



DEFAMATION, PRESUMED DAMAGES, AND REPUTATIONAL INJURY:  
A LEGAL AND PHILOSOPHICAL INQUIRY

*Benjamin C. Zipursky\**

Introduction.....	798
I. Presumed Damages.....	800
II. An Ideational Theory of Reputation and Reputational Injury.....	806
A. The Ideational Theory.....	806
B. Analytical Versus Substantive Accounts of Reputation and Reputational Injury .....	813
C. Provisional Conclusion and Proposed Counterarguments .....	814
III. Criticisms of the Unrestricted Ideational Conception.....	816
A. Breadth.....	816
B. Depth.....	817
C. Moral Valence.....	818
D. Cognitive Content .....	819
E. Falsity .....	819
IV. The Restricted Ideational Conception .....	822
V. The Unrestricted Ideational Conception and the Common Law of Defamation.....	824
A. Breadth: Disclosure and Special Relationship Cases .....	824
B. Depth: Retraction Cases.....	826

---

\* Professor of Law and James Quinn '49 Chair in Legal Ethics, Fordham Law School. For helpful feedback on this paper, I am grateful to Jane Bambauer, John Goldberg, Jeff Helmreich, Arthur Ripstein, Ken Simons, Eugene Volokh the UC Irvine Center for Law and Philosophy and numerous members of the UC Irvine Law & Philosophy Symposium on Defamation. The research assistance of Danielle Dascher in the Fordham Law School library was invaluable.

C. Moral Valence: Disease and Difficult Cases .....	827
D. Cognitive Content: Cartoons Cases and the Definition of Defamatory Content.....	828
E. Falsity: Public Concern and Media Defendant Cases and the Evolution of Falsity.....	829
F. Summary.....	830
Conclusion .....	831

### INTRODUCTION

Achieving a sound analysis of reputation and reputational injury is important for understanding the law of defamation. This goal has, however, received surprisingly little attention.<sup>1</sup> In light of the burst of renewed attention given to defamation law in the courts<sup>2</sup> and the media,<sup>3</sup> now is a good moment to try to make progress on this topic.

Although this article is principally theoretical, the project of writing it was undertaken with legal controversies in mind. Amongst the many issues in defamation law that continue to foster debate, some pertain to damages and would thus seem to call for a theory of reputational injury. Controversy swirls around the adjective “presumed” in the phrase “presumed damages.”<sup>4</sup> Critics ask why defamation plaintiffs are entitled to have their damages presumed and need not prove them, and they are naturally drawn to the concern that if the need for compensation is not actually proven, then liability is really punishment for uncivil speech even

---

<sup>1</sup> An impressive exception is LAWRENCE MCNAMARA, *REPUTATION AND DEFAMATION* (2007), which systematically develops a theory of reputation as the foundation for a theory of defamation and defamation law. Similarly, a philosophically rich approach has recently been advanced in Adam Slavny, *The Normative Foundations of Defamatory Meaning*, 37 L. & PHIL. 523 (2018). The account advanced here conflicts with both McNamara’s and Slavny’s in basic ways, as explained in the latter parts of the paper.

<sup>2</sup> See, e.g., *McKee v. Cosby*, 139 S. Ct. 675, 679 (2019) (Thomas, J., concurring in denial of *certiorari*) (proposing that the Court reconsider *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

<sup>3</sup> Jeremy W. Peters & Katie Robertson, *Fox News Settles Defamation Suit for \$787.5 Million*, N.Y. TIMES, Apr. 18, 2023.

<sup>4</sup> See, e.g., David A. Anderson, *Reputation, Compensation and Proof*, 25 WM. & MARY L. REV. 747 (1983).

where it does no harm.<sup>5</sup> This unsurprisingly leads to the conclusion that presumed damages are repugnant to free speech values,<sup>6</sup> and should no longer be permitted by common law courts<sup>7</sup> (even if the Supreme Court has decided to lay low on the issue<sup>8</sup>).

Damages in tort law are overwhelmingly linked to a plaintiff's right to redress injury, and it is therefore reasonable to suppose that clarity on what damages ought to be available to a defamation plaintiff will be lacking until we have greater clarity on what sorts of wrongful injuries defamation law is designed to redress. This brings us to the topic of the paper, reputational injury.

Part I of the paper presents Justice Lewis Powell's famous attack on presumed damages in *Gertz v. Robert Welch, Inc.*<sup>9</sup> After responding to some parts of that attack, I isolate a more general concern underlying his critique: that no coherent conception of intrinsic reputational injury can be formulated. Much of the paper is devoted to sketching such an account and subjecting it to challenges. Part II of the paper sets forth a rather basic theory of reputational injury, which I call "the ideational conception of reputational injury" or "the unrestricted ideational conception of reputational injury." Part III presents a series of challenges to the basic account, and, in response to those challenges, Part IV counterposes a different, and markedly narrower theory based on what I call the "restricted ideational conception of reputational injury." Strikingly, if the restricted conception of reputational injury lies at the core of defamation law, then the doctrine of presumed damages really is problematic. Part V takes up the question of which conception of reputational injury provides the better interpretive account of the common law of defamation, and answers that it is the unrestricted ideational conception, not the restricted one. In this way, it defends the coherence and viability of presumed damages doctrine in the common law of defamation.

---

<sup>5</sup> Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 738 (1986).

<sup>6</sup> *Id.*

<sup>7</sup> See Anderson, *supra* note 4; Post, *supra* note 5; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

<sup>8</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (interpreting *Gertz's* limitation on presumed damages narrowly).

<sup>9</sup> 418 U.S. 323 (1974).

## I. PRESUMED DAMAGES

Justice Lewis Powell's statement about presumed damages in *Gertz v. Robert Welch, Inc.*<sup>10</sup> is classic:

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. . . . [T]he states have no substantial interest in providing plaintiffs gratuitous awards of money damages far in excess of any actual injury.<sup>11</sup>

From the perspective of a tort scholar, it is surprising and indeed troubling that a Supreme Court opinion would make, and indeed rely upon, such inaccurate basic legal statements. The assertion that libel is an “odddity” in tort law because compensatory damages do not require proof of actual harm seems to overlook a large portion of tort law: Trespass, battery, assault, and false imprisonment are all well-established torts that do not require proof of damages as an element, and indeed permit compensation without proof of “loss.” Moreover, at least in battery, assault, and false imprisonment, it is crystal clear that such damages are not limited to nominal damages or punitive damages. These are called “general damages.”<sup>12</sup> It is horn-book tort law that general damages can be recovered under these torts so long as the elements are established, and general damages are not to be conflated with “emotional harm.” Apparently, defense lawyers before the Supreme Court in the 1970s managed to persuade Justice Powell that all torts but libel and slander are just versions of the tort of negligence (which does require proof of damages), and anything else is anomalous. That is simply false. A more general anxiety is of course that cases of defamation focus upon and apparently seek to regulate speech among willing parties, thus triggering special First Amendment concerns. It is crucial to see, however, that in the passage quoted above, Justice Powell is seeking to make an

---

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 349.

<sup>12</sup> See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 47 (2d ed.), Westlaw (database updated 2020) (explaining, in describing general damages for dignitary harm, “[t]he idea is loosely linked to the idea of mental distress, but no actual proof of mental distress is required. The invasion of the plaintiff’s rights is regarded as a harm in itself”).

argument independent of the communicative aspect of the tort and turning principally on its allegedly anomalous structure, among torts, vis-à-vis proof of harm.

Notwithstanding the mismatch between the text of Justice Powell's pronouncement and the positive law, there are three related points in the passage above that cannot be so easily refuted: (i) the state's only legitimate role in tort law is to provide compensation to victims for losses; (ii) the phrase "presumed damages" in defamation is unique to libel (and slander), (iii) the concept of reputational injury *as such* does not really make sense.

Let us start with the first point, relating to the alleged goals of tort law. It is worth noting at this juncture that several prominent scholars of defamation have indeed articulated a version of Powell's critique of presumed damages in more straightforwardly normative form, abstracted away from the constitutional dressing. One part of David Anderson's critique relates to the contrast between defamation claims and more familiar tort claims:

The genius of modern tort law is its emphasis on injury. Early tort law was an adjunct of criminal law and focused not on injury, but on wrong. If a court awarded damages, the damages were only incidental to the criminal prosecution of the perpetrator. Gradually, the focus of tort law shifted from wrong to injury, so that tort law is no longer primarily a scheme for punishing wrongs, but "a body of law which is directed toward the compensation of individuals . . . for losses which they have suffered."

This focus on injury, rather than on wrong, has made possible the vast extension of tort liability that has occurred during the last generation. The most notable example is the field of products liability, in which injury is now compensable without proof of wrong in any but the most technical sense. . . . This redirection of tort law from wrong to injury has bypassed defamation.<sup>13</sup>

Anderson does not shy away from shifting the descriptive, quasi-historical claims above into an overtly normative one: "[P]resumed harm permits recoveries that are not necessarily related to the legitimate interests of defamation law."<sup>14</sup>

Lyrissa Lidsky, now one of the Reporters for the American Law Institute's Restatement Third of Torts: Defamation and Privacy, wrote (adverting to Anderson):

[D]efamation is an evolutionary throw-back in tort law. Tort law originated as a mechanism to right wrongs but has since evolved into a system for compensating injuries. However, this "redirection of tort law from wrong to injury has bypassed defamation."

