. 1567, 1569 (1993) ("Each party is only obligated to pay his or her own attorney's fees, regardless of the outcome of the litigation.").

out" is unclear, and in a sense could not be answered, because the possibility of purchasing defamation liability insurance that covers defense costs has often rendered the question hypothetical. Only liability insurance could provide this form of breathing space because of the protection against defense costs incurred in defeating suits that only liability insurance provides.

Possibly cutting in the other direction by truncating some suits are the anti-SLAPP (Strategic Lawsuits Against Public Participation) statutes that have been enacted in over half the states in recent decades.[139] These statutes are designed to facilitate summary disposition of groundless suits (mostly, but not entirely, for defamation) that are meant to intimidate individuals from making statements about public or political matters.[140] Whether the availability of these procedures has reduced or increased the complexity and length of speech-tort suits is unclear.

2. Data

We only have limited data about defamation complaints and trials from the last few decades, and I have not been able to find data about the making and resolution of less formal claims before a suit is instituted.[141] My hypothesis is essentially that the new constitutional rules, although providing additional substantive protection against liability, have increased the cost of litigating many of the suits that were brought, and thereby have made purchasing liability insurance more valuable. The data certainly does not refute this thesis, but there is not enough data to confirm it either.

First, there is no longitudinal data about the cost of litigating defamation claims. Second, an important, more general factor confounds any analysis that might otherwise be helpful: as is well known, the percentage of civil cases of all sorts that go to trial has been decreasing over time.[142] One would expect defamation suits to be subject to the same

[139] Melissa Wasser, Colorado Becomes 31st Jurisdiction With Anti-SLAPP Protections, Reps. Comm. for Freedom of the Press (June 5, 2019), https://rcfp.org/colorado-anti-slapp-protections/ [https://perma.cc/MPV9-NZ3M].

[140] Id; see also Shannon Hartzler, Note, Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant, 41 Val. U. L. Rev. 1235, 1239–42 (2007) (explaining the effectiveness of SLAPP suits in silencing speech regarding public or government affairs).

[141] For much earlier data, see Kaufman, supra note 15, at 3–4.

[142] See Shari Seidman Diamond & Jessica M. Salerno, Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges, 81 La. L. Rev. 119, 122–27 (2020) (discussing the diminution of civil cases litigated through trial since the 1960s); Jeffrey Q. Smith & Grant

forces that have caused a general decline in trials. It appears that this is precisely what has occurred. Between 1980 and 2016, there was a 75% decline in the number of defamation trials against media defendants in federal court compared to a general decline in federal civil trials of 70%.[143] The rates of decline are nearly identical.

On the other hand, slightly more than half of the 615 defamation trials-to-verdict against media defendants during that period were litigated under the actual malice standard.[144] It seems unlikely that this percentage was as high before 1964 because actual malice would only have been at issue if there was a privilege defense, or if a plaintiff was seeking to buttress a claim for punitive damages, although there is no data to prove it. In any event, in those 615 trials, defendants won about 43% of the trials during this period in which actual malice was litigated, and defendants won 39% of the trials that did not involve actual malice.[145] It follows that, in all of the trials in which there was a defense verdict, defendants' costs were entirely for defense since the defendants had prevailed on the liability question in those trials. The constitutional rules did not provide any breathing space with respect to the threat of incurring such defense costs. Either liability insurance provided such breathing space, or nothing did.

For the period of 2009–2020, a separate study looked at 246 cases brought against a group of major media defendants (which would have been included among the 615 in the study referred to in the previous paragraph).[146] These defendants made dispositive motions in 177 of the cases.[147] Defendants prevailed in 75% of those motions, but only 16% of the 177 motions were on the issue of actual malice.[148] As with the first study, it is not possible to say whether these motions reflected an increase in the number of issues or cost of litigation as compared to suits brought before 1964. But the fact that 75% of the 177 cases—53% of the 246 cases overall—were resolved by dispositive motions in favor of defendants demonstrates that all of the defendants' costs in those cases involved defense costs.

R. MacQueen, Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?, Judicature, Winter 2017, at 26, 28–29 (same).

[143] Norwick, supra note 136, at 101–02.

[144] Id. at 126.

[145] Id.

[146] Id. at 110, 129–30.

[147] Id. at 110.

[148] Id. at 111–12.

In short, because of the absence of fairly complete data, it is not possible to prove that the proliferation of issues generated by the new constitutional protections that were introduced beginning in 1964 increased the costs of defending against defamation suits. But it is possible to say that defendants after 1980 faced substantial defense costs even in cases in which the new rules protected them against incurring liability. Whatever breathing space the new rules provided would have been undermined by the prospect of incurring these defense costs even when the suits were defeated, unless defendants could count on their liability insurers to pay these costs. And, as Part I indicated, they could.

We have no meaningful data about suits alleging IIED and public disclosure. Given the high standards applicable to IIED, it seems likely that there are far fewer such suits than there are defamation suits. But it also seems likely that, as with defamation, a significant portion of defendants' costs in such suits involves defense rather than adjudicated liability or settlements because at least some suits eventuate in small settlements or disposition in favor of the defendant.

III. INTERACTING INFLUENCES: UNCERTAIN LIABILITY, MORAL HAZARD, AND "REGULATION" BY INSURANCE

The previous two Parts set out the characteristics of insurance against speech-tort liability, the formal relationships between the speech torts and the constitutional limits on their scope, and the data we have about litigation once these limits were in place. With an understanding of these relationships in mind, this Part delves into the interactions that add complexity to these relationships and develops the building blocks of an analytical framework for understanding the subject.

