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Introduction

Protest is fundamental to a democratic society. It enables people to associate with others to voice their opinions effectively, and to advocate for change. As the United States Supreme Court wrote in the case of a 1960s civil rights boycott of white merchants in Mississippi's Claiborne County, "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost."[1] In the United States and abroad, protest has played a central role in political and social transformation.

Legal suppression of protest, not only through criminal law but also through imposition of civil liability, has long presented First Amendment concerns. As the Supreme Court has made clear, "[t]he use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award."[2] When tort liability threatens constitutionally protected speech, the Court has limited causes of action for defamation, false light, invasion of privacy, intentional infliction of emotional distress and misrepresentation.[3]

Abroad, there are many examples of tort liability's use to suppress protest. Russian law provides a recent cautionary tale. As legal scholars

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1. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982).

2. *Id*. at 933.

3. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Fla. Star v. B.J.F., 491 U.S. 524 (1989); Snyder v. Phelps, 562 U.S. 443 (2011). For a full discussion of the ways in which the First

from Russia have described, Russian courts have granted "unhindered" liability against opposition leaders for pure economic losses to businesses impacted by pro-Navalny protests.[4] Courts have imposed this liability even though economic loss is not generally recoverable in Russian tort law, actual evidence of economic loss from the protests has been thin to nonexistent, and there are few, if any, legal ways to demonstrate opposition to the government despite its acts in contravention of international law.[5] Both at home and abroad, concern about the use of law, including tort law, to suppress protest is well-grounded.

At the same time, governments do not show up to a protest as an abstract concept. For now, at least, law enforcement requires the effort of human officers. Officers are harmed when crushed against metal doors.[6] They suffer brain injury when hit by rocks and bottles.[7] As Joseph Heller wrote in his classic book *Catch-22*, there was a "grim secret" that an airman hit by anti-aircraft fire "spilled all over the messy floor. . . . Man was matter . . . Drop him out a window and he'll fall. Set fire to him and he'll burn."[8] Protests that are not peaceful raise real risks of physical harm to persons—bystanders, other protesters, and police.[9] In protest, as in other activities, "violent conduct is beyond the pale of constitutional protection."[10]

Tort liability doctrines in the context of physical harms suffered by police during protest must navigate two critically important sets of values—on the one hand, protesters' rights to free speech and assembly, and on the other, the value of officers' and bystanders' lives and health, and their right to petition courts for redress.[11] Courts must incorporate both sets of values into the opinions they craft. Specifically, when state courts define common-law duties of care owed to officers and other professional rescuers, they must account for traditional tort principles of deterrence, accountability, and compensation for physical harm, while

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Amendment has upended tort law, see generally Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 Tex. L. Rev. 813 (2020).

4. Artyom Nektov & Semyon Stepanov, *Pure Economic Losses from the Russian Perspective*, 15 J. Tort L. 215, 256–59 (2022).

5. *Id.* at 265–67.

6. Spencer S. Hsu, *Man Who Pinned Officer to Capitol Tunnel Door Sentenced to 7.5 Years*, Wash. Post (Apr. 14, 2023, 4:05 PM), https://www.washingtonpost.com/dc-md-va/2023/04/14/mccaughey-sentenced-hodges-capitol-tunnel-attack-jan6/ [https://perma.cc/J5WS-2CAA].

7. *See* Doe v. McKesson, 945 F.3d 818, 823 (5th Cir. 2019).

8. Joseph Heller, Catch-22 440 (1955).

9. Professor Eugene Volokh reminds that the central issue of tort liability is risk of violence by the protesters, not violence against them because of their speech. *See generally* Eugene Volokh, *The Right to Defy Criminal Demands*, 16 N.Y.U. J.L. & Liberty 360 (2022).

10. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933 (1982).

11. *McKesson*, 945 F.3d at 835–36 (Willett, J., concurring in part, dissenting in part).

not exercising viewpoint discrimination or chilling speech.[12] This is a difficult and exacting task. As the Supreme Court wrote in a recent suit brought by an officer who had been injured during a protest, "[w]hen violence occurs during activity protected by the First Amendment, that provision mandates 'precision of regulation' with respect to 'the grounds that may give rise to damages liability' as well as 'the persons who may be held accountable for those damages.'"[13]

This Article develops a list of questions to guide courts when they determine the common law tort liability of protesters *to* police.[14] To be sure, much is currently being written about the tort liability *of* police to protesters, and rightly so.[15] In both contexts, victims of violence lack the legal protections that traditional negligence law would ordinarily provide.[16] It is time for courts to consider whether civil recourse has been too stingy to both types of victims.

That physical harm to police can raise the potential for tort liability may be a surprise to people who are not well versed in contemporary tort law. As described more fully in Section I, for decades, courts have limited officers' injury claims under common law doctrines such as "the firefighter's rule."[17] The firefighter's rule has recently been described as imposing constraints on professional rescuers' suits against those who innocently or negligently create a peril that occasions the officers' presence within the scope of the officers' employment.[18] The contours of the firefighter's rule vary greatly among jurisdictions.

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12. See *infra* Section I for the discussion of firefighter's rule.

13. McKesson v. Doe, 592 U.S. 1, 4 (2020) (per curiam).

14. We use the term "police" to include those who act in a policing capacity.

15. Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 Geo. L.J. 1479, 1517–24 (2016); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1821–25 (2018); William Baude, *Is Qualified Immunity Unlawful*, 106 Calif. L. Rev. 45, 53 (2018); *see also* John C.P. Goldberg & Ben C. Zipursky, *Sherman v. Department of Public Safety: Institutional Responsibility for Sexual Assault*, 16 J. Tort L. (forthcoming 2024); Zadeh v. Robinson, 928 F.3d 457, 463–64 (5th Cir. 2019).

16. Pierson v. Ray, 386 U.S. 547, 553–54 (1967) (qualified immunity).

17. *See, e.g.*, Restatement (Second) of Torts § 345 cmts. c, d (Am. L. Inst. 1965) ("firemen and policemen entering under authority of law, without [a purpose connected to the business of a land possessor], are commonly held by courts to stand on the same footing as licensees"); Gibson v. Leonard, 32 N.E. 182, 189 (Ill. 1892). Courts have limited liability for injuries incident to military service, even when the injuries are not suffered in combat, under the *Feres* doctrine. Feres v. United States, 340 U.S. 135, 144 (1950). In this Article we will call the rule the "firefighter's rule."

18. Restatement (Third) of Torts: Miscellaneous Provisions Firefighter's Rule (Am. L. Inst., Tentative Draft No. 2, 2023) ("An actor who innocently or negligently creates a peril that occasions the presence of a professional rescuer owes no duty to that professional rescuer when the rescuer is injured by the very same peril that occasioned the rescuer's presence and the rescuer is injured while (1) on duty, (2) acting within the scope of employment, and (3) engaged in the performance of emergency activities."). *See also* Dan B. Dobbs et al., Hornbook on Torts 605 (2d ed. 2016) [hereinafter Dobbs et al., Hornbook on Torts] (Limited Duties to Professional Risk Takers: The Firefighters Rule) ("When firefighters, police officers, and perhaps other public safety

Increasingly, however, each of the major premises for this court-made limitation on officer suits has been discarded in other contexts. Specifically, the Restatement (Third) of Torts, and many courts, have said that a duty of reasonable care *is* owed to licensees. Similarly, the Third Restatement and most states have jettisoned all-or-nothing doctrines of implied assumption of the risk. In the face of widespread abandonment of the main doctrinal foundations of the firefighter's rule, and the frequent availability of commercial insurance to cover firefighters' losses in the same manner as others' losses, many courts have reduced restrictions on officer recovery in cases of negligently caused physical harm.[19] Accordingly, the possibilities for officer-initiated injury claims have expanded.

Indeed, this year, courts in the United States must decide several appellate-level lawsuits that ask who, if anyone, can be held accountable for the severe physical harms suffered by police called upon to respond to violent protests. Two highly visible cases well illustrate the trend. In the first case, *Thompson v. Trump*, one hundred and forty United States Capitol Police officers were injured on January 6, 2021, during organized attempts to overturn the results of the U.S. presidential election.[20] Two of the officers who were struck and crushed, along with eleven representatives of the United States House of Representatives, filed suit based on allegations that the defendants had incited the violence that caused the plaintiffs' harm. Named as defendants were former President Donald Trump, Donald J. Trump Jr., Rudolph W. Giuliani, Representative Mo Brooks, various organized militia groups—including the Proud Boys, Oath Keepers, and Warboys—and the leader of the Proud Boys, Enrique Tarrio.[21] The police officers sued only former

officers are injured by perils that they have been employed to confront, many courts hold that they ordinarily have no claim against the person who created those perils"; noting that the rule is typically applied to negligent and strict liability conduct).

19. Sanders v. Alger, 394 P.3d 1083, 1088 (Ariz. 2017) (refusing to adopt the firefighter's rule); Christensen v. Murphy, 678 P.2d 1210, 1217 (Or. 1984); Ipsen v. Diamond Tree Experts, Inc., 466 P.3d 190, 194–95 (Utah 2020) (limiting the firefighter's rule). On the role of the availability of liability insurance in dampening the firefighter's rule, see Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 133 YALE L.J. (forthcoming 2024).

20. Blassingame v. Trump, 87 F.4th 1, 10 (D.C. Cir. 2023).

21. Thompson v. Trump, 590 F. Supp. 3d 46, 62, 71 (D.D.C. 2022) ("The *Blassingame* Plaintiffs claim to have suffered physical injury. ('Officer Hemby was crushed against the doors on the east side trying to hold the insurrectionists back.'); (alleging Officer Hemby suffered 'cuts and abrasions' over his face and hands); ('The insurrectionists struck Officer Blassingame in his face, head, chest, arms, and what felt like every part of his body.')") (citing complaint). *See also* Brief for United States as Amicus Curiae at 2, Blassingame v. Trump, No. 22-5069 (D.D.C. Mar. 2, 2023), https://www.washingtonpost.com/documents/0a50eb3b-4573-47bc-9ff7-0deede034ad4.pdf?itid=lk_interstitial_manual_17 [https://perma.cc/BZ5X-CJC5].

President Trump.[22] In the criminal courts, many of the individual protest organizers have already been sentenced to jail for their misconduct. Enrique Tarrio was sentenced to twenty-two years in prison.[23]

In the second police-officer tort injury case wending its way through the courts this year, *McKesson v. Doe*, a Baton Rouge police officer suffered traumatic brain injury when he was hit by an object (perhaps a rock or slab of concrete) that was thrown by an unidentified protester during a July 9, 2016, Black Lives Matter protest in Louisiana. The officer sued Black Lives Matter and protest organizers for instructing protesters to block the highway in front of police headquarters and then escalating conflict with police that day.[24] Organizer DeRay McKesson originally faced a criminal charge of "obstructing a highway of commerce,"[25] but those charges were ultimately dropped.[26]

In both cases, the plaintiff police officers have asserted their rights to physical security and redress for injury, while the protest-related defendants have invoked their protected interests in speech and assembly.