---

<sup>13</sup> Anderson, *supra* note 4, at 747–48 (internal citations omitted).

<sup>14</sup> *Id.* at 755.

Defamation still compensates based on the tendency of statements to harm reputation rather than the actual harm caused. Hence, the natural solution to making defamation law more instrumental in compensating reputational harm is to shift defamation's focus from the *tendency* of a given statement to harm reputation to *actual harm* to reputation.<sup>15</sup>

Lidsky is plainly asserting not only that tort law has in fact developed in the direction of compensating injuries rather than righting wrongs, but that compensating harms is what tort law should be doing, and righting wrongs is of questionable value in the modern day.

Perhaps tort scholars were once enchanted with the idea that tort law is principally about delivering compensation to those who incurred accidental injuries, but academic critique from all sides has undermined whatever plausibility that argument might have had. It is plain that—at a minimum—a wide variety of intentional torts permit redress for wrongs and much of this is not compensation for bodily harm as such.<sup>16</sup> Moreover, few legal thinkers today are content to describe basic areas like professional negligence and products liability as compensatory systems that aspire to free themselves from notions of wrongdoing and accountability.<sup>17</sup> Conversely, even scholars of accident law working from within an instrumental tradition have, over the past several decades, come to doubt whether compensation for the physical injuries caused by accidents is tort law's function.<sup>18</sup>

Of course, neither Anderson nor Lidsky was making principally a sociological point about what dominates contemporary legal academia. Both were asserting that tort law's defensibility as an institution turns on its capacity to provide compensation for harms, not on its capacity to right wrongs. Unfortunately, neither provides a normative argument for that proposition.

In a body of work over the past twenty-five years, coauthor John Goldberg and I—along with what is now a wide range of scholars across the common law world—have indeed supplied a broad range of arguments that tort law is a domain

---

<sup>15</sup> Lyrisa Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 44 (1996) (internal citations omitted).

<sup>16</sup> See, e.g., RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 3 (Tentative Draft No. 4, 2019).

<sup>17</sup> See, e.g., JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020).

<sup>18</sup> See, e.g., GUIDO CALABRESI, *THE FUTURE OF LAW AND ECONOMICS, ESSAYS IN REFORM AND RECOLLECTION* (2016) (advancing a pluralistic understanding of tort law).

of wrongs and that it does enforce a right of individuals to obtain redress for legal wrongs against those who wronged them; we have also defended this proposition from a normative point of view.<sup>19</sup> I shall not rehash those arguments here. I will say, however, that there is a separate institutional point applicable to Lidsky in her role as Restatement Reporter: If there is something plausibly referred to as the set of concepts and principles underlying the law, a normative critique of those concepts and principles would have to be extraordinarily powerful and well done to surmount what is a substantial institutional obligation to remain faithful to those concepts and principles. That standard is of course not met by the simple assertion that right-thinking torts scholars today should focus on compensating harms rather than righting wrongs.<sup>20</sup>

Let us return then to the word “presumed” in the phrase “presumed damages.” As pointed out by Robert Post (like Lidsky, now also a Reporter for the American Law Institute’s Restatement Third of Torts: Defamation and Privacy), it is common to treat the doctrine of presumed damages as fundamentally evidentiary,<sup>21</sup> and the word “presumption” often connotes an evidentiary function. Yet Post criticizes this explanation, and rightly so, especially because the defendant has no opportunity to rebut it.<sup>22</sup> Irrebuttable presumptions are not evidentiary, but substantive. On one level, this should be neither surprising nor troubling: It appears to show that presumed damages are, after all, functioning as general damages do in the intentional torts that have no damages element at all. Yet this raises the puzzle of why they are not just called “general damages.” Instead, we have a tort (libel) that purports to have a damages element but then says it is automatically satisfied when the other elements have been satisfied. Why?

---

<sup>19</sup> See, e.g., GOLDBERG & ZIPURSKY, *supra* note 17.

<sup>20</sup> Nor has Lidsky suggested the standard has been met; the passage quoted is from an article she wrote more than a quarter century ago as an academic, not as a Restatement Reporter.

<sup>21</sup> Post, *supra* note 5, at 697–98.

<sup>22</sup> *Id.* It is in one sense misleading to say the defendant has no opportunity to rebut presumed damages. A defendant is free to argue that a jury should award no compensatory damages or low compensatory damages on the ground that the plaintiff was not really harmed. Nonetheless, this does not undercut the completeness of the tort pleading or the entitlement to a verdict. Rather, it would lead to only a nominal damages award.

At least part of the answer is historical. Before libel law became a significant part of the common law docket in King's courts (rather than part of the Star Chamber), slander law was there. The early versions of slander law in the common law did in fact require proof of "temporal damage," which meant roughly something concrete, and other than sheer damage to reputation itself. Monetary damages, a discrete change in one's calling or one's relationships, or some demonstrable real-world change akin to this would need to be established for there to be a slander cause of action in one of the King's courts.<sup>23</sup>

The most plausible answer as to why temporal damages were required relates to somewhat arcane jurisdictional matters.<sup>24</sup> It was originally the case that complaints about someone defaming another were made in ecclesiastical courts.<sup>25</sup> These did not generally provide any compensation for the plaintiff at all. This effort to obtain redress drew plaintiffs to the King's (nonreligious) courts. Plaintiffs thus needed to fend off the argument that the complaint should be raised in ecclesiastical courts.<sup>26</sup> A second problem was that it was not at all clear that defamation actions fit under any writ.

Both problems might be solved if the plaintiff refigured the case in the mold of actions for trespass on the case; these were called actions on the case for words, and—according to Helmholz's authoritative history—they were first recognized in the King's courts in the 1530's or 1540's.<sup>27</sup> The pre-1500 model for actions on the case was structured so that the plaintiff needed to plead both some kind of wrongful conduct or breach of duty owed to the plaintiff and some kind of damages. This would fit into the "case" mold. And if the case was said to involve some kind of damages, that would distinguish such actions from those in the ecclesiastical courts.

The defamation cases in Kings' courts were primarily slander, not libel; for libel, litigants typically used the notorious Star Chamber, which actually delivered

---

<sup>23</sup> See generally Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 560 n.1 (1903).

<sup>24</sup> *Id.* at 555 (1903).

<sup>25</sup> *Id.* at 550–51.

<sup>26</sup> *Id.* at 557.

<sup>27</sup> R. H. Helmholz, *Introduction*, in SELECT CASES ON DEFAMATION TO 1600, at xiv (1985).



criminal punishment (and occasionally tort damages).<sup>28</sup> While many slander actions were brought to obtain redress for economic harm that was caused by defamatory words, many were brought to seek redress in situations where such concrete harm was not proved. As they developed, English courts adopted the rule that certain cases did not require proof of temporal harm; harm to the plaintiff could be presumed from the content of the allegedly defamatory statement. The now familiar categories of slander *per se* were developed.

Recall that I tentatively concluded above that our puzzle was not why damages are available without particular proof of concrete harm—that is just general damages, and they are typically available in all of the intentional torts that are dignitary in their nature. The puzzle is why they are given a special name, one that seems to connote that proof of some other kind of damages is in principle required, and then indulges the concept of a “presumption” to make it the case that such proof of other damages is not required.

Stepping back from the historical and jurisdictional context suggests an answer to this question: Defamation law needed the pretense that there was a separate category of damages in order to gain a jurisdictional place in the King’s courts and to fit within a writ. And, indeed, for some cases, it did really fit that mold. But for other cases—certainly some of the most plausible and powerful cases (e.g., purporting to include slander about the commission of crime)—the gist of the injury for which plaintiff was suing was such that a focus on temporal damages would come to seem a distraction.

Since the damages requirement was to some degree an analytical construction for procedural and jurisdictional reasons in the first place, once the tort became sufficiently established it was actually analytically clarifying to simply presume damages. This was the equivalent of recognizing that these were, in many prototypical cases, efforts to seek general damages for reputational injury. One could do so and still leave the whole family of slander cases (including ones that really were in the first instance about pecuniary harm) under the rubric of an action on the case for words.

---

<sup>28</sup> Veeder, *supra* note 23, at 555.

Libel cases migrated to the common law courts only after<sup>29</sup> the Star Chamber was formally abolished by Parliament in 1640.<sup>30</sup> When libel did finally become part of the common law, all libels were given the status of actionability without proof of special damages. This is not surprising, given that libel was principally treated as a crime in the Star Chamber, and accordingly, proof of damages was never required there. Needless to say, however, the background of libel as a crime does indeed provide historical grounds for Justice Powell’s worry—that the doctrine of presumed damages serves principally as a way of empowering courts to punish defendants rather than principally affording private redress to plaintiffs. Nonetheless, the plainly redressive role that presumed damages were playing already in the Kings’ courts’ slander claims weighs against that account. So too does the frequently asserted historical claim that private rights of action for libel were adopted by the courts in order to stem the bloodshed of dueling between the putative victims of defamation and those who allegedly defamed them in print.<sup>31</sup> This suggests that, once the Star Chamber had been shut down, libel actions were permitted by the King’s courts principally to afford individuals private redress for dignitary injuries, and certainly not as pure punishment of speech.