The core of this framework has three features, identifying vectors of influence on breathing space that—unfortunately for any effort to reach a simple, bottom-line set of conclusions—point in different directions. First, natural risk aversion, uncertain speech-tort liability standards, and associated uncertainties such as the threat of disruptive litigation all tend inevitably to promote "excess"[149] caution on the part of media and other potential speech-tort defendants. Second, liability insurance generates countervailing moral hazard, which in other contexts is regarded as a negative, but in this context reflects de facto breathing space, thus tending

[149] I use the term "excess" here and below to mean more caution than the actor in question would exercise in the absence of these factors.

to combat risk aversion and reduce uncertainty, and thereby neutralizes excess caution. Third, techniques that insurers use to mitigate moral hazard ("regulation" by insurance) have the practical effect of shrinking insurance coverage and reintroducing uncertainty, thereby reducing the breathing space that liability insurance would otherwise generate.

This three-part framework can guide assessment of the strength of these different influences in different settings and, ultimately, may provide a basis for making calculations of the net impact of the interacting influences. However, one thing in general is clear: since liability insurance mitigates the effect of excess caution, it creates breathing space that would not exist in its absence. And since, in this context, the techniques that insurers use to combat moral hazard do not cause policyholders to exercise more caution than they would exercise in the absence of liability insurance, the net effect of liability insurance is to create breathing space.[150] The question to be answered in the future is how much breathing space, and in what situations.

A. Risk Aversion and Uncertain Liability Generate Excess Caution

As a general matter, potentially liable parties are risk-averse, and uncertain liability standards make them more so. Ironically, in its effort to create breathing space for speech, the Supreme Court, in developing constitutional protection, has rendered liability standards less certain than they were under the traditional common law rules. This reduces breathing space to a greater extent than the constitutionally mandated rules themselves contemplate.

1. The Causes of Excess Caution

Under simple models of behavior under the threat of tort liability, potential defendants weigh the marginal cost of additional safety precautions against the marginal reduction in the magnitude of expected tort liability in deciding whether to take the precautions in question.[151] This is a useful way to begin thinking about the deterrent effect of tort

[150] See Kenneth S. Abraham & Daniel Schwarcz, The Limits of Regulation by Insurance, 98 Ind. L.J. 215, 235 (2022) [hereinafter Abraham & Schwarcz, The Limits of Regulation] (explaining that devices that insurers employ to combat moral hazard rarely are capable of having a net-positive effect on loss prevention, but almost always merely reduce the net-negative impact of insurance on loss prevention).

[151] See Abraham, supra note 46, at 78–79.

liability with or without risk aversion, but its simplicity ignores several factors of special significance.

First, most potential defendants are risk-averse: they prefer a comparatively high probability of experiencing a small cost to the lower probability of experiencing a large cost.[152] This tends to lead to the taking of precautions against incurring tort liability that are greater than the expected value of the risk of liability that the precautions avoid. In effect, risk aversion causes potentially liable parties to spend, or sacrifice, more on taking precautions than they consider to be economically worth spending or sacrificing in order to reduce the risk of liability.[153] This is sometimes called "excess" caution.

Second, taking additional safety precautions is not the only means available to potential defendants to reduce the risk of incurring tort liability. Instead of continuing to engage in the same amount of the same activity but with additional safety precautions (a "safety-level" change), a potential defendant may choose to engage in less of the activity or in a substitute activity (an "activity-level" change).[154] For example, a newspaper that faces a continuing risk of incurring liability for defamation can choose to exercise more care in verifying that the facts it publishes about individuals are true, or it can engage in less investigative reporting of the sort that may result in publication of information that may harm the reputation of individuals named in its stories. All things considered, sometimes it may be more cost-effective to make an activity-level change than to make a safety-level change.

Third, when uncertainty about the precise risk of incurring liability and its associated costs is added to this kind of decision-making, risk aversion tends to produce *additional* excessive caution in the following way. A simplistic model of behavior under the threat of tort liability assumes clarity and certainty regarding the factors that affect the imposition of tort liability. Without such clarity and certainty about the inputs relevant to potential defendants' behavior, the accuracy of simple models deteriorates. In particular, uncertainty about what behavior will be judged to have violated the applicable standard of liability is crucial. Uncertainty about application of the relevant liability standard will create uncertainty

[152] See Abraham & Schwarcz, Insurance Law and Regulation, supra note 21, at 3; Steven Shavell, Economic Analysis of Accident Law 186–87 (1987).

[153] Shavell, supra note 152, at 209–10.

[154] For the classic discussion of this distinction, see Steven Shavell, Strict Liability Versus Negligence, 9 J. Legal Stud. 1 (1980).

on potential defendants' part about how to make the cost-benefit analysis that will determine what to do in response to the threat of liability. Questions regarding how much additional safety or how much less safety will be optimal for that party, whether it will be optimal for that party to increase or decrease activity levels, and what combination of safety-level and activity-level adjustments will be optimal will not have clear answers. Uncertainty about these matters will remain.

In the face of this kind of uncertainty about the applicable liability standard, risk-averse potential defendants will be inclined to fashion their conduct so that it involves an additional margin of risk reduction.[155] Potential defendants will employ an additional margin of risk reduction because if their less risky conduct nevertheless does result in harm, it will reduce the probability that they will incur liability for that harm. After all, their conduct has been even more cautious than a neutral observer would think it had to be in order to avoid tort liability, and therefore even less likely to result in liability under the applicable, but uncertain, standard.

Applying these insights to the speech torts is no doubt complicated and probably partially offset by many media organizations' devotion to their mission. In oversimplified terms, they seek to bring truth to their audiences. This may mean that changes in activity levels are disfavored, additional precautions are not taken when time is of the essence, and excess caution resulting from the factors discussed above does not occur to as great an extent as might otherwise be predicted. Nonetheless, for-profit media organizations have shareholders, and not-for-profit organizations have budgets that must be balanced and contributors to attract and keep. Some attention to the bottom line is likely to persist, and for at least some media, some excess caution is likely to be exercised as a result.