Both cases pit the physical safety of police officers against the First Amendment rights of protest organizers, but this is not to say that the two cases present the same factual bases, assert the same causes of action, or require the same outcome. Rather, the juxtaposition of cases is meant to highlight the breadth of political contexts in which the conflicting values of free speech and assembly on the one hand, and physical security on the other, play out. By considering this pair of current cases together, our aim is to create an analytical framework that recognizes the threats involved in decisions in this context, to both speech and safety, without as great a risk of ideological distortion.[27]

In Section II, we spell out the First Amendment free speech interests involved. We begin by examining liability based on pure speech versus liability for expressive conduct that violates rules of general applicability. While free speech doctrines draw a sharp distinction between speech and conduct, we address the cases that apply these doctrines,

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22. Brief for United States as Amicus Curiae at 9, Blassingame v. Trump, No. 22-5069 (D.D.C. Mar. 2, 2023).

23. Alan Feuer, *Ex-Leader of Proud Boys Sentenced to 22 Years in Jan. 6 Sedition Case*, N.Y. Times, Sept 5. 2023, at A1.

24. Doe v. McKesson, 945 F.3d 818, 822–23 (5th Cir. 2019).

25. Fenit Nirappil et. al., *Black Lives Matter leader DeRay McKesson Released After Being Held in Baton Rouge on a Night of Tension and Protests*, Wash. Post (July 10, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/07/10/arrest-of-activist-deray-mckesson-fuels-online-outrage-at-end-of-difficult-week/ [https://perma.cc/9Y5J-BNBT].

26. Carrie Wells, *Charges Dropped Against DeRay McKesson After Baton Rouge Arrest*, Balt. Sun https://www.baltimoresun.com/maryland/baltimore-city/bs-md-deray-charges-dropped-20160718-story.html [https://perma.cc/875E-QCVS] (last updated July 18, 2016, 6:52 PM).

27. John Rawls, A Theory of Justice 132–33 (1971) (using the heuristic device of the veil of ignorance). Many articles in this area sound like partisan screeds.

which present more blurry lines. We also review existing free speech doctrines in the context of incitement of third-party violence. Next, we outline the ways in which free speech principles have intersected with negligence law. We find that liability is less likely in cases of general, rather than contextualized, expressions. Moreover, cases involving harm to third persons have been more successful than cases involving harm to listeners. Finally, we summarize our approach to assembling these sets of applicable free speech doctrines.

Our substantive thesis, presented in Section III, is that free speech precedent will permit negligence liability against influential speakers (including protest leaders) only if the liability rule is designed to protect the plaintiff's significant interest in physical safety, and when the defendant knew or should have known that their own expressive conduct would heighten the risk of listener misconduct in a particular spatial-temporal context, and the increase in risk to physical safety is not the result of political viewpoint. Even then, the negligence liability of a protester who actively creates a risk of injury by a third person can withstand constitutional muster only when the negligence action is specifically defined to comport with First Amendment dictates to isolate defendant's protected and unprotected conduct.

Procedurally, we believe that when analyzing common-law liability claims for physical injuries suffered by police in the highly political circumstances of protest, courts would do well to think through a framework of content-neutral questions to aid their analysis. Our hope is that this Article will help judges identify and analyze salient factors when both constitutional free speech protections and tort law physical safety interests matter to the analysis.[28] Our goal is to maximize states' important interests in officers' physical safety and access to civil recourse, as well as protesters' First Amendment rights.

In conclusion, we comment on the published January 6th and Black Lives Matter torts opinions and illustrate several important issues that were overlooked in judicial analysis of those plaintiffs' common law claims. In the decisions, the Louisiana Supreme Court seems not to have addressed the importance of federal constitutional free speech interests in shaping the tort claim itself, and the federal courts seem not to have appreciated some particulars of state common law negligence actions.

This Article is chiefly designed to address common-law tort claims. However, the issues highlighted here may be relevant to some statutory claims as well. Moreover, the First Amendment analysis in this Article

28. Factor lists have proven helpful in a number of tort and constitutional law contexts. *See, e.g.*, Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441, 444 (Cal. 1963) (identifying factors to guide whether exculpatory clauses are against public policy).

is shaped by current interpretations of the amendment's requirements. As understandings of federal constitutional rights change, or when state constitutions apply unique standards, further considerations may shape the analysis. In addition, courts can, and often must, add their state's precedent and then-prevailing statutory constraints as well.

I. Protesters' Duty of Reasonable Care to Avoid Creating Risks of Physical Injury to Officers?

This Section begins the analysis on the tort law side of the ledger.[29] Federal First Amendment issues will be identified and incorporated next. In this way we explore important state interests before examining federal constitutionally-imposed restrictions on them.

In terms of tort liability, whether protesters owe a duty of reasonable care to avoid creating risks of physical injury to police can be separated into two issues. First, what duties of care do protesting persons owe to others more generally? Second, does the fact that the injured party was an officer alter that calculation?[30] Because the firefighter's rule has played such an important doctrinal role in the liability question, we examine the two issues in the opposite order. First, what duties of care are owed to officers more generally? Second, does the protest context alter those duties? We examine these two issues in sequence: officer as plaintiff and protester as risk creator.

A. Officer as Plaintiff

In the simplest case, if a driver fails to use reasonable care and crashes into a car being driven by another person, the negligent driver can be subject to liability to the injured driver. Suppose now that the injured driver is an on-duty police officer. Should the plaintiff's identity as an officer disable the injured plaintiff from filing suit? Typically, whether an officer-plaintiff is entitled to sue requires an analysis of a state's "firefighter's rule," sometimes referred to as a "fireman's rule," or "professional rescuer's rule."

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29. Most articles written about *Doe v. McKesson* focus only on constitutional free speech issues, rather than also address officers' legitimate interests in avoiding physical harm and in the purpose of tort liability more generally. Or, the articles view tort liability only as a barrier to fully free speech. *See* Nick Robinson & Elly Page, *Protecting Dissent: The Freedom of Peaceful Assembly, Civil Disobedience, and Partial First Amendment Protection*, 107 Cornell L. Rev. 229, 232–33 (2021).

30. Doe v. McKesson, 945 F.3d 818 (5th Cir. 2019), cert. granted, judgment vacated, 592 U.S. 1, 3–4 (2020) (certifying the questions in roughly this order).

1. The Waning Firefighter's Rule

A number of jurisdictions have declined to adopt, or have abolished, rules that prevent officers from pursuing ordinary negligence claims. According to the Third Restatement of Torts, "a half-dozen states have completely or mostly abolished the firefighter's rule, whether by judicial decision or legislative action. Furthermore, a handful of states that had not previously adopted the rule have expressly declined to do so, finding that contemporary justifications for the rule do not support its creation."[31] Another scholar counts ten states that have statutorily abolished or limited the rule.[32] Other common law countries have opted out of firefighter-rule limitations as well. For example, the English House of Lords "noted the American adoption of the [firefighter's] rule and summarily dismissed the whole idea."[33]

Even so, a majority of states still employ some version of the firefighter's rule.[34] The scope of the rule, which stems from an 1892 Illinois judgment, has been stated in a variety of ways and has become riddled with exceptions.[35] The Utah Supreme Court recently described the core doctrine this way: "a person does not owe a duty of care to a professional rescuer for injury that was sustained by the very negligence that occasioned the rescuer's presence and that was within the scope of the hazards inherent in the rescuer's duties."[36]

From the face of this rule, several qualifications are evident. The rule does not apply in cases of gross negligence or intentional torts.[37] It does not apply if the officer's injury was not created by "the very danger,"

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31. Restatement (Third) of Torts: Miscellaneous Provisions Firefighter's Rule (Am. L. Inst., Tentative Draft No. 2, 2023). *See, e.g.*, N.J. Stat. Ann. § 2A:62A-21 (West 1993) ("[W]henever any law enforcement officer, firefighter, or member of a duly incorporated first aid, emergency, ambulance or rescue squad association suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is directly or indirectly the result of the neglect, willful omission, or willful or culpable conduct of any person . . . [the injured rescuer] may seek recovery and damages from the person or entity whose neglect, willful omission, or willful or culpable conduct resulted in that injury, disease or death.").

32. Cristen C. Handley, *Back to the Basics: Restoring Fundamental Tort Principles by Abolishing the Professional-Rescuer's Doctrine*, 68 Ark. L. Rev. 489, 507 (2015) (noting by 2015, "at least ten states . . . statutorily abolished the rule or narrowed its scope.").

33. Dobbs et al., Hornbook on Torts, *supra* note 18, at 608 n.51 (citing Ogwo v. Taylor, 1 A.C. 431 (1987)).

34. Restatement (Third) of Torts: Miscellaneous Provisions Firefighter's Rule (Am. L. Inst., Tentative Draft No. 2, 2023).

35. Gibson v. Leonard, 32 N.E. 182, 189 (Ill. 1892); Dobbs et al., Hornbook on Torts, *supra* note 18, at 605–08.

36. Ipsen v. Diamond Tree Experts, Inc., 466 P.3d 190, 199 (Utah 2020); Restatement (Third) of Torts: Miscellaneous Provisions Firefighter's Rule (Am. L. Inst., Tentative Draft No. 2, 2023).

37. *Ipsen*, 466 P.3d at 192. Accordingly, "a person *does* owe a duty of care to a professional rescuer for injur[ies] . . . sustained by the *gross negligence* or *intentional tort* that caused the rescuer's presence." *Id.* (emphasis in original).

that triggered the officer's "presence at the scene in the first place."[38] Independent acts of negligence after the officer arrives on premises can trigger liability.[39] Moreover, negligence that falls outside the inherent hazards of a job can trigger liability as well. Additional carve outs are legion.[40] Liability can attach if the defendant violates a safety statute designed to protect officers. There can be liability when a landowner fails to warn an officer of latent dangers on the property despite knowing of the officer's presence, and so on.[41] In the case of an officer hit by a car, when a risk poses a broad threat to any number of people, some courts have held that "'[i]t would be illogical to insulate' the risk creator from liability 'simply because the person injured happened to be a police officer or firefighter.'"[42]

Although it is a matter of state tort law whether, and to what extent, a firefighter's rule should apply in a given jurisdiction or situation, in recent years, the firefighter's rule has become increasingly difficult for many jurisdictions to justify.[43] The push to minimize or eliminate the rule, and to treat officers in the same way as other rescuers, reflects three major doctrinal and practical trends in tort law. First, there is a general trend towards reasonable care as a generalized default standard

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38. W. Page Keeton et al., Prosser and Keeton on The Law of Torts 431 (5th ed. 1984) [hereinafter Keeton et al., Prosser & Keeton on Torts].