The analysis above supports the tentative conclusion that the very idea of presumed damages in the torts of libel and slander is not as problematic, constitutionally, as Justice Powell confidently asserted it to be. A premise underlying my comments, however, is that general damages make sense for defamation claims because it makes sense to think there is such a thing as a reputational injury that is not merely a link in a chain to other, more concrete injuries. Part II begins to explore that issue.

## II. AN IDEATIONAL THEORY OF REPUTATION AND REPUTATIONAL INJURY

### A. *The Ideational Theory*

Defamation law appears to characterize reputational injury indirectly and implicitly, by defining “defamatory words” as those which tend to injure reputation, and then saying in greater detail what defamatory words are. Here is a classic expanded version, from New York’s highest court, stating that defamatory words are those:

---

<sup>29</sup> Helmholz, *supra* note 27.

<sup>30</sup> Veeder, *supra* note 23, at 568.

<sup>31</sup> *Id.* at 569.

which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society.<sup>32</sup>

One might infer from such language that Post was correct when he wrote in his 1988 landmark article *The Social Foundations of Defamation Law: Reputation and the Constitution* that a reputational injury is one that pertains to the “social apprehension” of the plaintiff.<sup>33</sup> Dictionary definitions strike similar notes, defining a person’s “reputation” as “[t]he general opinion or estimate of a person’s character or other qualities; the relative esteem in which a person or thing is held.”<sup>34</sup> Arthur Ripstein’s highly nuanced analysis of defamation in *Private Wrongs* in fact begins with the thought that “[y]our reputation consists in the opinion that others hold of you.”<sup>35</sup> Don Herzog’s wide-ranging and insightful book *Defaming the Dead* arguably advances a like-minded view: “A diminution of your reputation doesn’t happen in your head, though you might well feel bad about it. It happens in how others discuss you, in how they think of you, in how they treat you.”<sup>36</sup> Similarly, Adam

---

<sup>32</sup> *Kimmerle v. N.Y. Evening J., Inc.*, 186 N.E. 217, 218 (N.Y. 1933).

<sup>33</sup> Post, *supra* note 5, at 698.

<sup>34</sup> See, e.g., *Reputation*, OXFORD ENGLISH DICTIONARY (online).

<sup>35</sup> ARTHUR RIPSTEIN, *PRIVATE WRONGS* 204 (2016). Among the most important differences between Ripstein’s view and the one developed in this article are: (1) it is critical to Ripstein’s account that reputation not be understood as an interest as such, because of the structural and substantive role that rights have in his tort theory and the well-developed distinction between interests and rights; while this article (like my tort theoretic approach generally) is rights-based rather than interest-based, the analytical framework for thinking about reputational injury is intended to be available to those adopting interest-based approaches *or* rights-based approaches; (2) Ripstein’s view is in some respects akin to the “restricted ideational conception” that I ultimately reject as an account of the positive law of defamation; (3) Ripstein’s view, while interpretively ambitious, is less positivistic than the one provided here. Notwithstanding these differences, both Ripstein and I reject instrumentalist conceptions of the wrong of defamation and of the injury of being defamed, both advance accounts that render the doctrine of presumed damages in defamation law justifiable, and both understand defamation law as fundamentally a form of private law.

<sup>36</sup> DON HERZOG, *DEFAMING THE DEAD* 215 (2017). On first appearance, Herzog’s account seems similar to mine because of his insistence on getting out of the head of the defamed person and recognizing the importance of third parties’ views of the person defamed, but different because it is not only third parties’ thoughts but also their *actions* to which he refers. While there are indeed differences between his view and mine, the passage quoted does not necessarily demonstrate them, because it is describing how reputational diminution occurs; third party action and discussion are

Slavny takes “a person’s reputation to be the beliefs and attitudes that others hold about her.”<sup>37</sup>

In an effort to cast a wider analytical reach akin to the broad language of the New York court quoted above, one can characterize injury to reputation as diminution in the opinion, judgment, attitudes, and feelings that third persons have about a person.<sup>38</sup> On this view, exposure to hatred, shame, ostracism, or disgrace would constitute diminution in opinion, apprehension, and feelings. Conversely, enhancement of reputation would be constituted by more favorable opinions, judgments, apprehensions, attitudes, and feelings about a person. Indictment for homicide is bad for one’s reputation; a Nobel prize is good for one’s reputation.

At the risk of committing to a sort of circularity, it is possible to go one step further in these rather general quasi-definitional statements. One could analyze a person’s reputation as the set of thoughts, beliefs, impressions, feelings, opinions, attitudes, and judgments that others have about that person. With the concession that this is a sort of lesser-of-evils terminological choice, I will use the terms “third-party ideas” or “ideas” broadly to cover all of the above. To the extent that these mental states are favorable, a person has a good reputation; the extent that they are unfavorable, a person has a bad reputation. To the extent that a person is wholly unknown in a community, she might be deemed to lack a reputation in that community altogether. Let us call this (for the moment), an “ideational theory of reputation.”

A reputational injury occurs when someone’s reputation is diminished or when someone who did not have a reputation in some community (or among other person(s)) comes to have a negative reputation. Put in terms of the account proffered, a reputational injury occurs when some third party’s (or parties’) ideas about the plaintiff are diminished or when, with regard to someone about whom there were no third-party ideas, that person comes to be the object of a negative set of third-party ideas. With, again, admissions of suboptimality, I call this an “ideational theory” of reputational injury. In order to match the theory of reputation as stipulated

---

plainly part of that, and nothing in my account here or later in the article is inconsistent with that observation.

<sup>37</sup> Slavny, *supra* note 1, at 527.

<sup>38</sup> It is a significant question, addressed below (in Part III.A), whether “third persons” is too threadbare a conception of the requisite opinion holders or apprehenders; it is possible that the concept of “reputation” requires a notion of the “public’s” opinion or “the general public’s opinion.”

above and in preparation for a somewhat contrastive account in Parts III–V, I shall sometimes refer to this as an “unrestricted ideational theory of reputational injury.”

It should be obvious that a claim that a defendant has inflicted a reputational injury on a plaintiff carries with it a presupposition that for someone to become the object of certain sets of opinions, ideas, or attitudes by others is in some important sense a setback for that person; things were—in at least some sense—better for the plaintiff before he or she was the object of that set of ideas (or would have been better if she had not become the object of that set of ideas).<sup>39</sup> An obvious question about defamation law is this: Assuming (as we now have) that the coming of a third party or third parties to this set of ideas is a setback to the plaintiff, is it a setback for instrumental reasons, intrinsic reasons, or both, or is the question not possible to answer? While others have not typically framed the question in such plain terms, it is clear that there are stark differences in the answers adopted by various jurists across the common law world.

In some contexts, it is quite clear that a good and untainted reputation is valuable at least in part for instrumental reasons. A person’s reputation as a good surgeon, chef, or broker is likely to bring more patients, customers, or clients, and that in turn will normally produce more revenue. Reputation is also valuable for attracting and keeping friends, for being taken seriously in one’s opinions or wishes, for attaining leadership roles, and so on. Conversely, a seriously damaged reputation sometimes leads to depression or emotional harm, and a reputation within a community of X’s as an X-hater could of course lead to physical injury or death.<sup>40</sup> In all of these ways, having a better reputation and avoiding reputational diminution are of instrumental value.

An ideational theory nicely accommodates phenomena that display the instrumental value of good reputation and the avoidance of reputational injury. The beliefs, attitudes, opinions, and dispositions of third parties are of course connected to their actions, as a general matter. Whether as an analytical claim about what such

---

<sup>39</sup> My background framework of normative concepts and methodology for theorizing about wrongs in torts is set forth in GOLDBERG & ZIPURSKY, *supra* note 17, especially Chapter 7: “Dual Constructivism,” *id.* at 205–28.

<sup>40</sup> *Saunders v. Bd. of Dirs., WHYY-TV*, 382 A.2d 257 (Del. Super. Ct. 1978) (prisoner alleges he was defamed for being falsely depicted as an FBI informant, and that such defamation rendered him a target of prisonhouse violence).

beliefs and opinions are, or as an empirical claim about their likely impact, favorable beliefs, attitudes, and opinions about someone's capacity as a chef or a surgeon are more likely to incline people to go to the chef's restaurant or the surgeon's operating room; favorable opinions about someone's trustworthiness are more likely to incline people to be friends, and so on. Diminution in those opinions, beliefs, and attitudes are likewise apt to diminish the likelihood of patronizing the bakery<sup>41</sup> or doctor's office<sup>42</sup> and diminish feelings of friendship.<sup>43</sup>

In all of the above-mentioned respects (and no doubt many more), a good reputation has instrumental value. However, one can readily acknowledge the instrumental value of a good reputation without insisting that the value of reputation is purely instrumental. A good reputation, one might argue, also has intrinsic value.<sup>44</sup> Conversely, one might suggest, having suffered a reputational injury may be intrinsically injurious, or what one might call "intrinsically harmful." An ideational conception accommodates these phenomena, too.