The Supreme Court's notion that protecting the exercise of First Amendment rights requires breathing space can be understood to be a version of these "excessive care" concerns. Because potential defendants are likely to be both risk-averse and uncertain about their liability

[155] See John E. Calfee & Richard Craswell, Some Effects of Uncertainty on Compliance with Legal Standards, 70 Va. L. Rev. 965, 966 (1984) (indicating that, if the legal standard is uncertain, those threatened with liability can reduce the chance of being held liable by "overcomplying" or "taking extra precautions"); see also Robert D. Cooter, Economic Analysis of Punitive Damages, 56 S. Cal. L. Rev. 79, 91–93 (1982) (discussing the manner in which uncertainty associated with fault standards affects precautions, because fault liability creates a "jump" in costs rather than a continuous damages function).

exposure, the requirement, for example, that the defendant have had actual malice is an attempt to counteract the impact of risk aversion and the difficulty of predicting whether a particular statement will or will not have constitutional protection against liability. But whatever the standard, the more uncertain its application is, the more likely it is to generate excess caution.

In addition, free speech is not entirely a private good and is perhaps even predominantly a social good—it provides benefits far beyond what those who exercise their speech rights gain from doing so and affects a substantial portion of the populace. Free speech generates what economists call positive externalities.[156] An uncertain threat of liability that induces excess precaution in the form of a reduction in activity levels therefore has the potential to deprive substantial numbers of people of a valuable benefit without an offsetting private or public gain. For example, if there is less investigative journalism because media and individual journalists do less of this form of reporting, then not only are those who were or would be paying for the product of this reporting deprived of it, but the public at large is also likely to be deprived of a component of circulating discourse that was previously of benefit to the body politic. Discouraging the taking of excessive precautions against speech-tort liability therefore has the potential to produce a larger quantum of valuable speech.

2. The Uncertainty of Protective, Constitutionally Required Liability Standards

The constitutionally modified standards of liability governing speech torts, valuable though they may be in providing breathing space for the speech that is involved, have created uncertainty regarding their application that was previously absent. The consequence is that different vectors of influence may be generating offsetting, or conflicting, tendencies. On the one hand, the constitutional liability standards created additional breathing space. On the other hand, because the application of

[156] A positive externality is a benefit received by a third party as a result of conduct or a transaction by one or two other unrelated parties. Will Kenton, Externality: What It Means in Economics, with Positive and Negative Examples, Investopedia (June 18, 2024), https://www.investopedia.com/terms/e/externality.asp [https://perma.cc/T3HG-WSTE]. Speech may, of course, have not only positive externalities, but negative externalities too. It may mislead or cause harm, for example. But the Supreme's Court breathing-space concerns imply that the former outweigh the latter.

the standards (actual malice and negligence in defamation, actual malice in IIED, and newsworthiness in public disclosure) is uncertain, potential defendants are likely to be more cautious about avoiding liability than they would be under an equally protective but less uncertain standard, and therefore take less advantage in practice of the breathing space protecting them in theory.

The actual malice standard, for example—applicable to suits by public officials and public figures in defamation and IIED, and to all claims for recovery of presumed and punitive damages—is more protective than the prior common law rules. But the common law rules had one advantage: the applicable standard of care, absent privilege, was strict liability.[157] Even an innocently false statement rendered the maker of a defamatory statement subject to liability. It was clear that a false defamatory statement could be actionable.

In contrast, application of the actual malice standard is considerably less certain. The standard turns on states of mind: knowledge of the falsity of a defamatory statement, or disregard of whether the statement is true or false. And the latter must be "reckless," not exactly a state of mind but partly so.[158] Similarly, the negligence standard, which the Supreme Court held in *Gertz* is the minimum standard that can be applied to private figures suing over matters of public concern, is less certain of application than the common law strict liability standard.[159] Also similarly, the newsworthiness standard for public disclosure is uncertain in application.[160]

It is true that, even under the common law rules, when a conditional privilege applied in a defamation suit, a showing of either actual malice or negligence (depending on the jurisdiction) was required to defeat the privilege, which meant that there was potential uncertainty depending on the circumstances.[161] But the Supreme Court's breathing-space rules, salutary though they may be for free speech rights, created more uncertainty. And given the manner in which potential defendants can be expected to react to uncertain liability standards, the breathing-space rules

[157] See supra note 78 and accompanying text.

[158] See supra Subsection II.B.1.

[159] See Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (holding that states may define the "appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual" so long as strict liability is not imposed).

[160] See supra Subsection II.B.3.

[161] See supra notes 86–89 and accompanying text.

probably create less breathing space than the rules on their face seem to create because of the excess caution these rules are likely to generate.

B. Liability Insurance and Moral Hazard (Counterintuitively, Breathing Space)

Insurance generates "moral hazard"—the tendency of an insured party to exercise less care to avoid causing a loss than the same party would exercise if it were not insured against the loss.[162] In conventional analyses, moral hazard is regarded as a negative feature of insurance because it may result in underinvestment in the taking of precautions and, consequently, in excessive loss.[163] But to the extent that breathing space is the goal, the moral hazard of insurance against the speech torts is a positive rather than a negative. Ironically, then, given the principles underlying the Supreme Court's breathing-space rules, moral hazard generated by insurance against speech-tort liability is at least partly a good thing.[164]

Yet, as I indicated earlier, consideration of the role played by liability insurance is entirely missing from both the Supreme Court's analysis of the impact of the breathing-space rules and from scholarly analysis. Insurance against liability for committing speech torts provides a layer of de facto protections against speech-tort liability. Policyholders are afforded a free defense against allegations that turn out to be protected by the constitutional rules and a free defense against suits containing allegations that may not be protected, as well as indemnity against liability if it is ultimately imposed. Since the point of the breathing-space rules is to give speakers confidence that they will not incur costs or be held liable for engaging in protected speech, the financial protection provided by liability insurance affords very similar protection.

In fact, liability insurance protection is broader than constitutional protection in some ways. The constitutional breathing-space rules obviously shrink the scope of liability. But these breathing-space rules do not ensure that groundless suits alleging breach will not be brought; the rules merely reduce the probability of such suits by lowering their prospect of success. When such a suit is brought, the defendant still must incur many of the costs associated with the suit, including incurring the

[162] See Abraham & Schwarcz, Insurance Law and Regulation, supra note 21, at 8.