39. Dobbs et al., Hornbook on Torts, *supra* note 18, at 609 ("To say that the officer is barred only when injury results from risks that produced the officer's presence may be to permit recovery in an assortment of cases. One case held that a firefighter could not recover for injuries resulting from a negligently set fire, but could recover for injuries inflicted by the owner's attack dogs, since the officer was responding to the fire but not to attack dogs . . . . A firefighter might be denied recovery for burns in an electrical fire for which she was summoned, but she could recover for injuries from the explosion of a gasoline tank on the premises or for injuries from other dangerous conditions on the premises.").

40. *Id.* §§ 24.2, 24.3.

41. Keeton et al., Prosser & Keeton on Torts, *supra* note 38, at 430; Cal. Civ. Code § 1714.9 (West 2002) (authorizing civil lawsuits by police and firefighters when the conduct is not intentional but "[w]here the conduct causing the injury occurs after the person knows or should have known of the presence" of the public safety officer; "[w]here the conduct causing the injury violates a statue, ordinance, or regulation" designed to protect the public safety officer); Dobbs et al., Hornbook on Torts, *supra* note 18, § 24.2, at 606 (finding exceptions for active negligence, violation of "ordinance or safety statute aimed at protecting firefighters or officers, when the firefighter's presence is known and the landowner fails to warn of known dangers, and when injury occurs on premises open to the public.").

42. Dobbs et al., Hornbook on Torts, *supra* note 18, at 610 n.71 (citing Torchik v. Boyce, 905 N.E.2d 179 (Ohio 2009)); *but see* Krajewski v. Borque, 782 A.2d 650, 652 (R.I. 2001) ("Although plaintiffs claimed that these public policy considerations [assumption of the risk and public compensation of police officers] no longer are valid and that the rule simply shifts the costs of on-duty injuries from the tortfeasor to the taxpayer, we have repeatedly reaffirmed the policies underlying the rule . . . and we decline to revisit those policy issues in this case").

43. Restatement (Third) of Torts: Miscellaneous Provisions Firefighter's Rule cmt. b (Am. L. Inst., Tentative Draft No. 2, 2023).

in negligence cases.[44] Second, legislatures and courts increasingly favor splitting responsibility among multiple actors and have abandoned all-or-nothing rules, such as contributory negligence and assumption of the risk. Finally, the widespread availability of third-party liability insurance to cover the losses of injured parties—officers and others—casts doubt on the wisdom of liability exclusions.

2. The Broadening Norm of Reasonable Care

Negligence law in the United States has increasingly moved away from the ad hoc contextual rules of the writ system toward a more generalized norm: actors should use reasonable care with respect to affirmative acts that risk physical injury to others. Recognizing liability when an actor's fault causes harm, with fewer exceptions, would result in a smaller number of people being required to individually bear costs from the harms they have suffered because of the negligent risks of others.[45]

In many areas, courts have moved toward a more general standard of reasonable care.[46] The expansion most relevant to the firefighter's rule has taken place in the context of landowner liability. In older cases, landowners owed reasonable care to business and public invitees. Licensees such as guests were only entitled not to be subject to willful and wanton conduct. Because officers were usually categorized as licensees, they were accorded this lesser standard of care. Scholars in the torts field questioned the lower standard of care from the start. Dean Prosser thought it "quite foolish" to say that an officer who enters a home to prevent a burglary "confers no pecuniary benefit upon the occupier," i.e., was not an invitee subject to the reasonable care standard.[47]

Today, a lower standard of care for firefighters seems even more discordant with landowner liability doctrines. In most states, reasonable care is now owed to licensees as well as invitees.[48] The Third Restatement of Torts would not only accord reasonable care to licensees, but also to

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44. Ellen M. Bublick, *Tort Common Law Future: Preventing Harm and Providing Redress to the Uncounted Injured*, 14 J. Tort L. 279, 299–304 (2021).

45. *Id.* at 298–99, 303–04 (describing the trend toward a broadening liability to people foreseeably risked and harmed by negligence).

46. Broadbent v. Broadbent, 907 P.2d 43, 50 (Ariz. 1995) (reasonable care rather than parental immunity). Second-hand asbestos exposure cases in which partners and children are sickened by asbestos from a workplace through another can also be understood in this light. Kesner v. Super. Ct., 384 P.3d 283, 288 (Cal. 2016); Boynton v. Kennecott Utah Copper, LLC, 500 P.3d 847, 862 (Utah 2021).

47. Keeton et al., Prosser & Keeton on Torts, *supra* note 38, at 429, 431 (using the word "traditionally" but citing cases from the 1970s and 80s).

48. Rowland v. Christian, 443 P.2d 561, 567 (Cal. 1968); Restatement (Third) of Torts: Liab. for Physical & Emotional Harm §§ 49–54 (Am. L. Inst. 2012).

most trespassers.[49] Thus, even if firefighters were considered licensees, or most types of trespassers, reasonable care would be the norm. The rising standard of care owed to licensees invalidates the primary rationale for the firefighter's rule.[50] As the Restatement acknowledges, "[t]o the extent that the firefighter rule has historically been grounded in the status of professional rescuers on the land, this Restatement eliminates the basis for that rationale . . . ."[51]

Consistent with the broadening norm of reasonable care, some courts have rejected doctrines that entitle officers to less care for their physical safety than is enjoyed by others. As the South Carolina Supreme Court wrote, "[t]he more sound public policy—and the one we adopt—is to decline to promulgate a rule singling out police officers and firefighters for discriminatory treatment."[52]

3. Splitting Rather Than All-Or-Nothing Rules

At the same time the generalized norm of reasonable care is expanding, tort law rules increasingly apportion responsibility among multiple actors, rather than rely on all-or-nothing doctrines such as the firefighter's rule.[53] Statutes and common law decisions have created comparative fault and apportionment of responsibility frameworks in nearly every state.[54] These frameworks permit juries to assign responsibility by percentages.[55] Fractional systems have largely replaced or reduced the use of all-or-nothing doctrines such as contributory fault,[56] open and obvious danger,[57] and assumption of the risk.[58] Leading scholars have

49. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 51 cmt. m (Am. L. Inst. 2012). However, few courts have followed the Third Restatement to extend due care to trespassers beyond trespassing minors or persons in discovered peril.

50. *Id*.

51. *Id.*

52. Minnich v. Med-Waste, Inc., 564 S.E.2d 98, 103 (S.C. 2002).

53. Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 Val. U. L. Rev. 859, 868 (1996) (identifying a "deep change" in tort law towards splitting which is "redirecting the development of different doctrines"); Nora Freeman Engstrom & Robert L. Rabin, *Felons, Outlaws, and Tort's Troubling Treatment of the "Wrongdoer" Plaintiff*, 16 J. Tort L. 43 (2023) (supporting comparative fault rather than all-or-nothing outcomes with respect to wrongdoer plaintiffs).

54. Ellen M. Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 Notre Dame L. Rev. 355, 365 (2003).

55. *Id.* at 411–12.

56. Restatement (Third) of Torts: Apportionment of Liab. § B19 cmt. l (Am. L. Inst. 2000). Only four jurisdictions retain the all-or-nothing bar of contributory negligence. 1 Dan B. Dobbs et al., The Law of Torts 763 (2d ed. 2011).

57. 2 Dan B. Dobbs et al., The Law of Torts §§ 271–282 (2d ed. 2011).

58. 1 Dan B. Dobbs et al., *supra* note 56, at 850.

argued for abolition of the illegal activity exception as well, and this result has been dictated by some state statutes.[59]

The waning of the implied assumption of risk doctrine undermines the firefighter's rule. Primary implied assumption of the risk—the idea that plaintiffs consented to relinquish their rights to non-negligent conduct when they voluntarily encountered a known risk—was the second leading justification for the firefighter's rule.

Assumption of the risk in firefighter cases is typically not based on plaintiff negligence, but on the notion of plaintiff's voluntary consent. But the idea that firefighters consent *to the negligence* they encounter is implausible. "The claim that people implicitly agree to relinquish their right to be free of others' negligence came under sustained attack during the first half of the twentieth century."[60] As Restatement Reporter Kenneth Simons well illustrates: plaintiffs may be presented with three choices (1) not to engage in an activity, (2) to engage in an activity and encounter a tortiously created risk or (3) to engage in an activity and not encounter a tortious risk. When a defendant tries to prove that plaintiff consented to the defendant's negligent conduct—for example, to climb defendant's unsafe staircase at a place of work—the defendant often points to the plaintiff's decision to (2) work and encounter the negligent risk (climb the staircase), rather than (1) not working. However, to show that a plaintiff consents *to the negligence* would require the defendant to show that the plaintiff would prefer to (2) work and encounter the negligent risk (climb the unsafe staircase), rather than (3) work and *not* encounter the negligent risk (climb a safe staircase).[61] Choosing to work and engage in work-related activities, in spite of others' negligent risks, is not the same thing as consenting to the negligent conduct.[62] Professor Simons would allow the defense of implied assumption of the risk only in those rare circumstances in which the plaintiff had an actual preference for negligent conduct rather than non-negligent conduct.

Because the category of plaintiffs who prefer negligent conduct to non-negligent conduct seems hen's teeth rare, the Third Restatement went further; it abandoned the doctrine of implied assumption

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59. Engstrom & Rabin, *supra* note 53, at 61–67. Some courts have also gotten rid of the unlawful acts doctrine as incompatible with state comparative fault statutes. Dugger v. Arredondo, 408 S.W.3d 825, 836 (Tex. 2013).

60. Dilan A. Esper & Gregory C. Keating, *Putting "Duty" in Its Place: A Reply to Professors Goldberg and Zipursky*, 41 Loy. L.A. L. Rev. 1225, 1273 (2008).

61. Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. Rev. 213, 218–24 (1987).

62. *Id.*; Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 Colum. L. Rev. 1413, 1454, 1460 (1999) (a worker does not assume the risk of violence by working in a convenience store at night).

of the risk entirely.[63] Rather, the Restatement would resolve issues of implied assumption of the risk through established doctrines of duty and comparative fault. As Professor Dobbs advised (quoting Professor Steven Sugarman), "[w]hen we are tempted to say 'assumption of risk' we should instead say something else."[64] State appellate court decisions largely follow the lead of torts authorities and state legislatures that consign the full bar of implied assumption of risk to the dustbin of history.[65]

4. Availability of Insurance

As important as is repudiation of the doctrinal foundations of the firefighter's rule, the practical availability of liability insurance may play an even more key role in expanding tort liability to firefighters. Explaining the "twin star" relationship of insurance coverage and tort liability, Professors Catherine Sharkey and Kenneth Abraham observe that "the most common references to liability insurance occur in judicial decisions that break down the barriers to or otherwise expand tort liability."[66] Their illustrations of areas to which "availability of liability insurance has been influential" include the firefighter's rule.