Ironically, a negligence case (not a defamation case) will help illustrate this point. Consider the New York Court of Appeals case *Lauer v. City of New York*.<sup>45</sup> Edward Lauer's son Andrew died of brain damage at three years of age. According to the Medical Examiner's autopsy, the damage was caused by trauma—a blow to the head with a blunt object. The father then became the prime suspect of the Queens' New York DA's office. When the man's wife, neighbors, colleagues, and friends learned that prosecutors suspected Lauer of having killed his own child, Lauer's social world fell apart. His wife divorced him and he was shunned by neighbors, other relatives, and family friends. It turned out, however, that there was an error in the first autopsy, which a second report by the same Medical Examiner discovered: The child's brain damage was due to a natural cause—a brain aneurysm, not to a violent blow to the head. Evidently embarrassed about their initial

---

<sup>41</sup> *Gibson Bros., Inc. v. Oberlin Coll.*, 187 N.E.3d 629 (Ohio App. 2022) (bakery sues college for defamation, asserting it has lost patrons).

<sup>42</sup> *Bongiovi v. Sullivan*, 138 P.3d 433 (Nev. 2006) (plastic surgeon lost patients due to defendant's defamatory statement).

<sup>43</sup> *Hudnall v. Sellner*, 800 F.2d 377 (4th Cir. 1986) (plaintiff shunned by friends after defamatory statements made by defendant).

<sup>44</sup> See Eric Descheemaeker, *Protecting Reputation: Defamation and Negligence*, 29 OXFORD J. LEGAL STUD. 603, 612–13 (2009) (emphasizing recognition of intangible value of reputation).

<sup>45</sup> 733 N.E.2d 184 (N.Y. 2000).

mistake and fearful for their own professional standing, the pathologists buried their corrective report in a filing cabinet and did not reveal it to prosecutors until a local investigative reporter unearthed the truth over a year later. Lauer clearly suffered tremendous reputational injury. That is because many people came to the belief about him that he had killed his own child, or at least suspected him of this terrible act. This would be a reputational injury even if there were no economic harm.

How might this injury be described? The most obvious example is the termination of his relationship with his wife, but termination is just one extreme. Many others in his daily circle no longer interacted with him, or no longer did so in any of the same ways. Note that it is possible or likely that Lauer would have suffered tremendous emotional harm and become depressed as he absorbed the information that people around him viewed him as having killed his son. But what if he had not become depressed, but principally angry and resentful? Or what if he had remained calm, stoically watching his life fall apart but continuing to march forward in his now very lonely daily routines? What if he had been a somewhat isolative or overly-busy person, so his social time with others was very minimal to begin with? Would this mean that he had *not* endured a reputational injury? Surely not.<sup>46</sup>

Consider, by way of analogy, a middle-aged woman who has lost a foot due to a car accident.<sup>47</sup> It is possible that the event will have caused her tremendous pain, but it is also possible that this has not occurred—that she was rendered nearly unconscious on impact and that she remained unconscious until her mangled foot was amputated to save her life. No doubt, there would commonly be gravely difficult emotional problems adjusting to such an injury, but assume for the purposes of argument here that the evidence put forward by rehabilitation medicine experts is that the nature of adjustment and the magnitude of emotional difficulties vary quite widely, and that our hypothetical character was fortunately among those who

---

<sup>46</sup> Some readers will be distracted by my apparent lack of interest in whether the reputational harm is warranted rather than unwarranted, with the idea that it is sometimes awkward to regard a *warranted* bad reputation as an injury at all (e.g., was Charles Manson's reputation "injured" by accurate news reports of the murders he committed?). This important objection is addressed in detail in Part III.E, *infra*.

<sup>47</sup> *Cf.* *Wyeth v. Levine*, 555 U.S. 555 (2009) (affirming multimillion dollar jury verdict for loss of arm; although the plaintiff's medical bills and the loss of her career as a guitarist were obviously concrete pecuniary losses, much of the verdict went beyond that).

adjusted better than most and quite quickly, learning to be mobile on crutches and even to drive. Let us suppose further that her job as an accountant was not interfered with, other than the months of her rehabilitation process, that her adult children and friends socialize with her no less than before, that her medical insurance has covered all of her medical costs, and that an experimental rehabilitation program is paying for her rehab. Does she still have an injury?

My question here is of course meant rhetorically. Common sense and the language of the law would seem to agree: There were injuries in both cases, and in both cases money and emotional affect and pain do not capture it. Of course, the missing foot has a real—literally flesh and bone—quality to it, while we must still resort to the metaphor of a “tarnished reputation” in the *Lauer* case. Something basic in the person’s life has changed and changed for the worse.

It may indeed be a good thing in a person’s life that she is regarded as a great artist, rabbi, or sister, and conversely a bad thing if she is regarded as an inept teacher, a coward, or an unfaithful partner. Whatever instrumental value (or injury) such a reputation would afford, being known as a great artist would have substantial intrinsic value, too. While it might at first seem promising to explain this putatively intrinsic value in terms of the subjective emotional well-being that comes with heightened self-esteem, further analysis suggests that is too reductive. A person’s foolish obliviousness to her own reputation is in some ways worse for him than self-awareness would be, even if from a subjective point of view the opposite seems to be true.<sup>48</sup> Relatedly, consider a person who correctly believes she is quite well-liked and well-regarded: She is even more enviable, and things are better for her, if she is extremely well-liked and well-regarded, and indeed that she is modest about (or not perfectly well-informed of) others’ opinions of her does not make her less well-off than she would be with greater awareness.

Finally, those who defend another’s reputation against others’ estimations are typically doing so in part because they believe the person is *entitled* to be regarded in a certain way—even by people who may never have contact with them. A person who is known to be very emotionally unresponsive to external recognition or validation might nonetheless be regarded as having gained something when awarded external recognition or prizes, and likewise having endured a setback for a negative

---

<sup>48</sup> Cf. Shelly Kagan, *Me and My Life*, in PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 309, 311 (1994) (citing THOMAS NAGEL, *MORTAL QUESTIONS* (1979)).



valuation. To be sure, there is instrumental value and, typically, subjective emotional value in such positive changes in reputation, but it is unrealistic to say that all of the value in reputational boons or the disvalue in reputational injury is of instrumental form or that all of the intrinsic value is essentially emotional.<sup>49</sup>

***B. Analytical Versus Substantive Accounts of Reputation and Reputational Injury***

In the classic article adverted to above, Post argued that there are three different concepts of reputation and that it is crucial to recognize the differences among them.<sup>50</sup> One concept of reputation—reputation as property<sup>51</sup>—takes reputation to be valuable as a sort of asset, akin to goodwill, that permits for greater accrual of wealth. A second concept of reputation as honor takes reputation to be a sort of ranking in a hierarchical social order (prototypically, with royalty at the top).<sup>52</sup> A third concept of reputation as dignity takes defamation law to be protecting the social conditions for self-respect and community inclusion as a full and equal member.<sup>53</sup> Post offers a wide array of features of defamation law to support his claim about these three different concepts.

How does the ideational theory of reputational injury compare to the property-based, honor-based, and dignity-based theories advanced by Post? The short answer is that in important respects it is entirely consistent with each of Post's "concepts" of reputation in defamation law and with the union of all three concepts. That is because the ideational theory is in an important sense formal and thin, and therefore able to accommodate an array of different values that underlies the role the law of defamation has played and continues to play. Sometimes the injury that motivates a plaintiff to sue is one aptly characterized in proprietary or economic terms; sometimes a plaintiff believes his or her honor has been besmirched; sometimes the complaint is fundamentally about a kind of dignitary injury. Defamation law is open to all of these plaintiffs and courts and juries recognize each of these as kinds of losses or injuries. The nature of the injury in all of the cases is in one respect the same: The beliefs, attitudes, opinions, and impressions of third parties toward

---

<sup>49</sup> See *supra* Part II.A.

<sup>50</sup> Post, *supra* note 5.

<sup>51</sup> *Id.* at 693–99.

<sup>52</sup> *Id.* at 699–707.

<sup>53</sup> *Id.* at 708–19.

the plaintiffs have changed and changed in a manner that is to the detriment of the plaintiff in some sense. In today's academic verbiage, one might say that the ideational theory is orthogonal to Post's account.