[163] See Abraham & Schwarcz, The Limits of Regulation, supra note 150, at 219 (noting centuries-long concerns about moral hazard).

[164] I say "partly" because speech has not only positive, but also negative, externalities.

costs of defending against it. Liability insurance ensures that the policyholder will not have to incur these legal defense costs, even if a suit is unsuccessful.[165] This includes covering the cost of anti-SLAPP proceedings designed to secure summary dismissal of groundless suits.

Further, by definition, the constitutional breathing-space rules do not protect against liability if a breach of the applicable standard is proved. Liability insurance, in contrast, does exactly that. In doing so, it not only provides de facto breathing space; it also reduces the need for potential defendants to think as carefully as they otherwise would about whether they are violating the applicable standard. They will be protected by their liability insurance if they do.

There are limits, nonetheless, on the capacity of liability insurance to supply breathing space. The certainty of protection provided by paying a fixed premium typically lasts for only one year because almost all liability insurance policies of any kind have only a one-year policy period.[166] Each policy is a freestanding contract that can only be renewed if both parties so choose at a premium that the insurer sets at its option. Insurers set premiums based on changes in the liability climate generally, changes in the insured's operations, the insured's particular liability experience, and market forces. As a matter of fact, in my experience, annual premium increases typically are fairly predictable, but not always. To the extent that premiums for each annual policy period are based on the current year's claims experience—"experience-rated"—then premium levels are uncertain in proportion to the uncertainty of liability itself.[167] And since potentially liable parties typically engage in risky activity that may result in lawsuits for years to come, premium-level uncertainty spans years, not months.

[165] See supra Subsection I.A.1.

[166] There are two forms of coverage grants. "Claims-made" policies only cover liability arising out of suits first brought against the policyholder during the policy year. Consequently, protection ends when the one-year policy period ends. "Occurrence" policies protect against liability arising out of an injury occurring during the one-year policy period, regardless of the year in which a suit alleging liability for that injury is brought. Therefore, a new policy must be purchased each year. For discussion, see Abraham & Schwarcz, Insurance Law and Regulation, supra note 21, at 570–71.

[167] See Abraham, supra note 38, at 71–73 (discussing experience rating).

C. "Regulation" by Insurance: Combatting Moral Hazard

Moral hazard costs insurers money because it increases insured losses. Insurers therefore employ a number of devices designed to combat—that is, partially neutralize—moral hazard, including risk-based pricing; partial insurance; excluding from coverage the most egregious manifestations of moral hazard, such as intentionally caused loss; and providing policyholders with risk-management support and assistance. Media Liability insurance policies employ these mechanisms to various degrees. Given that CGL policies' coverage of speech-tort liability is ancillary and that the threat of speech-tort liability on the part of the non-media organizations these policies insure is less significant, CGL and other insurers almost certainly employ these devices to a more limited degree with respect to their policies' speech-tort coverage.

1. Risk-Based Pricing

Risk-based pricing is a principal mechanism for combatting moral hazard in all forms of insurance.[168] Applications for Media Liability insurance are long and detailed, requiring the applicant to provide considerable information relevant to the level of risk the applicant poses. One fourteen-page application, for example, requires (among other things) information on the nature of all media activities in which the applicant is engaged; the percentage of work performed in each of a series of over two dozen activities; revenue produced by each of the applicant's different activities; procedures for utilizing outside law firms in prepublication and pre-broadcast review; procedures for handling requests for retractions and corrections; procedures for ensuring the accuracy of published matter; procedures for reviewing the accuracy of old social media posts; past claims or suits; and past subpoenas seeking documents or information related to the applicant's newsgathering activities.[169] Other media liability insurers use similarly detailed applications.[170] This kind of information is of obvious use to insurers in

[168] See Abraham & Schwarcz, The Limits of Regulation, supra note 150, at 235–36; Omri Ben-Shahar & Kyle D. Logue, Outsourcing Regulation: How Insurance Reduces Moral Hazard, 111 Mich. L. Rev. 197, 205–08 (2012).

[169] AXIS Pro Media/Pro. Ins., Multimedia Liability Insurance Application, AXIS 1010900 0222, https://www.axiscapital.com/docs/default-source/resources/axis-10109 00-0222.pdf?sfvrsn=5390e71b_6 [https://perma.cc/PDU2-TM53] (last visited Apr. 3, 2025).

[170] See, e.g., Phila. Ins. Cos., Media Liability Cover Pro Application, https://www.phly.com /Files/Application%20-%20Media%20Liability36-10327.pdf [https://perma.cc/W5FS-AS3F]

determining the level of risk posed by the applicant so that the insurer can decide whether to accept the application and what premium to charge for coverage.

Exactly how, to what extent, and which policyholders are most influenced by risk-based pricing is hard to say. Insurers may occasionally give policyholders specific feedback about the relevance of different features of their activities to the level of premiums they are charged, but in my experience, this is far less common than might be thought.[171] Some policyholders probably take note of the questions on applications for coverage and draw speculative inferences about the positive or negative impact of their answers on premiums; other policyholders may not. But based on my acquaintance with dozens of commercial policyholders, all policyholders understand that future premiums are likely to be "experience-rated"—i.e., will take account of whether claims were made against them or paid during the expiring policy period. Even if the insurer told the policyholder nothing about how different aspects of its conduct would affect future premiums, the policyholder would still have an incentive on its own to evaluate the riskiness of its conduct and consider means of reducing risk in order to avoid claims and consequent premium increases.

Despite the difficulty of quantifying the impact of risk-based pricing on moral hazard in Media Liability insurance, it seems indisputable that there is considerable impact. If there were no risk-based pricing at all, policyholders' incentive to reduce risk and avoid claims would be substantially weaker and moral hazard would be greater. Even if it is not possible in any particular instance to pinpoint the effect of risk-based pricing, there is little question that the practice has an impact worth taking into account.