As Sharkey and Abraham note, in "early decisions challenging the rule, courts expressed reservations that the abolition of the fireman's rule would place an undue burden on a single negligent individual."[67] However, later opinions started to recognize that insurance was often available to cover injuries on insured properties. Accordingly, those opinions sought to relax the firefighter's rule and afford firefighters recoveries in a broader range of cases. Many opinions proffer that, when liability insurance is available, there is "no justification for failing to treat the negligent injury of a fireman as . . . much a 'cost of doing business' as the negligent injury of any other person in the course of the commercial operation."[68]

Premises liability insurance is one main form of insurance coverage that might provide compensation to officers who have suffered physical injuries. But other forms of liability coverage might be available to officers in negligence actions as well. If an officer is standing in the roadway

63. Restatement (Third) of Torts: Apportionment of Liab. § 3 (Am. L. Inst. 2000).

64. 1 Dan B. Dobbs et al., *supra* note 56, at 850.

65. *Id.*

66. *See generally* Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11 (2008); Abraham & Sharkey, *supra* note 19 (manuscript at 23).

67. *Id.* at 35.

68. *Id.* at 36 (citing Kreski v. Modern Wholesale Elec. Supply Co., 390 N.W.2d 244, 250 (Mich. Ct. App. 1986)).

helping a stranded driver, and is then injured by a negligent driver in a second car, the second driver's automobile insurance could fund the officer's claim (in states in which courts recognize such a claim). Individual umbrella liability insurance could also be triggered in some suits. These forms of insurance coverage would be available if the negligent insured had injured anyone other than a firefighter in the same situation.

The courts that *do not* provide recovery in such cases prove the unsoundness of an expansive firefighter's rule. When an officer cannot recover from a third party who has caused harm, even though the negligent driver would be liable to all others, and auto insurance is available to defend and pay the claim, the discriminatory treatment of officers becomes more glaring and more difficult to justify. Barring an officer who was hit by a negligent driver from suing for physical injuries hurts the officer while helping no one. Yet some states do just that.[69]

Another insurance source potentially available in officer injury claims could be governmental liability insurance policies. Both statutes and common law standards sometimes waive governmental immunity in the amount of insurance coverage that a governmental entity has purchased.[70] Although workers compensation laws may prevent officers from suing their own employers, at times, more than one governmental entity may be involved in policing a protest. If some percentage of fault is assigned to another governmental entity, perhaps based on the faulty conduct of an agent from that department, governmental insurance policy coverage may come into play.

5. Other Rationales

Though primary supports for the firefighter's rule are largely defunct, an assortment of other policy reasons have been proffered to backfill support for the rule.[71] As the Third Restatement observes, "where the firefighter's rule has been retained, it now rests, somewhat precariously, on a kaleidoscope of public-policy considerations" that "are not water tight," "rest[] on a dubious empirical premise," and are "under- or over-inclusive."[72] For example, current justifications argue that firefighters have access to special compensation outside the tort system, even

69. Ellinwood v. Cohen, 87 A.3d 1054, 1057 n.2 (R.I. 2014). Although expanding coverage could increase insurance premiums, the number of people in this excluded category is not large compared to the covered population.

70. Abraham & Sharkey, *supra* note 19 (manuscript at 32).

71. Margo R. Casselman, Note, *Re-Examining the Firefighter's Rule in Arizona*, 59 Ariz. L. Rev. 263, 274–83 (2017).

72. Restatement (Third) of Torts: Miscellaneous Provisions Firefighter's Rule cmt. b (Am. L. Inst., Tentative Draft No. 2, 2023).

though this claim has been shown to be empirically false.[73] Similarly, it has been suggested that without a firefighter's rule, people experiencing emergencies would be reluctant to call for assistance.[74] Yet, doctrinal limits that stem from a desire to promote calls for assistance would seem to bar suit only to those who summoned the rescuers.

As the doctrinal and practical support for the firefighter's rule erode, and courts actively reshape tort doctrines in other contexts, vestigial limits on the firefighter's rule may continue to recede as well. The issue of officer recovery is, of course, an issue of state law. The rule's contours and existence may vary from state to state. Some states have shied away from, or dissolved, the rule's limitations faster than others. What is most significant to understand is that states have an important and substantial, some would say fundamental, interest in affording officers private civil recourse. Persons who suffer negligently-caused physical injury generally enjoy common law rights to sue based on rationales of accountability, deterrence, and compensation.[75]

B. Protester as Risk Creator

The question of duty in negligence law centers on the concept of risk creation. When an actor's conduct creates or continues a risk of physical harm, the actor ordinarily owes others a duty of reasonable care.[76] Though presented with varied language, this is the approach of the case law, the understanding of major commentators, and the view of both the Restatement (Second) of Torts[77] and the Restatement (Third) of Torts.[78] The risk creation idea is also implicit in the formula for misfeasance—a situation in which a person acts affirmatively in a way that creates a risk of harm to others. Justice Cardozo famously asked, "whether the

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73. *Id.*

74. Casselman, *supra* note 71, at 280–81.

75. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrong*s, 115 YALE L.J. 524, 552 (2005) (asserting "a fundamental right to a law for the redress of private wrongs"); Betsy J. Grey, Removing Torts 4 (draft article on file with the author) ("Federalism principles may also counsel a strong reluctance to displace state tort remedies, to avoid undermining the fundamental state interests in protecting the health and safety of its citizenry and redressing injuries.").

76. 2 DAN B. DOBBS ET AL., *supra* note 57, at 2–3 ("[A] duty of care is ordinarily owed to avoid conduct that creates risks of harms to others."). One concern about permitting recovery is that it might give government actors greater incentive to distribute public government services in favor of the wealthy rather than the poor. Ehud Guttel & Ariel Porat, *Tort Liability and the Risk of Discriminatory Government*, 87 U. CHI. L. REV. 1, 15 (2020).

77. RESTATEMENT (SECOND) OF TORTS § 302 cmt. a (AM. L. INST. 1965) ("In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.").

78. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (AM. L. INST. 2010).

putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good."[79] "Acts of misfeasance, or active misconduct working positive injury to others, typically carry a duty of care."[80] Nonfeasance typically does not create a duty, although there are circumstances in which "affirmative duties" have been created by statute or common law with respect to nonfeasance.[81]

1. Conduct that Actively Creates a Risk of Injury by Third Persons

Not all conduct that negligently creates risk involves direct harm by the risk-creating actor. Conduct can be negligent because it creates risks of harm by another. Dram shop liability is one well-known example. A bar's negligent overservice of alcohol to an intoxicated patron past the point of intoxication creates a risk that the patron will cause a car accident and injure others. The bar can be said to have created the risk even though the bartender is not behind the wheel, does not direct the patron to drive, and actually wishes that the patron would not drive or cause harm. Though the drunk driver is the immediate author of the accident victim's harm, the bartender can be subject to liability for the negligent risk the bartender created that was one cause of the ultimate harm.[82] (Through vicarious liability, the bar can face common law liability for the negligent acts of its employee-agent, too.)

The Third Restatement articulates the concept of actively creating risk by another as follows: "The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party."[83] Conduct is thus negligent because of the prospect of improper conduct by the plaintiff or a third party.[84]

Liability for negligently increasing risks of harm by others is not a new concept. The Second Restatement of Torts defined the blackletter standard this way: "An act or an omission may be negligent if the actor

79. H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 898 (N.Y. 1928). As Dean Prosser notes, "there arose very early a difference, still deeply rooted in the law of negligence, between 'misfeasance' and 'nonfeasance'—that is to say between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm." KEETON ET AL., PROSSER & KEETON ON TORTS, *supra* note 38, at 373.

80. Boynton v. Kennecott Utah Copper, LLC, 500 P.3d 847, 857 (Utah 2021) (citing B.R. *ex rel.* Jeffs v. West, 275 P.3d 228 (Utah 2012)).

81. *See generally* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 47–58 (AM. L. INST. 2012).

82. Torres v. JAI Dining Serv. (Phoenix) Inc., 497 P.3d 481, 484 (Ariz. 2021).

83. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 (AM. L. INST. 2012).

84. *Id*.

realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."[85] In comments, the Second Restatement explains there are

> situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise . . . where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.[86]

By way of illustration, the Second Restatement presents the following scenario: "*A* gives an air rifle to *B*, a boy six years old. *B* intentionally shoots *C*, putting out *C*'s eye. *A* may be found to be negligent toward *C*."[87]

The liability of an actor whose negligence creates risk under third-party negligence rules is *not* vicarious liability. The defendant is not blameless-but-liable for the negligent acts of another. Rather, the defendant is liable for third-party negligence because the defendant's own conduct "created or increased an unreasonable risk of harm through its intervention."[88] In the dram shop case, the vendor created a risk of harm by negligently overselling alcohol. In the air rifle case, *A* created a risk of a shooting by giving an air rifle to a young child. Neither defendant is required to control the third-party: the drinker or the child. Rather, the defendants are required to control their own conduct—"to take no active steps in creating risks of danger from third persons."[89] Similar doctrinal rules apply when an actor's negligent conduct creates an unreasonable risk of negligent or reckless harm by another.

Although third-party liability for harm is not new, now that a jury can assign an actor a small percentage of the total responsibility for an injury, the scope of potentially liable parties has increased. Courts routinely begin their analysis of third-party nonfeasance liability cases with stock phrases such as "a person has no legal duty to protect another from the criminal acts of third persons."[90] Yet that language is a starting point. When actors control the extent to which others are exposed to danger, courts often impose a duty of reasonable care in the exercise

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85. Restatement (Second) of Torts § 302B (Am. L. Inst. 1965).

86. *Id*. § 302B cmt. e. The other context involves special relationships.

87. *Id.* § 302B cmt. e, illus. 11 (emphasis added).

88. Keeton et al., Prosser & Keeton on Torts, *supra* note 38, at 305.

89. Dobbs et al., Hornbook on Torts, *supra* note 18, at 635 ("the no-duty-to control rule has no logical application when the defendant is affirmatively negligent in creating a risk of harm to the plaintiff through the instrumentality of another or otherwise.").

90. Bublick, *supra* note 62, at 1420 n.36 (quoting Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 756 (Tex. 1998)).

of that control. In light of that duty, actors must not increase foreseeable dangers, or at least must warn of the risk.[91] For instance, a landlord who refuses to let a tenant add a deadbolt lock to the door, retains the plaintiff's apartment key, and mishandles the key by leaving it out in the open and labelled with the plaintiff's address, can be held liable for unreasonably increasing the risk that a criminal could obtain the key, enter the apartment and cause physical harm.[92]

2. Risks of Protest

Applying these general liability rules to the question of protesters' potential creation of risk—directly or by third parties—protests may well create risk (though whether an actor would be subject to liability for creating those risks requires further analysis). Certain decisions made by the organizers or de facto leaders of a protest can heighten the risks of a protest. That reasonable time, place and manner restrictions can be placed on protests, suggests that there are unreasonable times, places and manners in which to protest. States are entitled to "protect the health and safety of their citizens," and "protect listeners from unwanted communication."[93] Which decisions unreasonably increase the risk of violence at a protest is likely a mixed question of law and fact. Some actions that may increase the risk of violence are: a protest at night; a protest in an unsafe location; expressing a desire for violence during the protest; targeting specific subjects of violence; conducting the protest in a dangerous manner; having the leader(s) exhibit or encourage unlawful behavior; encouraging participants to bring weapons in an unlawful manner or for an unlawful purpose. It does not take much imagination to envision risks to police and others when angry protesters, armed with weapons, are told to unlawfully swarm a building containing targeted actors who are guarded by police.