Nonetheless, the ideational theory qualifies Post's account in a significant way. On my view, Post has not offered an account of the concept of reputation but rather of the kinds of impact good and bad reputations can have on people's well-being. It is as if we said there are three concepts of employment: a proprietary conception, an honorary concept, and a dignitary concept. Being fired hurts economically, hurts in terms of social standing, and hurts in terms of one's sense of dignity. But employment itself is neither a proprietary, honor-based, or dignity-based concept. The solicitousness of a legal or educational system toward securing the good of employment might be trained on any of these three kinds of goods (or more), and one might claim employment is critical to a person for one of these reasons, but these are not concepts of employment. A fair reading of Post's article is making the analogous claim, really: The function of a legal system said to be protecting reputation may be properly linked to goods in the domain of property, honor, and dignity. None is a concept of reputation; all are values that underscore the importance of protecting reputation.<sup>54</sup>

### *C. Provisional Conclusion and Proposed Counterarguments*

According to the ideational theory of reputational injury, a person can be injured by another if the other communicates to third parties in ways that alter how they think and feel about him or her. Moreover, coming to be someone who is thought poorly of by third parties is in many cases an intrinsic injury: It can diminish a person's well-being in a significant way—almost like losing a piece of herself. In this respect, it is like the dignitary injuries of offensive battery or assault and liberty invasions like false imprisonment. For this reason, it is utterly plausible that our law of defamation would empower individuals who can prove that defamatory words about them were communicated to a third party to recover some damages from the person who committed the defamation, at least assuming we have set the fault level for the speaker in a justifiable manner.

The three Parts that follow (III–V) are complex because they involve potential counterarguments to the view advanced thus far. Moreover, rather than responding

---

<sup>54</sup> A similar point about Post's actual aims is succinctly stated by RIPSTEIN, *supra* note 35, at 197 n.19.

to my own objections one-by-one, I allow them to build up, and then construct one rather grand objection. Indeed, I claim (within this dialectical exercise) that each of the individual objections is a hint to what would arguably improve the model of reputational injury advanced in Part II, and I use all of them together to construct a whole alternative model in Part IV: the restricted conception of reputational injury. Part V adjudicates between my own two models, and ends up adhering to the unrestricted ideational conception as the better account of the conception of reputational injury found in the common law of defamation. I also adhere to the view that it is a coherent model, and one in which the doctrine of presumed damages is vindicated.

Readers are entitled to know in advance why—apart from philosophical interest and a sense of putting my own model through due diligence—the challenging, restricted, conception is especially relevant to the ultimate goals of the paper. The structure of my argument thus far seems to have been this:

An abstract ideational conception of reputational injury is justifiable, and on that conception, it is plausible that there is intrinsic reputational injury that occurs as a result of defamation. *General damages as a remedy* is appropriate for intrinsic reputational injury, and *presumed damages* are just a particular form of general damages. Therefore, presumed damages are plausibly an appropriate remedy in some defamation cases.

The gap I worry about is this: It is possible that there are various different versions of an abstract ideational conception of reputational injury. In particular, perhaps there are some versions of what a reputational injury is—even as an intrinsic injury—under which it is an entirely contingent matter whether someone who has been defamed (about whom defamatory statements were communicated to other parties) will have suffered *the special kind of reputational injury* that defamation law aims to protect against. And perhaps that more demanding conception of reputational injury is the version that is ensconced in defamation law. If so, then an impressive argument might still be available—even if an ideational conception is sound—that general damages for reputational injury should not be so quickly available after all and that, therefore, the critique of presumed damages was more powerful than I have acknowledged.

### III. CRITICISMS OF THE UNRESTRICTED IDEATIONAL CONCEPTION

In at least two respects that could plausibly be described as “formal”—what I shall call “breadth” and “depth”—the analytical framework offered above is arguably simpler and more open in its putative scope than the concept of reputation extant today. Sub-parts A and B, below, briefly frame those objections. The last three objections relate to substantive features of the concept of reputation.

#### A. *Breadth*

A snippet from above will help to illustrate the first respect, which I will call *breadth*. I wrote “a reputational injury occurs when some third party’s or parties’ set of ideas about the plaintiff are diminished.” The phrase “some third party” ensures that a reputational injury will occur when someone falsely reports to a child’s parent that that the child has been skipping school regularly; the child’s reputation has been injured, under this framework, even though it is only *one* person whose beliefs about her have changed. Arguably, while one might concede that this change in third-party beliefs could indeed be a setback for the child, it is odd to call it a change in her “reputation.” When one says that “Mr. Jones has a reputation as a strict grader” one is not referring to one person’s view of Mr. Jones, but actually to the ideas that several different members of a community have. The question arises as to whether reputation and reputational injury should be understood to presuppose a large group or at least a substantial swath of minds in a community. I will call this the “community breadth” or “breadth” objection.

The breadth objection relates to a much larger idea that could threaten the framework set forth above in a fundamental way. One of the best developed abstract theories of the concept of reputation is that provided by Lawrence McNamara in his 2007 book *Reputation and Defamation*.<sup>55</sup> McNamara’s contention is that an “*individual’s reputation is a social judgment of the person based upon facts which are considered relevant by the community.*”<sup>56</sup> Although “community” is the part of the definition upon which McNamara places greatest emphasis, the phrase “social judgment” is the one that most clearly indicates that he is regarding reputation as—at least prototypically—something a group of people share in judgment.

---

<sup>55</sup> MCNAMARA, *supra* note 1.

<sup>56</sup> *Id.* at 21 (emphasis in original).

### B. *Depth*

Before answering the breadth objection, it is worth raising another concern that might be viewed as orthogonal to this one. Philosophers have pointed out that terms like “belief,” “feeling,” and indeed a variety of mental state terms, have a kind of ambiguity that relates in part to temporal duration.<sup>57</sup> Consider the sentence “I saw the look on Mark’s face when he got the bill, and I thought he was mad at me for ordering a second glass of wine.” The speaker of that sentence is referring to a *thought* or *belief* in his head: the belief that Mark was angry at him for ordering a second glass of wine. The speaker is giving a snapshot of a belief running through his head at a particular time. That is what philosophers sometimes call an “occurrent belief.”<sup>58</sup>

Similarly, “I saw Mark’s face when he watched his younger sister Mindy read her rejection email from Berkeley. He smirked. At that moment, I really hated him.” The attitude of hating Mark revealed by the speaker is “occurrent,” at a time. We can imagine the speaker going onto say, “But I have gotten to know him since then. He was angry at Mindy because she had belittled all of her high school friends for not having good enough grades to apply to any of the UC schools, and she had teased him for not getting into Berkeley two years earlier. He eventually came around to being really supportive. He is not a judgmental or arrogant guy at all. He is modest and kind, and quite impressive for a 24-year-old. I actually really admire Mark.”

The speaker’s statement that Mark is modest and kind is expressive of a belief, but it is not an occurrent belief but rather what might be called a “standing” belief:<sup>59</sup> one that endures over time, and characterizes her considered set of beliefs (including her belief that he is 24 years old), in such a way that it reflects how she will behave under various circumstances (including what she will say). Similarly, her attitude of admiration for Mark constitutes a standing attitude. It could change, but

---

<sup>57</sup> See, e.g., Eric Schwitzgebel, *Belief*, STAN. ENCYC. OF PHIL. (Jun. 3, 2019), <https://plato.stanford.edu/archives/win2021/entries/belief/> (distinguishing occurrent beliefs from dispositional beliefs).

<sup>58</sup> *Id.*

<sup>59</sup> Here I am admittedly altering what is the standard formulation by philosophers today, one that emphasizes the role of the attributed belief in the persons’ web of actions and dispositions, not so much its temporal duration per se. *Id.*

it is not just a mental state at a time, but an enduring mental state directed toward Mark.

One might use the distinction between occurrent and standing beliefs (or attitudes) to frame the following question: When Zipursky says “a reputational injury occurs when some third party’s set of ideas about the plaintiff are diminished,” are the ideas in question occurrent or standing or either one? If someone blurts out “Sam was driving drunk last night” and the listeners believe that statement as they are hearing it, but do not form a standing belief of that nature, is that a reputational injury to Sam?

The framework put forward in Part II of the paper is, on its face, available for both occurrent and standing beliefs or attitudes, just as it is available for both a single reader/listener and a community of readers or listeners. That is, a statement that generates an occurrent negative belief in one (third) person seems to count as a statement generating a reputational injury. One might argue, however, that the concept of reputation as used in our society pertains to standing beliefs, not purely ephemeral ones. To say that someone has a good reputation as a psychiatrist, for example, is to say something about what numerous people in the community believe and say about the person’s professional competence in this area. And presumably these are standing beliefs, not occurrent ones. In this sense, the ideational thesis appears to fail in two respects. I will call the latter the “mental state depth” or “depth” objection.

### C. *Moral Valence*

It is often contended that the concept of reputation is not just about popularity or positivity but is in important respects *moral* in its orientation, at least insofar as it relates to what is regarded as wrongful in a community.<sup>60</sup> This is a key point in Ripstein’s account<sup>61</sup> and explicit in McNamara’s.<sup>62</sup> A diminution in reputation, on

---

<sup>60</sup> For a broad and sensitive exploration of what this *should* mean for the forthcoming RESTATEMENT (THIRD) OF TORTS: DEFAMATION AND PRIVACY, see Kenneth W. Simons, *Defamatory in Whose Eyes?*, 4 J. FREE SPEECH L. 761 (2024).