2. Partial Insurance

A second way in which insurers can attempt to combat moral hazard is by insuring only some of the monetary risk that the policyholder faces. Partial insurance combats moral hazard by creating partial noninsurance,

(last visited Apr. 3, 2025) (ten-page application); OneBeacon Pro. Ins., Media Liability Application, NPA-90001-01-14, https://apogeeinsgroup.com/wp-content/uploads/2020/05/Media-Liability-Application.pdf [https://perma.cc/QQF4-CKX8] (last visited Apr. 3, 2025) (sixteen-page application).

[171] See Abraham & Schwarcz, The Limits of Regulation, supra note 150, at 239 (noting that insurers are incentivized to keep risk assessment formulas confidential).

thereby giving the policyholder the incentive to avoid incurring a liability for which it will be wholly or partially responsible. Partial insurance gives the policyholder skin in the game. In effect, partial insurance means that insurance provides only partial breathing space.

Typically, this is done through a deductible or a self-insured retention that must be exhausted though expenditures by the policyholder before coverage of a particular loss attaches and by specifying a monetary "limit of liability," or policy limit, above which sum there is no insurance.[172] Thus, a policyholder might purchase Media Liability insurance subject to a $5,000 or a $1 million SIR, and with a policy limit of $1 million or $50 million or more, or anything in between.[173]

Like risk-based pricing, the extent to which partial insurance combats moral hazard depends on the ability of policyholders to identify risk-posing features of their conduct that they can adjust so as to reduce the risk of liability. Some of these features may be difficult to identify,[174] but others may be obvious. Media organizations are likely to understand at least some of the features of their activities that could be conducted with more care, more research, and more prudence. The fact that their coverage is subject to an SIR that would be a significant cost to them if triggered makes them more likely to be more careful than they would be if there were total, rather than partial, insurance. Similarly, partial insurance gives policyholders the incentive to consider whether and to what extent to make activity-level adjustments that will place their self-insurance at less risk.

I take it as axiomatic that there are SIR "sweet spots" for both insurers and policyholders, but they may not be the same. The larger the SIR, the greater care (whether safety- or activity-level care) the policyholder will attempt to exercise, and the lower the premium the insurer can charge. For an insurer, the sweet spot is an amount that maximizes the sum of the liability and defense costs that the insurer saves through the additional care that the policyholder exercises because it has skin in the game, plus the premiums that the insurer collects from the policyholder. For the policyholder, the sweet spot minimizes the sum of the cost of the

[172] See id. at 247; Ben-Shahar & Logue, supra note 168, at 208–09.

[173] In practice, my observations are that insurers typically are likely to take on no more than $5–10 million of risk, with other insurers providing "excess" coverage in layers up to the total level of coverage the policyholder seeks.

[174] Abraham & Schwarcz, The Limits of Regulation, supra note 150, at 248 (explaining why it is often difficult for organizations to identify cost-effective risk mitigation measures).

additional care that it takes, the cost of its share of expected liability and defense costs, plus the premiums it pays for insurance. Because the inputs into these different sweet spots are not susceptible to precise quantification, the SIR that the parties mutually select is likely to be a function of the degree of the policyholder's risk aversion and the insurer's underwriting judgment.

Further, even apart from literal self-insurance, there are uninsured costs that policyholders bear whenever there is a claim or suit contending that the policyholder's statements constituted one or more of the speech torts. The prospect of incurring these costs functions in a manner quite similar to express self-insurance. For example, when a policyholder receives a phone call or letter of complaint, whether oral or in writing, it likely will make sense to investigate the allegations and assess the contention that the statement in question was false or otherwise harmful. When there is actually a suit filed against a media organization, it may engage in more formal or extended self-scrutiny to determine what went wrong, if anything, and how to further ensure that it publishes only truthful information, since this is typically its self-defined mission. In addition, even once the insurer's duty to defend attaches, the policyholder must invest unreimbursed time in helping counsel develop a defense, submitting to depositions, answering interrogatories, appearing at a trial if it occurs and testifying, and so forth. And there are possible reputational costs that policyholders face when there is a public accusation that they committed one or more of the speech torts. All of these are real, uninsured costs, the prospect of which also encourages policyholders to exercise care to avoid incurring them, even when they do have liability insurance, and thus undercuts breathing space.

3. Exclusions from Coverage

A number of the exclusions (noted earlier) in Media Liability, CGL, and other liability insurance policies have the purpose of combatting moral hazard, but in a limited way.[175] The exclusions do not affect the basic coverage that Media Liability insurance provides. They still cover liability even when there was actual malice, for example. But if a policyholder with actual malice makes a defamatory statement with the intention of causing injury, rather than in the due course of its operations, then it is not covered against any resulting liability. Whatever moral

[175] See supra Subsection I.A.2.

hazard the existence of the basic coverage itself generates, then, these exclusionary provisions do not combat it, but they do combat any temptation to cause harm intentionally that the existence of the insurance would otherwise create.

4. Risk Management by Insurers

This last method of combatting moral hazard involves advising and coaching policyholders regarding methods of loss reduction and prevention.[176] In many lines of insurance, insurers sometimes have a comparative advantage in this respect because of their expertise and their possession of aggregate claims data, derived from knowledge of large numbers of policyholders' claims and loss experience.[177]

In fact, however, in general there is much less involvement of commercial insurers in risk management than might be supposed, for a number of reasons. First, beyond providing general guidelines about best practices, customizing advice based on a particular policyholder's operations can be expensive.[178] Second, advice cannot be monopolized. A policyholder that benefits from loss reduction advice can make its operations safer but then switch insurers and still take advantage of a prior insurer's advice and be charged lower premiums.[179] Third, insurers risk irritating policyholders if they proactively insert themselves in a policyholder's operations by providing unsolicited advice about how to run their businesses.[180]

The exceptions to this customarily passive stance of insurers toward involvement in risk management by their policyholders involve niche and genuinely mutual insurers, who tend to understand the operations of their policyholders and have garnered their trust over time.[181] A prominent example is the intergovernmental risk pools that operate in some states and provide valuable advice to the municipalities and police departments they insure.[182]

[176] Abraham & Schwarcz, The Limits of Regulation, supra note 150, at 254; Ben-Shahar & Logue, supra note 168, at 210–11.