Permitting this full depiction of group protest as risk creation is, of course, problematic. Even before First Amendment rights are specifically factored into the equation, courts can limit tort duties in a way that acknowledges the rights of the protesters. An obvious first step would be for courts to ensure that risks created by the lawful public message of a protest are not counted at all in the created risks. For example, in the *Claiborne* scenario, "speeches, marches, and . . . social ostracism" are not only a poor basis for damages, but also an unconstitutional basis on which to argue that defendants' conduct created a duty or negligent

91. *Id.* at 1421.
92. *Id.* at 1422 (citing Berry Prop. Mgmt., Inc. v. Bliskey, 850 S.W.2d 644, 654 (Tex. App. 1993)).
93. Hill v. Colorado, 530 U.S. 703, 715–16 (2000).

risk.[94] Similarly, the First Amendment dictates that the offensive signs and slogans protest organizers display cannot be included in risk creation because of their content, even if others had previously responded to these provocations with threats of violence.[95]

3. Multiple and Partial Liabilities

Some might worry that tort liability of a negligent party would diminish the liability of a more blameworthy (often criminal) third party. However, to say that one party negligently creates risks of tortious or criminal harm to others is not to say that another tortious actor will be off the hook. Both actors can be subject to tort liability. Also, "the third party remains subject to whatever criminal punishments the law imposes."[96] Even if the third-party misconduct is merely tortious rather than criminal, the third party can be held to account for those torts.[97]

In addition, a fact that is critical but not always noted in terms of the liability of multiple actors: tort liabilities today are frequently only partial liabilities. Courts applying constitutional provisions that intersect with tort law often speak about tort liability in simple on-off terms. There is a cause of action or there is not. However, that all-or-nothing language is discordant with tort liabilities today. Typically, courts ask juries to apportion the liability for damage across multiple actors. For example, suppose that a large group of people continually push forward in a crowd, crushing a police officer. This tortious conduct, if done with a purpose or substantial certainty of the requisite harm to another, could constitute assault, battery, false imprisonment, intentional infliction of emotional distress, and civil conspiracy. Now imagine that twenty people towards the back of the group believe the pushing is designed to open a locked door and do not realize that a person is being crushed. The acts of all twenty people, which are possibly only negligent with respect to personal injury, may yet be actionable against all twenty. Yet if twenty are tagged with negligence liability, the damages award that each defendant is required to pay could be a tiny percentage of the total damages—for instance, one percent, five percent, or ten percent of the total.

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94. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933 (1982).

95. Snyder v. Phelps, 562 U.S. 443, 458 (2011); Volokh, *supra* note 9, at 390–92.

96. Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 19 cmt. d (Am. L. Inst. 2010).

97. *See id.* § 19 cmt. c. Ultimate division of payments to the plaintiff and among tortfeasors depends on the often complex and varied rules of apportionment of responsibility in the state. *See* Dan B. Dobbs et al., The Law of Torts Ch. 41 (2d ed. 2011).

This is so because, in most jurisdictions, juries are asked to apportion responsibility among all actors—defendants and plaintiffs. In several liability systems that are common to many states, plaintiffs' damage awards would reflect each party's assigned percentage share of the total award. In contrast, in joint and several liability jurisdictions, each defendant could be held liable for the plaintiff's full harm (less any responsibility apportioned to the plaintiff). However, even in those jurisdictions, the jointly liable defendants can ultimately divide their damages in an action for contribution or indemnity.

As such, contemporary tort law presents a conundrum for constitutional analysis. Tort law assigns liability to a range of negligent actors, but then fractionally apportions liability for damages among them. This broad, but partial, responsibility assignment is a more complex system than constitutional challenges have previously faced with respect to on-off criminal penalties and dignitary torts. Defamation liability exists or it does not. It permits punitive and compensatory damages, just compensatory damages, or no damages at all—three possibilities rather than many in between. But in negligence law, a party can be assigned responsibility for just one percent of the damage award. How expressive constitutional norms intersect with a practical liability system creates not only new problems to be addressed, but also a new way of thinking about the intersection of tort law and constitutional law.

Liability of many protesters who cause an injury would be consistent with common law approaches and is consistent with the potential criminal liability of many individuals in a single protest as well. However, the Supreme Court has said that extending liability beyond the individual who engaged in unlawful conduct requires "precision of regulation" *as to* "*the persons who may be held accountable*."[98] Such precision would seem to require that judges more carefully supervise the parameters of negligence actions in particular. Steps toward such precision are examined further in Section III. These measures could include increased judicial involvement in the case, heightened requirements for proof of actual and punitive damages (as in the speech-of-public-concern defamation cases); early mechanisms for judges to dispose of cases (akin to those found in anti-SLAPP statutes); tailoring the negligence claim to differentiate protected from unprotected conduct; and tailoring the negligence claim to focus on the actor's own fault, even if it is fault that heightens the risk of third-party misconduct, rather than permitting an inference of actor fault from the conduct of others.

Before we explore whether and how protester liability could work, it is important to examine First Amendment constraints more closely.

98. McKesson v. Doe, 592 U.S. 1, 4 (2020) (per curiam) (emphasis added).

II. Restrictions on Tort Liability Based on Speech and Association

In situations in which tort liability rules recognize an officer's interest in physical security and the potentially liable parties are participants and organizers of protests, tort rules will, of course, run up against constitutional protections for speech, association, and assembly. The First Amendment limits how states regulate behavior, including how states regulate behavior through civil liability.[99] However, protections for speech and assembly are not absolute. Tort rules that carefully frame negligence liability should withstand scrutiny.

A. Liability Based on Pure Speech Versus Liability Based on Expressive Conduct that Violates Rules of General Applicability

The Supreme Court has placed strict and relatively clear limits on state tort liability that concerns pure speech—cases in which the speaker's message itself is the source of harm. But civil liability can exist even within the bounds of pure speech. Cases of defamation, public disclosure of private facts, and false light, for example, all assign tort liability based on pure speech. The elements of those torts have simply been reshaped to avoid constitutional conflict. These speech-related torts are tightly constrained by First Amendment precedent such that great precision is used to ensure that these causes of action prevent only harmful expression. Tort actions are particularly constrained when the speech involves a matter of public concern or broad public interest.[100]

At the same time, First Amendment precedent draws a sharp distinction between speech and conduct. Laws of general applicability do not receive heightened First Amendment scrutiny, even if they are violated by journalists who are exercising free-speech rights.[101] Thus, when investigative reporters commit trespass, they can be sued in order to vindicate the general rights in the exclusive control of property. When they break contracts, they can be sued in order to vindicate interests in the enforcement of private agreements.[102]

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99. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

100. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278–79 (1964); Bartnicki v. Vopper, 532 U.S. 514, 529 (2001); N.Y. Times Co. v. United States, 403 U.S. 713 (1971); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967). *See also* Hustler v. Falwell, 485 U.S. 46, 56 (1988); *Snyder*, 562 U.S. at 458–59 (2011) (constraining IIED liability when the conduct causing severe emotional distress is pure speech).

101. Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991).

102. *Id.* at 668; *see, e.g.*, Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Food Lion Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956 (M.D.N.C. 1997).

Unfortunately, the line between pure speech and non-expressive conduct is not a line at all, but more of a thick blur. Hate speech is fully protected,[103] but if a person is motivated by racial animus while committing a crime, the state can impose an increased penalty because the disfavored belief (racial prejudice) is combined with conduct that was already forbidden.[104] State courts have implicitly used the same logic in torts like battery: an insult is not actionable, but an insult combined with an unconsented touching (even of an article the person is holding) can result in liability, although the only thing offensive about the contact was the speech.[105]

The Supreme Court crafted a test to apply to cases in which particularly expressive conduct violates laws of general applicability. In *United States v. O'Brien*, the Court explained:

> [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms . . . a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[106]

The last portion of the *O'Brien* test (the "no greater than is essential" part) might look, to the untrained eye, like a serious impediment to imposing liability in cases involving expressive misconduct. But the application of the test suggests otherwise. In *O'Brien* itself, the Court upheld the prosecution of a man who burned his draft card in protest. The Court found that the general prohibition on the destruction of draft cards was well-justified.[107]

Street protests are highly expressive. They also involve physical presence in large enough numbers that some degree of intimidation or risk of property damage will often be involved. Yet the Court fully protects nonviolent protests. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."[108] However, protesters who engage

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103. *See generally* Virginia v. Black, 538 U.S. 343 (2003).

104. *See generally* Wisconsin v. Mitchell, 508 U.S. 476 (1993).

105. Fisher v. Carousel Motor Hotel, Inc., 424 S.W.2d 627, 629 (Tex. 1967). This result can be understood as an acknowledgment that contact mixed with an insult is inherently more threatening and suggestive of violence than contact alone.

106. United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

107. *Id.* at 382.

108. Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 294 (1981). *See also* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

in violence, property destruction, or other prohibited conduct can be sued, just as a journalist can be sued for trespass. Extending tort liability beyond the individual protester who engaged in violence, though, requires "precision of regulation."[109]

The length to which liability can extend beyond the actor who engaged in lawless behavior is a difficult question. In a case like *McKesson*,[110] it is not hard to imagine that criminal or civil liability might be imposed for blocking a highway.[111] The more difficult question is whether the organizer can also be held liable for negligently creating a risk that other protesters would engage in violence or cause bodily harm. Likewise, the fact that criminal convictions were obtained in the January 6th riot against the individuals who breached the Capitol leaves little doubt as to those actors' potential tort liability. But the potential liability of organizers higher up in the chain of influence and informal authority for unreasonably increasing the risk of harm through the conduct of others remains uncertain.

B. Incitement

In *Brandenberg v. Ohio*, the Supreme Court strictly limited the conditions under which a state can punish a speaker for inciting others to commit violence.[112] In order to stay within constitutional bounds, incitement liability can apply when the defendant's speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[113] In other words, the speaker has to *intend* to cause the listener to *imminently* commit a crime, and there has to be an *objectively realistic risk* that it will work. This was the Court's way of allowing people to advocate passionately, and with loose or evocative language, without risking liability.

Brandenberg shows the Court's reluctance to extend state punishment of speakers whose speech inspires the lawless conduct of others. That said, *the Court has not said that the Brandenberg test for incitement is the sole form of liability that can apply to speakers who inspire lawless conduct*. Indeed, by alluding to a broader category of relatively less-protected speech that is "integral to criminal conduct," the Supreme

109. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

110. Doe v. McKesson, 339 So. 3d 524 (La. 2022).

111. "[T]he act of obstructing the highway is in itself wrongful irrespective of the actor's knowledge of the third person's purpose. Such an obstruction is a public nuisance, which makes the actor liable to those who suffer special harm as a result of it." RESTATEMENT (SECOND) OF TORTS § 328 cmt. a (AM. L. INST. 1965).