<sup>61</sup> RIPSTEIN, *supra* note 35, at 193 (“As a result, being cast in a bad light will inevitably be interpreted in part in terms of the standards prevalent in the community of which the plaintiff is a member. Your reputation resides in the opinions of others, and what those others think of as a wrong is relevant to whether someone has defamed you.”).

<sup>62</sup> MCNAMARA, *supra* note 1, at 15–58 (Chapter 1, entitled “Reputation and Community: The Centrality of Moral Judgment”).

this view, pertains in some part to what might be called “disreputability,” and disreputability connotes a property or aspect of a person that *merits* criticism or loss of esteem. Attributing criminality, dishonesty, professional incompetence, or other wrongful conduct are prototypical cases of defamation, and this is why. On what I will call the “moral valence” objection, the unrestricted ideational conception should be rejected because it lacks this moral valence. A person whom third parties come to regard as severely disabled, for example, is arguably now the object of a less favorable set of beliefs, attitudes, and feelings, but it would not be correct to say this person’s reputation has been injured.<sup>63</sup>

#### D. *Cognitive Content*

The unrestricted ideational theory treated reputation as “the set of thoughts, beliefs, impressions, feelings, opinions, attitudes, and judgments that others have about that person.”<sup>64</sup> Many scholars have regarded defamatory statements as ones that express thoughts, beliefs, and judgments, but not simply expressions of feelings, impressions, or opinions.<sup>65</sup> One might say such mental states do not constitute *beliefs* that third parties have, and *an injured reputation consists of negative beliefs and judgments about a person*—for example, that she is an incompetent surgeon or that he is perjurer. Simply causing someone to be regarded with pity or contempt does not count as injuring them reputationally, it might be argued, unless it is accompanied by a change in actual beliefs about that person; but on the ideational theory, it does seem to count as an injury. I will call this the “cognitive content” objection.

#### E. *Falsity*

Finally, as Jeff Helmreich has pointed out,<sup>66</sup> it is common in the United States today to understand the term “defamation” as referring to statements that by definition are false; it is common to understand “defamation” in such a way that the phrase “true defamation” is a contradiction in terms. One might go one step further and conceive of reputational injury as something that itself involves third persons

---

<sup>63</sup> Cf. Simons, *supra* note 60, at 780–81 (becoming regarded as having a disease does not justify a diminution of esteem).

<sup>64</sup> See *supra* note 39 and accompanying text.

<sup>65</sup> See RIPSTEIN, *supra* note 35; MCNAMARA, *supra* note 1.

<sup>66</sup> Jeffrey Helmreich, *True Defamation*, 4 J. FREE SPEECH L. 835 (2024).

as having false beliefs about the plaintiff, just as the injury of being deceived by another arguably cannot exist unless the recipient of the communication had (as a result of the deception) come to false beliefs. On this “falsity objection,” as I will call it, the version of the ideational conception of reputational injury set forth in Part II fails because it lacks a falsity component.

As Learned Hand famously observed,<sup>67</sup> it does not follow from the courts’ unwillingness to permit recovery without proof of falsity that there is no wrongdoing without falsity.<sup>68</sup> My point as to reputational injury and the irrelevance of falsity is justifiable independently of this point, however. Even if we assume, *arguendo*, that falsity is now required for the legal wrongfulness (or, indeed, moral wrongfulness) of the conduct, non-wrongful conduct can certainly cause a genuine injury. By way of an analogy, a non-negligent driver who runs over and crushes the plaintiff’s foot has caused injury,<sup>69</sup> even if there will be no negligence claim (and even it were not deemed to qualify as a moral wrong). Of course, saying there will be no defamation claim even where there is a reputational injury, unless there was wrongful conduct, calls for an explanation. As I have argued at length elsewhere, the law of torts is a law of wrongs, and the empowerment of individuals to use the courts to hold defendants accountable turns on the defendant having wronged them.<sup>70</sup> To the extent that falsity might be required for a defamation claim, it is far more plausible to interpret this as an implication of the wrongfulness requirement, not a result of the nature of reputational injury.

To be sure, the relations among injuries, cognizable injuries, and rights are complicated in torts. The professional boxer whose more skillful opponent broke his nose with an especially hard punch has plainly been injured, in one respect. Of course, he will be unable to prevail in a battery claim because he consented, but that is not all: Many courts would be inclined to say that his consent entails that he has suffered no *cognizable* injury. In a range of different torts and tort hypotheticals, the argument that the plaintiff cannot credibly claim a right was violated and in that

---

<sup>67</sup> *Burton v. Crowell Publ’g Co.*, 82 F.2d 154 (2d Cir. 1936).

<sup>68</sup> See *infra* Part V.E.

<sup>69</sup> Imagine that the plaintiff, as part of a fraternity hazing, agreed to lie down on a dark highway, camouflaged by a blanket, with his foot sticking out into the road in a virtually invisible way.

<sup>70</sup> See, e.g., Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757 (2012).



sense has no *cognizable* injury is so powerful that it may plausibly be said that the plaintiff was not injured. Moreover, there are some torts that historically have been structured such that the normative status of what is plainly a material harm suffered by the plaintiff goes into an element of the tort, rather than an affirmative defense. A woman who is the victim of a car-jacking (and thereafter must take public transit) will have no conversion claim against the car-jacker if it turns out that the bank, not she, was the only one with a valid possessory interest in the car (because, e.g., she was too far behind on her lease payments); the valid possessory interest is an element of the conversion claim.<sup>71</sup>

Returning to the tort of battery, there is (and has been for at least a century) great contentiousness among doctrinalists studying the tort of battery as to whether lack of consent is an element or consent is an affirmative defense.<sup>72</sup> For other so-called “defenses” to battery, they plainly are *affirmative defenses* and their absence is not an element. Thus, a man suing a police officer for battery because she tackled him will have established the elements of battery even if the police officer was justified in doing so; the police officer will have to establish an affirmative defense (of discipline or law enforcement or defense of a third party).<sup>73</sup> The man (even if he did not suffer enduring physical injury) has in one sense satisfied the injury requirement of the tort, even if in another sense there is no cognizable injury and no rights violation (assuming the tackle was justified).

It will come as a surprise to no one today that the debate in the tort of battery over the status of consent is far from being academic. Especially in battery cases today called “sexual assault,” there is extraordinary contentiousness about how the law should treat the issue of fact over whether there was consent. It is understandable that a defendant would want to insist that because there was consent, the plaintiff suffered no cognizable injury, and, relatedly, that the existence of authentic consent meant there was no violation of the plaintiff’s rights, either. I suggest, however, that there is space for the position that the plaintiff endured an intentional contact by the defendant that was of a general kind that is harmful or offensive. As in the case of the crushed foot, its cognizability as a tort turns on whether it was wrongful,

---

<sup>71</sup> See, e.g., *Sigler v. LeVan*, 485 F. Supp. 185, 202 (D. Md. 1980).

<sup>72</sup> See, e.g., RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12, cmt. 3 (Tentative Draft No. 4, 2019).

<sup>73</sup> *Id.* § 39, cmt. f (Tentative Draft No. 6, 2021).

and because it was battery its wrongfulness turns on whether there was consent. This analysis takes no position on the element versus affirmative defense question. Note, however, that while the wrongfulness determines whether there was a rights violation, it is not necessary to say whether it determines if there was an injury. One could go either way on this, and, absent any evidence to the contrary, the law's choice on whether to say lack of consent is an element or consent is an affirmative defense tells us how the injury is conceived.

The reason for this foray into the contentious issues surrounding the intentional tort of battery is that the interpretive question about the common law of defamation looks less murky in comparison. The principal topic addressed in this article is the analysis of the common law conception of reputational injury pre-*Sullivan* (more precisely, pre-*Gertz*). There is no disagreement among historians or doctrinalists that falsity was not an element in the common law of defamation until the *Times v. Sullivan* revolution; truth was an affirmative defense. Absent a persuasive historical account pointing otherwise, this tells us that the common law conceived of the injury existing as a form of harm—whether cognizable or not— independently of truth or falsity.

The discussion above concerning the relationship among injury, cognizable injury, and plaintiff's rights has the advantage of explaining why—despite the clarity of the historical doctrine—the analysis is not wholly satisfying. If the statement about the plaintiff was actually true, their *injury* turns out not to be *cognizable*. Its lack of cognizability does not turn on the kind of injury it is or its failure to constitute a significant kind of setback to the plaintiff, however. It turns on the plaintiff's lack of a right to be free of it.