[177] Ben-Shahar & Logue, supra note 168, at 210–11.

[178] Abraham & Schwarcz, The Limits of Regulation, supra note 150, at 255–56.

[179] Id. at 257.

[180] Id. at 259.

[181] Id. at 233–34.

[182] See Abraham, supra note 23, at 35–36; John Rappaport, How Private Insurers Regulate Public Police, 130 Harv. L. Rev. 1539, 1555–58 (2017).

In Media Liability insurance, as in other lines of insurance, there is little or no such provision of loss-reduction advice. This conclusion is based on my conversations with insurance industry professionals and on an important annual "insider" market survey.[183] That survey canvassed the fifteen insurers that offered Media Liability insurance in 2023. Five insurers indicated that they offered no risk management services; one indicated only that it offered a "Media Companies Guide to Records Management"; seven indicated that they offered access to experienced claims staff; and two companies indicated that they offered access to webinars, as well as eighty complementary pre-publication review hours with an experienced law firm.[184] This is hardly any affirmative risk management at all.

In short, media liability insurers do not tend to reach out to their policyholders to provide advice about loss reduction. Some insurers make claims staff or outside counsel available to policyholders who want such advice at the policyholders' option. But policyholders who seek such advice are less likely to be susceptible to moral hazard than those who do not. If you are looking for advice about how to reduce your liability exposure, you are not ignoring the risk of loss and relying instead on your insurance for protection. For this reason, the very limited risk management services that media liability insurers provide are unlikely to be effective at reducing moral hazard, though conceivably they may reduce losses among some policyholders.

Whatever the impact on loss rates of the absence of aggressive risk management by media liability insurers, this stance has a salutary effect from one standpoint: it promotes breathing space. A policyholder that had its liability insurer monitoring its vulnerability to lawsuits, and aggressively promoting risk management, would be less likely to feel free to risk incurring liability than a policyholder whose insurer stayed far in the background. Not only does Media Liability insurance promote breathing space, then; the passivity of media liability insurers preserves it.

[183] Betterley, supra note 29, at 70–71.

[184] Id. These latter two companies, which appear to offer the most robust risk-management services, are successors to an original, Bermuda-based mutual company formed by media companies decades ago to provide the earliest form of Media Liability insurance. See Our History, Mut. Ins. Co. Ltd., https://www.mic.bm/about [https://perma.cc/RM2U-XZWV] (last visited Aug. 15, 2025).

D. Taking Stock

The factors that influence the relationship between speech, breathing space, and liability insurance are now on the table. Uncertain liability standards generate excess caution by the media. Liability insurance helps to neutralize this excess caution. This is moral hazard. But there are limits on the extent to which liability insurance can have this effect, both because liability insurance is always partial, and because even an insured potential defendant can anticipate other noninsured costs. And liability insurers attempt to limit the moral hazard—in effect, breathing space—that liability insurance creates using a variety of devices, including partial insurance.

No one can say today, and probably no one will ever be able to say in general, exactly how these different vectors of influence net out. That will vary from setting to setting, in all probability depending on the media organization or individual in question. But, as I noted earlier, it is clear that the net effect of liability insurance must be to create breathing space. The question is how much breathing space and in what settings. As more data about the distribution and magnitude of Media Liability insurance and its role in litigation are collected, we will be able to say with more particularity how these vectors of influence interact. And with that knowledge, we may be able to venture more reliable estimates of the net effects of the different vectors of influence in different settings.

IV. NORMATIVE CONSIDERATIONS: BRINGING LIABILITY INSURANCE OUT OF THE SHADOWS

Liability insurance clearly plays an important role in providing breathing space for the exercise of speech rights in the speech-tort domain. The question now is how tort theory and First Amendment law should take account of this fact. That might seem like a puzzling question: Why not just take it into account all the way down? After all, liability insurance does in fact figure, in the significant and substantial ways I have shown here, in the operation of the speech torts in practice. This Part first addresses that question and then turns briefly to consider what the principal alternative to the actual malice standard—negligence—would look like.

A. The Role of Insurance in Tort Theory

An important strain of tort theory takes a strong stand against considering liability insurance at all in fashioning tort liability. Deontic, or "rights-based" strains of tort theory—"corrective justice"[185] and "civil recourse"[186]—take the position that liability insurance is not properly considered in determining the scope of tort liability because the hallmark of tort liability is responsibility for committing a wrong that harms another party.[187] Catherine Sharkey and I have elsewhere contended that at least some deontic theories have room for integrating liability insurance into their conceptions of tort law.[188] There is no need to rehearse that contention here, however, because so much of contemporary speech-tort law reflects thoroughgoing consequentialism.

Consequentialist theories of tort law, concerned heavily with deterrence,[189] are not opposed in principle to considering the availability of liability insurance in fashioning the scope of tort liability,[190] but very often say little about its particular role in tort. And of course, in the domain of the speech torts, consequentialist theories have said nothing about liability insurance.

This is an enormous omission by consequentialist theory because the very notion of adopting a liability standard that creates breathing space—the central factor motivating the First Amendment protections that have been superimposed on speech-tort law—is consequentialist. Reducing the adverse potential consequences for free speech of common law liability for defamation was the whole point of *Sullivan*, *Gertz*, and the other cases that have applied the principles underlying these cases. These cases were

[185] See generally Jules L. Coleman, Risks and Wrongs (1992) (describing the function of tort liability as the correction of civil wrongs committed by the defendant); Ernest J. Weinrib, Corrective Justice (2012) (same); Arthur Ripstein, Private Wrongs (2016) (same).

[186] See generally John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs (2020) (arguing that tort law's central aim is to allow victims to seek recourse for wrongs committed by the defendant).