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

113. *Id.*

Court has recognized that incitement is *not* the only form of crime-inducing speech that can be regulated by the state.[114]

It is possible that a form of negligence liability that is constrained, in a way similar to incitement (e.g., by requiring a separate illegal act, and by requiring proof of physical harm rather than a mere risk of harm) could survive constitutional scrutiny.[115] After all, the Court has repeatedly confirmed that legal rules can survive strict scrutiny if they are well-tailored to non-speculative harms.[116] Then again, usually the Court says well-tailored rules can survive strict scrutiny while it is in the process of striking down a law.[117]

C. Free Speech and Negligence Liability

In the context of negligence, plaintiffs often have a harder time when their claims are based on the defendant's general expression alone (books, conversations with others, etc.).[118] Plaintiffs have lost cases against authors who instruct readers about how to commit murder. A similar outcome has been reached in cases against producers of violent video content or rap lyrics.[119] In a mass media publication, a publisher of a book that misidentified a poisonous mushroom as edible was found to be fully protected from products liability claims.[120] Plaintiffs have suffered these losses even when it is foreseeable, in a stochastic sense, that

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114. United States v. Stevens, 559 U.S. 460, 468, 471 (2010); Eugene Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 Cornell L. Rev. 981, 1011 (2016) (summarizing the implications of caselaw for cases where speech leading to violence could be regulated consistent with free speech constraints).

115. For an example of another proposal for narrowly constrained liability based on speech that inspires violence, see generally Jane R. Bambauer et al., *Reckless Associations*, 36 Harv. J.L. & Tech. 487 (2023).

116. Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 799, 804 (2011).

117. Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (first usage of the phrase "strict in theory, fatal in fact"); *but see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts,* 59 Vand. L. Rev. 793, 844–55 (2006) (disputing the perception that laws are always struck down under strict scrutiny).

118. *See also* Jones v. J.B. Lippincott Co., 694 F. Supp. 1216, 1216–18 (D. Md. 1988) (poor advice about the treatment of constipation in nursing textbook); McMillan v. Togus Reg'l Office, Dep't of Veterans Affs., 120 F. App'x 849, 852 (2d Cir. 2005) (unpublished) (incorrect statements about Agent Orange in National Academy of Sciences publication); Lewin v. McCreight, 655 F. Supp. 282, 283–84 (E.D. Mich. 1987) (published bad instructions for mixing mordant, causing an explosion); Cardozo v. True, 342 So. 2d 1053, 1054, 1056 (Fla. Dist. Ct. App. 1977) (poisonous ingredients listed in cook book recipe); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263, 1264, 1267 (Ill. App. Ct. 1985) (poor instructions in how-to book about tool-making that caused injuries).

119. Olivia N. v. NBC, 141 Cal. Rptr. 511 (Ct. App. 1977); Laura W. Brill, Note, *The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harm,* 94 Colum. L. Rev. 984 (1994).

120. Winter v. P.G. Putnam & Sons*,* 938 F.2d 1033, 1034–36 (9th Cir. 1991).

a listener might engage in copycat crimes and harm innocent third parties, or suffer harm based on the misinformation.[121]

But there are circumstances in which more contextualized expression can provide the basis for liability, as when a driver causes an accident by signaling to another car that it can go when it is not safe to do so.[122] Or when one hunter communicates to another that it is safe to fire in the plaintiff's direction.[123]

In addition, the "no duty" outcomes that typically apply when general speech causes listeners to harm themselves do not always apply when the listener foreseeably harms a third person. If a person's speech encourages another to take an action that will put a third person in peril, the victim might be able to seek recovery from the person who directly caused the injury (the listener) *and* the speaker who convinced the listener to act. In *Weirum*, for example, the plaintiff sued a radio station for injuries caused by speeding teenaged drivers who ran into her car.[124] The court found that the radio station owed a duty because it created a risk to innocent third party drivers when it encouraged all of its listeners to find a DJ's car as quickly as possible as part of a promotional game.[125] The court took pains to note that the outcome in *Weirum* was dependent on its unusual facts, such as the design of a game that would be played in real space, and the provision of a prize for the winners. Nevertheless, this case illustrates that speech, in some contexts in which it creates risks of physical harm to others, can support a claim for negligence liability.[126]

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121. Olivia N. v. NBC, 178 Cal. Rptr. 888 892–93 (Ct. App. 1981); Herceg v. Hustler Mag., Inc., 814 F.2d 1017, 1020, 1023 (5th Cir. 1987); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1070, 1072 (Mass. 1989); Waller v. Osbourne, 763 F. Supp. 1144, 1151 (M.D. Ga. 1991); Bill v. Super. Ct., 137 Cal. App. 3d 1002, 1011 (Cal. Ct. App. 1982) ("Here, by contrast to *Weirum*, the petitioners' activity in producing a motion picture and arranging for its distribution, is socially unobjectionable—and, in light of First Amendment considerations, must be deemed so even if it had the tendency to attract violence-prone individuals to the vicinity of theaters at which it was exhibited.").

122. Restatement (Second) of Torts § 311 (Am. L. Inst. 1965); Shirley Cloak & Dress Co. v. Arnold, 90 S.E.2d 622, 626 (Ga. Ct. App. 1955) ("While the defendant's driver was under no obligation to give the plaintiff any signal at all when he undertook to do so, a duty devolved upon him to exercise ordinary care to see that the way was clear ahead for the plaintiff's car to pass safely, and whether he did so under the circumstances is a question for the jury's determination."); Miller v. Watkins, 355 S.W.2d 1, 4 (Mo. 1962).

123. Hellums v. Raber, 853 N.E.2d 143, 147 (Ind. Ct. App. 2006).

124. Weirum v. RKO Gen., Inc., 539 P.2d 36, 38–39 (Cal. 1975).

125. *Id.* at 40, 42. *See also* Stricklin v. Stefani, 358 F. Supp. 3d 516, 529 (W.D.N.C. 2018) (finding that Gwen Stefani owed a duty of care when she told the audience to move toward the stage).

126. The Georgia Supreme Court recently reached a similar result in a case brought against Snapchat based on the design of its "speed filter" because the company allegedly "knew that other drivers were using the Speed Filter while speeding at 100 miles per hour or more as part of a game, [and] purposefully designed its products to encourage such behavior[.]" Maynard v. Snapchat, 870 S.E.2d 739, 747 (Ga. 2022).

D. Assembling the Tests

There is no single, obvious way to understand how all of these various precedents fit together. The best summary, we think, is as follows: free speech precedent will permit negligence liability against influential speakers (including protest leaders) only if the liability rule is designed to protect the plaintiff's significant interest in physical safety, and when the defendant knew or should have known that their expressive conduct would unreasonably heighten the risk of listener misconduct.[127] This means that the context in which expressive conduct occurs, and in which the message is received, will be very important. A reasonable person in the speaker's position must be able to foresee, in real time, that their speech or expressive conduct poses an unreasonable risk that listeners will harm others, and liability must be limited to risks that are created in that particular spatial-temporal context.[128] The potential for liability should be closely tied to context such that, at nearly every other place or time, the speaker would be able to express the same message without risk of legal penalty.[129] When the defendant also personally engages in conduct that violates a generally applicable law (e.g., violence or property damage), this should strengthen the chances that negligence liability could succeed.[130]

In the next Section, we combine the strands of existing tort and free speech theory, and clues about where each is headed, in order to develop a set of requirements and persuasive factors that should guide negligence liability in the course of public protest.

III. Key Factors for Cases that Blend Physical Injury and Free Speech Interests

Lower courts must actualize the Supreme Court's counsel that when violence occurs during activity protected by the First Amendment,

127. If the defendant has engaged in pure speech and has not used unlawful conduct, First Amendment law very likely requires proof of subjective awareness of risk—a recklessness mental state standard. *See* Counterman v. Colorado, 600 U.S. 66 (2023).

128. Where the acts of violence of listeners occur weeks after the defendant's allegedly tortious expressive conduct, there would be a strong presumption against the constitutionality of civil redress. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928–29 (1982). Also, the defendant needs to engage in active conduct of some sort, rather than being a passive participant or an uninvolved supplier of materials or venue. *See, e.g.*, Twitter v. Taamneh, 598 U.S. 471 (2023).

129. Ward v. Rock Against Racism, 491 U.S. 781, 800–03 (1989) (upholding "time, place, and manner" restrictions on expression as long as the restrictions are content-neutral, meet the justification and tailoring requirements of intermediate scrutiny, and "leave open ample alternative channels of communication").

130. *Claiborne Hardware Co.*, 458 U.S. at 929 ("If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence.").

precision of regulation "with respect to the grounds that may give rise to damages liability" and "the persons who may be held accountable for those damages," is required.[131] When faced with liability questions in the politically-charged context of officer injuries during public protests, this list of content-neutral questions is designed to help courts recognize and address parties' foundational interests in physical security and free speech. We hope to help courts maximize states' legitimate interests in officer physical security and civil recourse for wrongfully inflicted harm, while minimizing impacts on protestors' legitimate First Amendment activity.

Here are some categories of questions that we believe courts should consider in their analysis. With respect to each question, we outline why we think the query is significant.

1. Plaintiff's Physical Harm

> Has the officer-plaintiff suffered physical harm? (required for this framework)
> Yes___ No ___

This Article focuses on physical harm to officers, which may also include parasitic emotional harms. There are several important reasons for the focus on physical harm. First, physical injuries, and the emotional harms that accompany them, have long enjoyed greater tort-law protection than stand-alone emotional harm or stand-alone economic harm.

Second, physical harm provides a major limiting principle for lawsuits. It limits both the number of plaintiffs who can file suit, and the total amount of recovery a given plaintiff can receive. As in the case of an in rem action that decides the ownership of a specific piece of property against all possible claimants, cases that involve an actual physical injury have a natural mechanism for definition. When the plaintiff has suffered a physical injury, the whole of the individual's damages is akin to a res. The total amount of recovery that the plaintiff can receive is restricted to compensatory damages, plus possible punitive damages if applicable (and then typically limited to four times compensatory damages by current constitutional proportionality standards). Within that defined category of damage, the question is simply which actor(s)—plaintiff, defendants, and potential non-parties at fault—bear what share of those costs.