#### IV. THE RESTRICTED IDEATIONAL CONCEPTION

The breadth, depth, moral valence, and cognitive content objections—at least as currently stated—are not rooted in defamation law itself but in analytic claims about the concept of reputation. Each contends that I have missed a fundamental feature of the concept of reputation, and, relatedly, the concept of a reputational injury. A person's reputation consists of the shared standing beliefs of members of a community about that person, more specifically about what attributes of that person are deemed to merit esteem or shortcomings that are deemed to merit disapproval, and reputational injury is the advent or increase in shared beliefs as to the latter. This “restricted conception,” while obviously presented in a form I believe

to be particularly analytically useful, closely resembles that put forth by McNamara in his 2007 book, *Reputation and Defamation*.<sup>74</sup>

Were I advancing such a critique, I might illustrate it as follows:

Consider the election for Georgia Senator on November 2020 (and the run-off in January of 2021) between Raphael Warnock (D) and Herschel Walker (R). Media reports at the time indicated that Walker had fathered a son out of wedlock, a son whose existence he publicly denied. Walker's public denials turned out to be short-lived; he was put in a difficult spot when reporters revealed that Walker had actually explicitly declared this same son, by name, as a dependent on his federal tax filings. *This series of reports appears to have done some real damage to Walker's reputation.*

The use of the word "reputation" in the final italicized sentence above is arguably quite typical, and the sentence in which it figures is both comprehensible and plausible. If one had to elaborate on what Walker's reputation was (during earlier phases of the campaign), one would say that there was a core of beliefs associated with Walker, including his stardom as a football player, his not-very-deep acquaintance with politics, his competitiveness, and his willingness to stand as an important figure for the Republican party—especially its Trump-leaning side. Then one might understand the italicized sentence to express the view that his overall esteem in the public's image went down when this information went public. Regardless of what one thinks of having children out of wedlock, untruthfully denying their existence displays a lack of integrity and a moral shortcoming as a father, and failing to acknowledge the objective undeniability of the facts seems to display poor judgment and an unenviable level of intelligence. One would be saying that, roughly speaking, the shared public image of Walker now includes these negative impressions and beliefs about him. It is not just a matter of what some people feel at some moments in time. It is, rather, about a shared public image that has an existence, some endurance, some breadth, a definite moral valence, and a cognitive content (that might or might not be true).

For the purposes of this article, I will refer to the conception of reputational injury just indicated as "the restricted ideational conception" of reputation and reputational injury, and I will refer to the view introduced in Part II as "the unrestricted ideational conception" of reputation and reputational injury. The prior Part can be understood to argue that the restricted ideational conception better cap-

---

<sup>74</sup> MCNAMARA, *supra* note 1.

tures the extant notion of reputation that English speakers use the word “reputation” to express than the unrestricted ideational conception does. The Walker example is meant to illustrate the plausibility of that claim. For the sake of simplicity, we will for now put to one side the question of whether there are conceptions lying between the restricted and unrestricted ones.

## V. THE UNRESTRICTED IDEATIONAL CONCEPTION AND THE COMMON LAW OF DEFAMATION

I now want to frame a doctrinal question using these terms of art: Which conception of reputational injury better accounts for those aspects of the common law of defamation that pertain to reputational injury: the restricted ideational conception or the unrestricted ideational conception? I shall argue that as to each of the dimensions of difference, it is clear that the unrestricted ideational conception of reputation is a substantially better fit.

### A. *Breadth: Disclosure and Special Relationship Cases*

How many people must have their beliefs, ideas, impressions, or attitudes toward the plaintiff changed by a defendant’s defamatory statement in order for the statement to be actionable under the common law of defamation? Is one enough, or must it be several, or must it be a large swath of a community? Is the argument that there was not sufficient breadth in the reach of the defamatory statement a sound legal argument in a defamation case?

The answer to this question is easy and uncontroversial: One is enough. Narrow reach is not an argument against liability, even if it is sometimes available as an argument to minimize damages. Two kinds of cases bring home the clarity of this point. In one kind, defamation claims are contrasted with public disclosure or false light privacy claims on just this point.<sup>75</sup> The latter claims do require broad dissemination of private information about the plaintiff, and are thrown out if there are no defensible allegations of such dissemination. By contrast, a claim for libel or slander requires, in principle, only that one person other than the plaintiff read or hear the defendant’s defamatory statement about the plaintiff.<sup>76</sup>

---

<sup>75</sup> See, e.g., *Moore v. Big Picture Co.*, 828 F.2d 270, 274 (5th Cir. 1987) (“[W]idespread publicity . . . is required before a successful false light cause of action may be established.”).

<sup>76</sup> *Ostrowe v. Lee*, 256 N.Y. 36, 38 (1931) (Cardozo, J.) (citation omitted) (“A defamatory writing is not published if it is read by no one but the one defamed. Published it is, however, as soon as read by any one else.”).

A second kind of claim involves one reader or listener who is in an especially important position relative to the plaintiff's well-being: a spouse, a child, a future employer. Turning that person's opinion—even that one person's opinion—turns out to be very important to the plaintiff, and therefore the injury was actually very significant notwithstanding that only one or a few persons received the defamatory communication and revised downward their estimation of or disposition toward the plaintiff.

Now is a good point to address two objections that critics might make of the prior discussion and the three sections that follow. First, is Zipursky begging the question by assuming that if courts recognize a cause of action for defamation, they must be deeming the plaintiff to have incurred a genuine reputational injury? Take the future employer case: maybe the courts deem the injury to be the plaintiff's failure to get the job, which is a concrete and indeed financial injury. Why suppose the law deems a single person's (the potential employer's) more negative view of or attitude toward the plaintiff to be a reputational injury in and of itself?

The immediately available doctrinal answer to this question is that a poor employment reference (assuming the plaintiff proves the reference was false and not given in good faith, thus defeating a privilege) counts as slander per se and there is recovery without proof of special damages. But this brings us to the deeper objection that might be put against the argument above: Many critics of presumed damages in defamation law predicate their critique on cases like this, arguing that the law is actually sanctioning a defendant in an almost regulatory or public law mode if it is not requiring that damages be proved and it is not even requiring proof of reputational harm. To loosen the definition of reputational harm so that this counts as reputational harm is simply to beg the question. And, a critic would add, it only tightens the circularity to argue that, from an interpretive point of view, the law's willingness to recognize a cause of action in such circumstances entails that the law must deem this looser conception of reputational harm to be an authentic injury. Or so the objection goes.

Two points in reply will have to suffice for now. The first is that while the objection might be forceful if I were unable to provide a plausible explanation of how a narrow or even single-point change in the ideas, opinions, or attitudes of others would be a setback, that is not the case. Surely it is a major setback to a person if only his wife were persuaded that he murdered their son (thinking of *Lauer*), or only a successful entrepreneur's father were caused (by a defamatory investigative

report) to believe that his son's business empire was created entirely by fraud. Even on the employer front, a handful of poisoned minds about someone's professional capacities is very plausibly an injury, something one would very much not want, and one would understandably feel an entitlement to hold someone accountable for having caused this through lies. This would be true even if financial consequences could not be identified.

Second, even if the narrowness of the community of hearers or readers renders the word "reputation" an imperfect fit, the law is full of fits that are imperfect in this sense; it may well be that the capacity to craft categories that work well turns on the willingness of legal participants to stretch various concepts under well understood circumstances. "Hearsay," "invitee," "trespasser," "Good Samaritan," "special relationship"—all are words or phrases with core meanings, and the law deliberately goes well beyond that core in a wide range of cases for a wide range of reasons. The upshot is that even if the ideational impact is only on a narrow band of persons—too narrow to fit the restrictive conception—defamation law takes seriously that impact and conceives of it as a reputational injury.

### ***B. Depth: Retraction Cases***

Recall that we distinguished between situations in which a reader or listener responded to the defamatory statement by forming a durable belief, judgment, or attitude toward the plaintiff, and those in which all we can be confident of is that the reader or listener understood the defendant's statement, understood it to be about the plaintiff, and understood its defamatory meaning at one particular point in time. Does a defamation action require the first, or will the second sometimes suffice?

The short answer is clear: The second, thinner account of the mental state of the third party will sometimes suffice; a more lasting impression is not necessary. Imagine the defendants are boycotting a store in their community, asserting to each customer who enters that the owner is racist. Such persons likely face defamation actions for the lost revenue on sales at the store, if the owner can prove such statements were made to third parties who then had a negative belief about the owner in the moment they entered the store. Similarly, consider a person who dishonestly points to the plaintiff and says (due to negligent factfinding), "this is the man that ran over your child and left the scene of the accident." If the parent of the injured child should respond immediately by physically beating the referent of the negli-

gent speaker's words, the relevant mental state is the roughly instantaneous concurrent belief that precipitates the conduct, but that will be good enough for a defamation claim.

A broader doctrinal point with the same implications concerns the force of retractions in defamation law. Immediate retractions do not undermine a defamation claim, but merely go to damages.<sup>77</sup> Sarah Palin's case against the *New York Times* provides a dramatic example. The *Times* correction was done within less than 24 hours, yet this did not stop the case from moving forward at all.<sup>78</sup> One would think that a defendant could not be attributed responsibility for standing belief changes in third parties, but even rather ephemeral changes are actionable.

### C. *Moral Valence: Disease and Difficult Cases*

The question here is whether injuring someone's reputation sufficiently to generate a plaintiff's defamation claim requires causing people's *moral* estimation of the person to drop. Can a person have suffered a reputational injury—for purposes of the common law of defamation—by virtue of some opinions, beliefs, feelings, and attitudes a third person or persons have about the person, even if these mental states are not a matter of viewing the person to be less worthy from a moral point of view?