[187] See, e.g., Coleman, supra note 185, at 206 (indicating that liability insurance is a means of satisfying a liability but is not capable of "providing independent grounds for imposing substantive duties"); Goldberg & Zipursky, supra note 186, at 275–76 (likening liability insurance to bankruptcy, as a backstop undergirding an independently coherent system of tort law).

[188] See Abraham & Sharkey, supra note 14, at 2230–33.

[189] See id. at 2233–36.

[190] The classic example is Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis 302 (1970) ("[T]he allowance of insurance for faulty parties is clear indication [that justice does not preclude satisfying tort liability through insurance].").

directly concerned with deterrence—that is, excessive deterrence. And insurance against liability for defamation and the other speech torts inevitably has a tendency to decrease deterrence, thereby increasing breathing space. That is precisely what "moral hazard" in all forms of insurance means. The difference is that in the speech-tort field, moral hazard is at least in part a social good rather than a social cost.

The question then becomes how the existence and availability of insurance against speech-tort liability should figure in First Amendment and speech-tort law going forward. It would be wholly unrealistic for the courts to continue to ignore insurance in considering the proper scope of First Amendment protections against speech-tort liability. But if courts and scholars are going to continue to take the notion of breathing space seriously, then the issue should not be how much breathing space there is on paper, but how much breathing space there is in reality.

This means at least taking account of the availability and scope of insurance against speech-tort liability as a means of providing breathing space. To be rigorous about this consideration will also require some knowledge of exactly what kinds of liabilities may be covered, what kinds may be excluded, and the extent to which different categories of media organizations are covered. In this Article, I bring together answers to the first two of these questions but no quantitative knowledge about the third. Are considerably more than half (as I believe) of traditional media organizations covered by Media Liability insurance? And what about nontraditional media organizations such as blogs, messaging apps, and other forms of social media?

Getting answers to these questions should be a research priority. In the meantime, courts and scholars should at least recognize that liability insurance is a major source of breathing space. That recognition should include not only the fact that liability insurance often pays speech-tort judgments and settlements but also the fact that it covers the costs of defense. Since the costs of defending against speech-torts suits would create a much greater chilling effect, thereby shrinking breathing space, in the absence of liability insurance, research should also pay much greater attention to the impact on breathing space of the insurance of defense costs. Just as the Supreme Court sixty years ago took account of the realities of defamation liability, the courts and scholars should take account of the reality that much speech-tort liability is now covered by liability insurance. And it turns out that this includes insurance in some instances against liability for actual malice, a form of liability that even

contemporary academic specialists in insurance law could be forgiven for incorrectly supposing is not covered by insurance.

B. An Alternative Standard?

A second normative issue to consider is what standard to adopt if the constitutional requirements were relaxed, perhaps because of the recognition that liability insurance also provides breathing space that the current standards are designed to create. There are two possible features of an alternative approach, which might be employed alone or in concert. One is to change the liability standard; the other is to modify the rules governing damages.

1. The Trouble with Negligence

It is virtually inconceivable that the old strict liability rules applicable to defamation would be reinstated because they have been superseded in most states with a negligence standard. Since that is the case, it is worth taking a look at how a negligence standard would operate if a negligence approach were substituted for all suits involving matters of public concern, even for public official and public figure plaintiffs. This would be a more significant move than it might seem to be because most reported suits (and probably most unreported suits) against the media are litigated under the actual malice standard rather than as negligence cases,[191] since under *Gertz*, plaintiffs cannot obtain presumed or punitive damages without such proof.[192]

The important point to note about negligence standards in general is that they are sometimes deceptively appealing compromises between two extremes: intent- or knowledge-based standards, on the one hand, and strict liability standards, on the other. And it is precisely in connection with the kinds of speech at issue in speech-tort cases that the appeal of a negligence standard would pose danger.

One of the attractive features of both of the extreme standards is that in connection with the breach issue, they treat like cases alike. Only the reckless-disregard prong of the actual malice standard risks significant

[191] Marc A. Franklin, Robert L. Rabin, Michael D. Green & Mark A. Geistfeld, Tort Law and Alternatives 1100 (10th ed. 2016); Lidsky, supra note 7, at 680.

[192] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.").

variation from jury to jury on the breach issue. And the strict liability standard did not really leave the breach issue to the jury at all. The result is that under the two extreme standards, there is little discretion involved in application of the standards governing defamation liability. In IIED and public disclosure, the standards are more subjective, but such severe blameworthiness is required in each tort that the risk of wide variation in result on the same facts seems minimal.

In some tort settings, a negligence standard operates in analogous fashion, treating like cases alike, but not all, and it probably would not do so in defamation. This happens most often where there is an established standard external to tort law itself. For example, in cases involving medical malpractice, fairly well-developed professional customs apply in mandatory fashion.[193] Juries are not permitted to decide how the defendant should have practiced medicine. Similarly, the violation of a statute is negligent per se. Many automobile accidents involve statutory violations, or allegations of violations. Juries are instructed that if they find that there has been a violation, they *must* find the violator negligent.[194] And where there are settled customs of conduct in other activities, evidence of compliance with or violation of custom is admissible in evidence, and the jury is instructed that it may take violation into account. The tendency of the jury will be to apply custom as the standard.[195]

In other kinds of cases, however, where such external standards are not available to determine whether there has been negligence or, like custom, to strongly guide the jury's exercise of discretion, there is a much greater risk that like cases will not be treated alike. Juries are left without the mandate or guidance provided by an external standard and must in effect construct and then apply their own normative standards. At the level of fine detail in which assessments of blame are sometimes made, different juries—indeed, different jurors—may have different judgments about whether a defendant's conduct entailed reasonable care. I have elsewhere criticized negligence for this reason.[196] In my view, it is a comparative

[193] Kenneth S. Abraham, The Trouble with Negligence, 53 Vand. L. Rev. 1187, 1201–02 (2001).

[194] The seminal case on this point is *Martin v. Herzog*, 126 N.E. 814, 815 (N.Y. 1920).