131. U.S. Const. amend. I; McKesson v. Doe, 592 U.S. 1, 3–4 (2020); 16A Am. Jur. 2d *Constitutional Law* § 533 (2023).

Actual physical injury is a critical distinction between the current officer-injury tort claims and *NAACP v. Claiborne Hardware.* In *Claiborne*, white merchants who suffered economic loss filed claims against boycott organizers who had threatened harm to Black customers if the customers shopped at boycotted stores. Imagine a variation on *Claiborne*. Suppose that the plaintiff in *Claiborne* had not been the white store owners who suffered economic loss, but rather a Black customer who had been threatened with violence. Imagine further that a third-party had carried out the threat of violence against the plaintiff, who then suffered physical injury (i.e., had been shot for going into the store despite the boycott). That physical injury case seems quite different from the store owner claims for economic loss. The Court said: "If that language had been followed by acts of violence, a substantial question would be presented whether [defendant] Evers could be held liable for the consequences of that unlawful conduct."[132] Thus the Court itself expressly noted that if the defendant's speech, which potentially created a risk of harm by a third parties, had actually resulted in physical harm by third parties, the speaker, and not only the violent actor, might have been subject to liability.

A third reason to permit tort liability in cases that involve actual physical injury is the state's particularly strong interest in preventing physical harm and providing tort recovery to a physically injured person. Tort actions are thought to serve at least three major goals: to deter physical injuries, hold wrongdoers to account, and provide compensation to injured parties. In terms of compensation, an injured person may not be able to work, may need extra care and accommodation, and may incur significant expense. Moreover, a person's interest in physical well-being is valuable in itself. An actor's unreasonable conduct that deprives another of life or health calls for compensation to the other. A physically injured person may also have a more legitimate need for a private action to hold the tortfeasor to account. Such accountability may also deter future injuries. When an actor who creates unreasonable risk of harm to another, bears the cost of harm the other has suffered because of actor's unreasonable choices, the actor must then internalize the costs of the risky conduct. The point of such deterrence is not to chill protest but to prevent physical injuries to others during protest.

Therefore, if the officer's suit does not involve some physical injury (as some recognized economic or dignitary torts do not), the claim may require further definition and limits than this framework provides.

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132. *Claiborne Hardware Co.*, 458 U.S. at 928 ("In this case, however—with the possible exception of the Cox incident—the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech.").

If the claim involves physical injury, with or without accompanying emotional distress, the state's substantial interest in promoting physical safety and allowing civil recourse is at its apex. In these physical injury cases, courts should proceed with further analysis of the tort law basis of the claim in Question 2.

2. Defendant's Criminal or Intentionally Tortious Conduct

> Did the defendant commit a crime or an intentional tort to persons, or conspire to commit a crime or an intentional tort to persons?
> Yes___ No ___

"The First Amendment does not protect violence. 'Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of "advocacy."'"[133] Tort liability of the protester who threw the injury-producing object in *Doe*, or of the protestors who hit the officers in *Blassingame*—batteries under civil and criminal law—are easy cases for tort liability, as well as for criminal sanctions. A defendant who commits a crime, particularly a crime of violence, has violated an important rule of general applicability. In such cases, the government's legitimate non-speech related interest in enforcing tort law and in protecting people from harm is at its height. The First Amendment does not protect unlawful or violent conduct. The state's ordinary tort mechanisms can be applied in full to such cases.

A few caveats are in order. First, intentional trespassory torts to persons typically involve wrongful acts. Battery, assault, and false imprisonment are the main examples. These torts contain no specific duty element, meaning that there is always a duty to avoid this misconduct. However, it is important to distinguish between intentional torts and intentional acts. Intentionally driving a car is an intentional act, but not an intentional tort. Consequently, the act of driving would fail the test in this Section. At times, state intentional tort law is so expansive that it seems not to require wrongful conduct at all (a battery in which the only intent required is an intent to contact which unexpectedly harms the plaintiff, for example). Intentional torts that are configured so broadly may be better suited to the negligence category. The category in Question 2 is designed for acts that involve wrongful conduct. Unlawful conduct that involves a crime of violence would also be a good match for this category. Here, ordinary tort liability can be applied in full. More

133. *Id.* at 916 (quoting Samuels v. Makell, 401 U. S. 66, 75 (1971) (Douglas, J., concurring)).

minor unlawful or criminal conduct may require further first amendment balancing.

Civil conspiracy also can create intentional tort liability. However, in civil conspiracy cases courts may need to require a specific showing of agreement with the unlawful or tortious aims.[134] As *NAACP v. Claiborne Hardware* cautions, to punish association with certain groups there must be "clear proof that a defendant specifically intend[s] to accomplish [the aims of the organization] by resort to violence" lest someone sympathetic to the association's mission but not intending to use unlawful purposes be inadvertently penalized.[135]

If the case proceeds as an intentional tort or criminal act case, or civil conspiracy with respect to intentional torts or crimes, courts need not look to the negligence analysis in Question 3 and can move on to Question 4. However, courts must still consider the scope of liability. It is not enough to show that the defendant performed an unlawful act and can therefore be tagged with liability for any harm. The unlawful conduct must result in the type of harm that made the defendant's wrongdoing tortious. Standard proximate cause analysis can be employed here, though with the broader lens of the extended liability rule for intentional torts. Moreover, increased involvement of the judge in defining the scope of liability makes sense to ensure consistency of protections for First Amendment interests.

If the case does not satisfy Question 2 and instead proceeds as a negligent physical injury case, the plaintiff must carefully articulate a doctrinal basis for duty as well as policy-based supports for the duty in Question 3, and meet the additional First Amendment requirements in Questions 4–6.

3. Defendant's Conduct Creating a Tort Duty in Negligence (Required if #2 not met)

To establish a tort duty in negligence:

1. Did the defendant engage in conduct* that either:
   - (a) violated a valid safety-related statute and
     - (1) the statute provides a standard to apply, and
     - (2) the statute was meant to protect a class of persons like the plaintiff from the type of harm that plaintiff suffered, and

134. *Claiborne Hardware Co.*, 458 U.S. at 919–20 ("'The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.' The principles announced in Scales, Noto, and Healy are relevant to this case. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.").

135. *Id.* at 919.

(3) no valid excuse permits non-compliance with statute; or

(b) created a risk of physical harm that amounts to misfeasance (active conduct working positive injury); or

(c) violates an affirmative duty owed to plaintiff despite ordinary rules of nonfeasance; and

2. issues of principle or policy (other than First Amendment principles and policies in later questions), do not warrant a special rule limiting liability.

3. An additional factor to consider when defendant is negligent because of the prospect of improper conduct by a third party is whether the defendant's unlawful or tortious conduct was visible to others.

* = The First Amendment constraints on what types of conduct can lead to legal liability are analyzed in the next query.

Yes___ No ___

This question focuses on the tort duty. The key question in this analysis, and one of the most important ways to ensure that regulation is precise enough to satisfy First Amendment concerns in the fuzzy area of negligence, is to focus on the wrongful conduct *of the defendant* as does the required subsection 1. That section recognizes a tort duty only when defendant's conduct violated a valid safety-related statute, heightened injury risk, or violated an affirmative duty.

Classic tort questions inform this duty analysis. Tort negligence doctrines often examine duties created by statute, common-law duties that stem from misfeasance, and the more limited duties when nonfeasance is at play. Different jurisdictions address the misfeasance in subsection 1b in different ways. For example, some courts also examine whether, at a broad level of generality, harm from the plaintiff's conduct was foreseeable. Another relevant question is whether other conduct by the defendant would have prevented or minimized the risk of physical harm. To say that the defendant created a risk of physical harm is to imply that the defendant could have made a different, and better, choice. As is often true in tort law, encouraging more care for safety is the critical goal of the law.

Some courts rely more on principle and precedent, while others focus on policies. Subsection 2 provides courts with a locus for this analysis.

An added concern, identified in subsection 3, is that when unlawful or tortious conduct is shown to other protesters, the defendant is modeling norms of lawlessness. Visibly flouting the law raises concern that others will follow suit. If defendant's wrong rests in creating and heightening risks of physical injury to others, the defendant's public demonstration of lawless conduct can be highly probative to defendant's misfeasance and correlative duty under tort law.

But even if classic tort duty questions can aid the analysis, classic tort descriptions of the conditions for defendant's liability will not do. Once the First Amendment comes into play, courts must be careful to identify the basis for the defendant's duty, and the ways to ensure that judicial analysis and trial issues are defined to focus on *the defendant's wrongful conduct.*

If defendant's conduct does not meet either subsection 1(a), 1(b), or 1(c), the case should be dismissed on tort law grounds because the defendant had no duty of care. If the defendant's conduct violated a safety-related statute in subsection 1(a), create a risk consistent with subsection 1(b), or violate defendant's affirmative duty under section 1(c), tort liability would be a result of the defendant's own wrongful conduct, even if brought about by a third-party. However, even when duty would ordinarily be established in subsection 1, in subsection 2 courts can find that countervailing principles and policies prevent recognition of a duty. Principles and policies specific to the First Amendment are addressed next.

4. First Amendment Constraints on the Tort Duty

> If the defendant's negligence was an act or set of acts of pure speech, was it
>
> (a) unprotected speech; or
>
> (b) protected speech that the defendant knew, at the time of expression, would significantly and unreasonably increase the risk that listeners in the given context would physically harm third-parties, and the increase in risk to physical safety is not the result of political viewpoint?
>
> __ Yes__ No

The conduct creating negligence liability under Question 3 may be expressive conduct that mixes expression and action without requiring the additional free speech analysis in this question. For example, the defendant's expressive conduct may include decisions about the location or timing of protest activities. In cases of expressive conduct that mixes expression and action, the requirement of plaintiff physical injury in Question 1 already ensures that tort liability is designed to further a substantial government interest in physical security and civil recourse, unrelated to suppression of free expression. Also, Question 5 ensures that restrictions on First Amendment interests from the tort action will not unduly limit protest and expression.

However, if the conduct creating tort liability is pure speech, in which the risk of physical harm is based exclusively on the content of the message, as in the question here, the First Amendment places more weighty demands on protection of free speech. Under subsection (a), if the pure speech constitutes unprotected incitement or unprotected true threats

(as determined by their respective constitutional tests), the usual rules for tort duty should apply.

Moreover, under subsection (b), the court may consider liability even for protected speech if liability is narrowly tailored to instances where physical risks are non-speculative, and where the defendant was actually aware of the risk and consciously and unreasonably disregarded it. The radio station game that encouraged speeding in Section II.C would be an example. Courts willing to consider imposing liability based on defendant's pure speech when defendant *knowingly or recklessly* creates a risk that listeners will engage in violence, must not engage in viewpoint discrimination, should be aware of the risk of chilling speech, and should ensure that there are ample opportunities for persons to engage in the American tradition of protest and provocative language. For example, lawful and constitutionally protected conduct, such as a lawful march, cannot ever form the basis of tort liability based on third party misconduct no matter how charged the event or cause may be. Likewise, speakers who make statements that seem to advocate violence, but are mixed or quickly followed up by admonitions not to engage in violence, may be immune to lawsuit based on the initial statements.[136] To illustrate, an influential member of a political protest who repeatedly yells "F*** the police up!" during a time when the protest is teetering on the edge of becoming a riot will satisfy 4(b) no matter what the topic or viewpoint of the protest may be. If the protest itself concerns policing policy, a speaker may still satisfy 4(b) for the same reasons that a speaker at a pro-choice, Anti-NATO, or any other rally would be. Moreover, there are innumerable opportunities for an anti-police protester to use the exact same expression, including at protests that have not approached a tipping point.