[195] See Gideon Parchomovsky & Alex Stein, Torts and Innovation, 107 Mich. L. Rev. 285, 286 (2008).

[196] See generally Abraham, supra note 193 (arguing that negligence is a problematic liability standard because, among other reasons, it requires the factfinder to create its own norms).

weakness of the negligence standard when it is applied without the assistance of external standards that, in contrast to intent-based and strict liability standards, negligence risks not treating like cases alike. But the horse is largely out of the barn on that issue in the general world of negligence law. We are not about to overturn more than a century of negligence law because of this concern.

But that is not true of defamation. If a negligence standard did replace actual malice in defamation, especially if the rules regarding recovery of presumed damages were also relaxed and there were no longer an incentive to prove actual malice anyway, there would be a serious risk that, in the absence of external standards, like cases would be less likely to be treated alike. A half-century ago, *The Restatement (Second) of Torts* articulated a few factors that could be taken into account in applying the notion of negligence to defamation, but these were discretionary.[197] There are some formal standards about such matters as fact-checking among the traditional media, company-specific standards of care, and industry customs—though these probably vary based on increasingly stringent budget considerations even among "traditional" media. But there has been an enormous proliferation of nontraditional media, some of it small, some of it exclusively digital, and some of it in the very business of publishing or republishing rumors. To the extent that defined standards of care even exist in the world of digital media, they are likely to vary depending on the category of media. Interestingly, there is very little recent case law revealing how negligence is proved in defamation suits. Most of the reported cases in older studies involved dispositive motions, not appeals from jury trials in which the jury's treatment of the evidence could have been reflected.[198]

The prospect of defamation suits against such media involving public officials and public figures, in which the issue would often be whether the defendant exercised "reasonable care" and in which juries would be asked

[197] See Restatement (Second) of Torts, supra note 86, § 580B cmt. h (suggesting the relevance of the time the defendant had available to check the accuracy of a statement, the importance of the interest the defendant was seeking to promote in publishing a statement, and the extent of the damage to the defendant's reputation that would be produced if the statement proved to be false).

[198] There is one forty-year-old article that devotes a section to this issue. See Lackland H. Bloom, Jr., Proof of Fault in Media Defamation Litigation, 38 Vand. L. Rev. 247, 346–85 (1985). Because this article preceded the rise of nontraditional and digital media by decades, what was occurring then could reveal little about the possible variable application of the negligence standard now.

to determine, probably often almost out of whole cloth, how much care the particular defendant before them should have exercised, is troubling.[199] As the author of the leading treatise on the law of defamation has put it, "[n]egligence standards are dangerous because they tend to present jury issues, and juries are usually permitted to decide the issue on the basis of their own individual concepts of 'reasonableness.' The result is often a popularity contest between the plaintiff and the defendant . . . ."[200]

Thus, the likelihood that different juries—not specialists in the relevant norms, if any, and free to invoke their own values about an activity with which they are unfamiliar—would make up their own standards is high. The result would be that different media defendants who engaged in similar conduct would be judged differently, and different plaintiffs would recover, or not, depending on variable jury attitudes. Interestingly, for defendants who purchased liability insurance, some of this variability would be homogenized by their liability insurance premiums. But plaintiffs do not have insurance against the risk that their suits will fail; they would face this variability on an individual basis.

2. New Damages Rules

A different possibility would be to cut back on the distinctive rules governing damages in defamation cases, or to do so along with adopting a negligence standard. Today, once actual malice is proved, the states are still free to apply the old common law damages rules, which permitted awards of "presumed" and punitive damages.[201] Decades ago, some of those concerned with better balancing breathing space and the protection of reputation suggested various modifications of the rules governing damages, including presumed damages.[202]

The idea behind these decades-old suggestions was that, with the common law rules left in place, but presumed damages unavailable

[199] The proposal to apply a negligent standard to public figures, recently made by my colleague and sometimes coauthor, G. Edward White, is in my view not persuasive for this reason. See generally White, supra note 16.

[200] 1 Sack, supra note 20, § 9.3.4.1, at 9-44.

[201] See Abraham & White, supra note 107, at 831.

[202] See, e.g., Floyd Abrams, Why We Should Change the Libel Law, N.Y. Times, Sept. 29, 1985, at 34, 87, 90, 92–93 (arguing that damages in libel suits should be limited and standardized); Pierre N. Leval, The No-Money, No-Fault Libel Suit: Keeping *Sullivan* in Its Proper Place, 101 Harv. L. Rev. 1287, 1288, 1291–98 (1988) (suggesting that plaintiffs should be permitted merely to establish falsity with no damages available).

without proof of actual malice or not available under any circumstances, a more desirable balance between free speech and protection of reputation would have been struck. Those suggestions were never adopted. But the need for them, if any, waned. This is because the one thing we know now is that the whole point of liability insurance is to smooth out the serendipity of low-probability, high-severity events such as big damage awards, by translating the risk of such events into insurance premiums. Because liability insurance is available, there is much less need for constitutional protection against liability for presumed damages than might have seemed desirable several decades ago.

CONCLUSION

In the world of legal scholarship and in the courts, First Amendment theory lies far away from recognizing the impact of liability insurance on freedom of speech. No scholar that I know of is a specialist in both fields. None of the scholars I know of in either one of the fields understands very much, if anything, about the other field. But in the world of the speech torts in practice, the two fields are closely related. It is time for academic and judicial analysis to take these facts of media, journalistic, and insurance life into account. Constitutional law and tort law scholars need to take their heads out of the sand of First Amendment and tort theory, both of which seem to be hermetically sealed off from awareness of the breathing space for free speech that liability insurance provides. The end result may be to change the law or simply to provide a firmer and more knowledgeable foundation for maintaining the law as it now stands. Either way, we cannot think and talk in an informed way about breathing space or the speech torts without taking account of the fact that the Constitution is not the only source of this form of protection for free speech and that the two sources of breathing-space protection commonly interact.