5. Alternative Avenues of Expression

> Were there ample alternatives for expressing the same message that would not have constituted tortious conduct?
>
> __ Yes__ No

The tort theory purpose of this inquiry is to ensure that there was some "precaution"—that is, some reasonable alternative means of getting one's point across—that serves as the basis for finding breach. The First Amendment purpose of this query is to ensure that strong political speech is not chilled. After all, if there are ample alternative methods to express disagreement and anger, the tort system will be able to channel

136. Courts considering tort liability on this basis can use the theory and analytical factors developed in: Jane Bambauer et al., *Reckless Associations,* 36 HARV. J. L. & TECH. 487 (2023).

political expression into those methods without deterring non-violent protest.

6. Legitimacy of the Speech-Related Regulation and Its Enforcement

> If the defendant's duty is based on a violation of a statute or ordinance, did the defendant violate a *valid and enforceable* law that is frequently enforced and not highly contested? If the defendant's duty is based on common law, would the common law impose liability on similarly-situated others who are not engaging in protest? Is the law being fairly and neutrally enforced with respect to the protesters?
>
> Yes___ No ___

The idea that the state can punish those who protest in ways that are unreasonable in terms of time place and manner, presupposes that they *will* have opportunities to protest at a reasonable time, place and manner. The state's ability to make certain requirements with respect to protest, hinges on the idea that there is a right way to protest, and ways that are *not* appropriate.

If a law barred all protest, it would be unconstitutional. In the case of an invalid law, the defendant's failure to follow the law could not form the basis of a tort duty.

Moreover, as with other forms of differential treatment, rules on the books must be enforced fairly, even when hated protesters are before the courts. Laws that are fair on their face must also be fair in practice. The Russian economic-loss liability decisions mentioned in the introduction are an example of tort liabilities that would fail all three of these questions.

7. Several Liability

> Is the defendant in a system in which defendant would be held responsible only for a proportionate share of the damages caused by the defendant's tortious conduct?
>
> __ Yes__ No

As discussed above, one reason to cautiously allow legal recourse for (and against) public officers is the changed nature of apportionment of responsibility for damages. If tort liability runs the risk of deterring even legitimate forms of protest due to caution or concern for error, the chilling effect will be mitigated, to at least some degree, when damages are reduced. Even when the third-party attacker(s) are not known or known but not named as defendants in the action, in many jurisdictions jurors can still assign a portion of the liability to those non-parties at

fault. Thus, even a liable defendant may be responsible for only a proportionate share of the assessed damages.

Conclusion: Applying the Analysis to Recent Controversies

The insights from this basic analysis—that courts must consider both tort liability questions and First Amendment questions in officer protest-related injury cases—seem straightforward. And yet, looking back at *Doe v. McKesson* and the civil actions against Donald Trump, courts have failed to fully address and reconcile physical safety *and* First Amendment issues.

In the Louisiana Supreme Court's opinion in *Doe,* for example, the court addressed the key torts issues: Louisiana's duty not to negligently precipitate the crime of a third party, and the abrogation of its professional rescuer's doctrine. However, that court completely failed to address *any* First Amendment questions. As the concurrence wrote, "I wish to point out that this court is deferring to the federal court [] determination of whether McKesson benefits from protections afforded by the First Amendment."[137] This omission might seem understandable at first. In its certified questions, the Fifth Circuit had asked only for the state supreme court's interpretation of its own tort law. Yet, the omission is still problematic because First Amendment constraints must shape the Louisiana common law negligence analysis itself, not only the limits that could have been imposed on it by the federal court.

The Louisiana Supreme Court drew no distinction between constitutionally protected and unprotected aspects of McKesson's conduct. At times the court focused on McKesson's own misfeasance in planning to block a highway, leading a group of people onto the highway, "intentionally breaking, and encouraging others to break, the law," inciting violence, and intending to use protest to get "martial law declared."[138] Such conduct could warrant negligence liability. At other times, the court's opinion did not clearly advise that the violence of others was relevant only to the extent that it informed McKesson's knowledge that *his own acts* heightened the risk of third-party physical harm to others.[139] That "activists [] pumped[] up the crowd," and other "protesters [threw] . . . water bottles" could be relevant to McKesson's state of mind or the reasonableness of his actions in that environment to the extent

137. Doe v. McKesson, 339 So. 3d 524 (La. 2022) (Weimer, J., concurring).

138. *Id.* at 528, 532.

139. *Id.* at 528 (plaintiffs alleged McKesson "knew or should have known" that the "demonstration and riot they staged would become violent.").

that he was aware of those actions by others. But the actions of others could not themselves count as his misconduct.[140]

When the case returned to the Fifth Circuit to review for a second time, the circuit court addressed the First Amendment issues that the Louisiana Supreme Court neglected. However, in judging whether the cause of action was narrowly tailored to target the tortious activity, the court seemed to define the tort in many different ways. For example, the Fifth Circuit disclaimed respondeat superior because the plaintiff "could not show that McKesson had the right to direct the unidentified protester's actions."[141] But then in the negligence claim, the circuit court went on to say that plaintiff's allegations tend to support that the protest at issue was "a protest that McKesson personally directed at all times."[142]

More concerning is that the court added that events, such as looting a store and a protester's thrown rock, by themselves tend to suggest McKesson's negligence. According to the court, "the fact that those events occurred under McKesson's leadership support the assertion that [McKesson] organized and directed the protest in such a manner as to create an unreasonable risk that one protester would assault or batter Doe."[143] This last statement, that the criminal acts of protesters tend to speak to the question of the defendant leader's negligence, sounds remarkably akin to res ipsa loquitur. But surely, in a case involving First Amendment rights, the plaintiff must prove defendant's own negligence, and not infer it from the fact of violence during a protest in which more than one-hundred protesters were involved. In the Fifth Circuit's decision, it is not at all clear that the creation of an "unreasonably dangerous condition" that is a "quintessential tort," was blocking the highway outside a police station, planning tortious acts, or just having a large group of angry people gather together at night.

There are many other tort issues that the Fifth Circuit's decision seems fuzzy about. The court writes that "*Claiborne* required only that the tortfeasor's conduct be unlawful."[144] And yet, in a negligence case in which the duty is variously described as a duty "not to negligently precipitate the crime of a third person," or merely a duty "not to lead a protest in a manner that is likely to incite,"[145] (march participants? police? anyone who is angry about McKesson's political views?), it is unclear where in the negligence case plaintiff must prove unlawful, and not

140. *Id.* at 527.
141. Doe v. McKesson, 71 F.4th 278, 282 (5th Cir. 2023).
142. *Id.* at 288–89.
143. *Id.* at 289.
144. *Id.* at 295.
145. *Id.* at 285.

merely negligent conduct. There is no precision about the negligence case that is being pursued, let alone how that case will be tailored so that judge and jury account for First Amendment concerns. To be clear, such an appropriately tailored case may well exist. However, the opinions themselves do not reveal the necessary level of precision.

The consolidated civil cases against former President Trump in *Blassingame* too, must carefully analyze tort law under the constraints of the First Amendment. So far, it seems the court in the Trump cases may have the opposite problem of the *McKesson* decisions; the district court was so mindful of constitutional protections that it may have done a disservice to the officers' legitimate tort law interests in protecting physical security and pursuing claims for redress.

Unlike the *McKesson* opinions, the district court in *Blassingame* was highly sensitive to the fact that Trump, if held liable, would bear responsibility for the physical assaults committed by third parties based on Trump's expressive conduct. For example, the district court counseled that holding a defendant liable for negligence for injuries resulting from intervening criminal acts required foreseeability of criminal harm. But the court construed the foreseeability requirement in an exceptionally narrow way. According to the court, "The crux of heightened foreseeability is a showing of the defendant's 'increased awareness of the danger of *a particular criminal act*.'"[146] Accordingly, the court concluded that plaintiffs could not meet such a demanding standard and dismissed plaintiffs' negligence claim.[147]

If such a narrow view of foreseeability were required by state tort law, the district court's statement might make sense. But as the District of Columbia Court of Appeals has recently written,

> We have previously applied the heightened foreseeability standard only in the context of what we will call 'pure' failure-to-protect cases . . . . The bar for establishing heightened foreseeability in these pure failure-to-protect cases is relatively high, because we want to 'limit the extent to which defendants become the insurers of others' safety from criminal acts,' and we do not want to invite an absurd sprawl of liability whereby everyone is responsible for preventing all crimes at all times. But this is not a pure failure-to-protect case. . . .[148]

Rather, in that recent case, the plaintiff tenant "did not need to make a showing of heightened foreseeability of an intervening criminal act," because he had alleged an affirmative act on the part of the landlords—that they had "affirmatively removed protections against criminality

146. Thompson v. Trump, 590 F. Supp. 3d 46, 124 (D.D.C. 2022), aff'd sub nom. Blassingame v. Trump, 87 F.4th 1 (D.C. Cir. 2023).

147. *Id.*

148. Freyberg v. DCO 2400 14th St., LLC, 304 A.3d 971, 977 (D.C. 2023).

that [the tenant] had put in place."[149] In the cases concerning President Trump too, the negligence claim was based on allegations that President Trump's affirmative acts heightened the risk of criminal harm by others, *not* that the former president simply had failed to protect the plaintiffs.

The tort law distinction between affirmative acts that work positive harm and a failure to protect is a critical distinction for courts to understand if they want to respect plaintiffs' physical security interests, and not only make their decisions on the basis of free speech concerns. Because the issue of presidential immunity was the "sole issue" before the D.C. Circuit on appeal, whether subsequent decisions in the Trump cases better account for officers' physical security remains to be seen.[150]

As the facts and legal analyses in each of these cases (against McKesson and Trump) continue to develop, it is possible that one or both of them can hold up as a legitimate exercise of tort liability despite the significant First Amendment interests involved. Of course, it could also be the case that neither of them have sufficient facts to justify holding the organizer or de facto leader responsible for the misconduct and violence of other protestors.

But we think a consistent framework for analysis would be useful for courts to promote transparency in these highly-political cases and to buttress against ideologically-driven rationalization. We also think courts must provide civil justice to injured officers—holding liable those who heighten risks of physical injury to them, while also minimizing impacts on free speech. The difficulty of finding the right balance between these two sets of values is complicated and will only become more so as tort liability continues on its path away from the binary yes-or-no liability answers for which expressive constitutional standards have traditionally been designed.

With new tort actions being filed by officers, courts will surely have the chance to continue to learn about tort law and constitutional law in tandem. With new tort actions being filed by officers, courts will surely have the chance to continue to learn about tort law and constitutional law in tandem—to try and keep our society both safe and free.

149. *Id.* at 979.

150. Blassingame v. Trump, 87 F.4th 1 (D.C. Cir. 2023).