If we are asking this question as a matter of positive law and legal history,<sup>79</sup> the answer is plainly “yes.” We can see this in at least two ways. The most obvious is that it has long been a version of slander *per se* to assert of someone that he or she has a “loathsome” disease. No doubt it is true that disease were stigmatized more in the past than they are today, and no doubt some infectious diseases—those that are sexually transmitted—may have been associated with a lack of moral virtue. But the law of defamation on disease makes clear that none of this needs to be true in order for there to be a slander *per se* claim.

---

<sup>77</sup> *Palin v. N.Y. Times Co.*, 940 F.3d 804, 808–09 (2d Cir. 2019).

<sup>78</sup> *Id.*

<sup>79</sup> Simons, *supra* note 60, at 780; *cf.* Slavny, *supra* note 1 (arguing from a *normative* point of view there can be defamatory injury that should be redressable, even where the moral valence constraint is not satisfied, but that cases with and without moral valence should be treated differently).

A related point arises in the famous Russian princess case, *Youssouppoff v. MGM*.<sup>80</sup> The plaintiff alleged that an MGM movie defamed her by portraying a Russian princess who resembled her, and depicting the Princess as having been raped by Rasputin. The Princess denied this, and sued for defamation. As to the argument that it is not immoral to have been raped and therefore there could be no claim for defamation, the court bridled. Of course this could injure her reputation, it confidently announced.

Justice Holmes' famous decision in *Peck v. Tribune* comes at the same point from a different angle.<sup>81</sup> The defendant argued that it was not defamatory to say of someone that she drinks whiskey, and the plaintiff replied, credibly, that it was defamatory *in her community* to say that. Holmes said that if it would lower her opinion in the minds of a respectable minority, then it could move forward. He evidently saw the law as caring about reputational injury in the sense of other people having a view of the person that is unfavorable.

#### ***D. Cognitive Content: Cartoons Cases and the Definition of Defamatory Content***

Recall the traditional formulation of what is defamatory, stating that defamatory words are those:

which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society.<sup>82</sup>

This language goes well beyond representational beliefs about someone—aversion is an example of a feeling one person can have about another that need not be articulable as a belief that someone has a certain attribute. Indeed, one might easily have added “repulsion” to this list. The final clause indicates that defamatory words are ones that engender obstacles to a person's associations with others. Inducing affect in others that leads to ostracism and aversion or merely changes the nature of the interaction or willingness to interact and does so in a negative manner would seem to qualify here. It is thus unsurprising that pictures, cartoons, and so on have typically been understood to be capable of defamatory meaning. Likewise plaintiffs sometimes sue in defamation when they feel their reputation has been damaged by

---

<sup>80</sup> *Youssouppoff v. MGM Pictures, Ltd.* [1934] 50 TLR 581 (HL).

<sup>81</sup> *Peck v. Trib. Co.*, 214 U.S. 185, 190 (1909).

<sup>82</sup> *Kimmerle v. N.Y. Evening J., Inc.*, 186 N.E. 217, 218 (N.Y. 1933).



demonstrably ‘overboard’ satirical commentaries or depictions of them, even if it is clear that no one has taken or would take them at face value. One’s image can be damaged even if no false beliefs have actually been generated.

*E. Falsity: Public Concern and Media Defendant Cases and the Evolution of Falsity*

Ironically, a strong legal argument can be made that *today* a reputational injury must involve the generation of false beliefs about the plaintiff (even though it was not always so).<sup>83</sup> This argument stems from Justice O’Connor’s opinion in *Philadelphia Newspapers, Inc. v. Hepps*,<sup>84</sup> stating that plaintiff bears the burden of proving falsity (at least in a case involving a matter of public concern and a media defendant), and especially from Chief Justice Rehnquist’s opinion in *Milkovich v. Lorain Journal Co.*,<sup>85</sup> holding that a defamation claim is not actionable unless it contains a provably false statement or an implication of such provably false statement. Both of those decisions, insofar as they purported to be describing defamation law (rather than pruning or transforming it) mischaracterized the common law, for it is clear that falsity was not in fact always a requirement. The defendant in this sort of case traditionally (prior to *Hepps*) had to establish truth as a *defense*, not simply that the plaintiff has failed to establish falsity as an element. As Hand explained in *Burton v. Crowell Publishing Co.*,<sup>86</sup> the social good done by privileged reporting of true statements generates a privilege. In *Burton*, however, the representation “in fact made of the plaintiff a preposterously ridiculous spectacle.”<sup>87</sup>

In accordance with the Restatement (Second), falsity is now an element.<sup>88</sup> The common law of most states has now changed to reflect that view. Consider that if the statement is not one of a sort that could be true or false, then a fortiori it is not

---

<sup>83</sup> See, e.g., *New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (Tex. 2004) (satirical article nonactionable).

<sup>84</sup> 475 U.S. 767 (1986).

<sup>85</sup> 497 U.S. 1 (1990).

<sup>86</sup> *Burton v. Crowell Publ’g Co.*, 82 F.2d 154, 156 (2d Cir. 1936) (“The only reason why the law makes truth a defense is not because a libel must be false, but because the utterance of truth is in all circumstances an interest paramount to reputation; it is like a privileged communication, which is privileged only because the law prefers it conditionally to reputation.”).

<sup>87</sup> *Id.* at 155.

<sup>88</sup> RESTATEMENT (SECOND) OF TORTS § 558(a).

false. An implication is that defamatory statements cannot be of the sort that is neither true nor false. Notably, however, this feature of defamation law is not part of the common law conception; it is part of the SCOTUS and ALI rewrite of defamation law.

### F. Summary

The upshot of the discussion in this Part is that the conception of reputational injury contained in the common law of defamation is quite broad; the unrestricted ideational conception better accords with common law defamation doctrine and its historical core than the restricted ideational conception.<sup>89</sup> The question in this Part has been largely interpretive: I have not been asking, principally, which conception of reputational injury should be guiding courts in defamation actions, but rather which has been doing so. Nonetheless, the explanation and articulation of the unrestricted ideational conception in Part II was not purely positive. It set forth reasons for thinking that reputational injuries in the unrestricted sense were often substantial, not just instrumentally but intrinsically.

Note that it is possible to utilize many of the considerations motivating the “restricted” conception of reputational injury in a manner that addresses free speech concerns at a more basic level. The article commenced with the statement that defamatory words are those “which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace,”<sup>90</sup> and it utilized that broad set of ideas to construct an expansive analysis of what constitutes a reputational injury. It might be possible, however, to retain the unrestricted conception of *reputational injury* but endorse a narrower criterion for what counts as *defamatory speech*. One way to do this would be to define “defamatory words” as those which tend to injure a person’s reputation *in the restricted sense*.<sup>91</sup> If the breadth, depth, moral valence, and cognitive considerations

---

<sup>89</sup> It is important to acknowledge two respects in which the argument of the last few pages has been imprecise: (i) it has treated the common law of defamation as something of a monolith, rather than confronting the fact that many different jurisdictions (even within the United States) structure their law differently, and that there has been change over time even within most single jurisdictions; (ii) it has taken the restricted conception and the unrestricted conception as if these were the only two options, when in fact restrictedness and unrestrictedness are varied in at least four dimensions.

<sup>90</sup> *Kimmerle*, 186 N.E. at 218.

<sup>91</sup> *Cf. McNAMARA*, *supra* note 1 (endorsing a conception of reputation similar to the restricted sense).

were built into what counts as “reputation” for ascertaining whether a statement tended to injure reputation, a narrower range of defendant statements would be candidates for defamation liability, assuming such defamatory words were spoken. Consideration of such a model goes beyond the scope of this article.

#### CONCLUSION

It is worth reviewing how Part V, despite its predominant emphasis on the positive law, fit into the larger critical enterprise of this article as it pertains to presumed damages. Part I argued that insofar as the phrase “presumed damages” refers to general damages in defamation law, the availability of such damages is entirely consistent with the law of many other intentional torts, such as battery and false imprisonment. The peculiar jurisdictional history of the defamation torts helps to explain why the term “presumed” damages was used in this tort and not the other intentional torts, thereby casting doubt on the critics’ theory that presumed damages was really just a tool to sanction unpopular speech. Part II deepened this account by: (i) providing a philosophical theory of reputational injury that deems reputation to be the set of ideas and attitudes that third parties have about someone, and reputational injury to be a kind of diminution on those ideas and attitudes; (ii) arguing that while reputational injury can certainly be instrumentally harmful, it can also be intrinsically harmful. General damages—frequently under the label of “presumed damages”—provide compensation for such intrinsic harm.

In Parts III and IV, I once again took up the cause of the critics of presumed damages, imagining that they might concede to a version of an ideational theory of reputation and to the idea of intrinsic reputational harm, but still object to the idea that mere publication of a defamatory statement about the plaintiff to a third party, in libel and slander *per se* cases, should be deemed sufficient for presumed damages. The core of that objection was that *authentic* reputational injury requires that a person’s esteem in a *community* (not just with one other person) be degraded; that community members’ mental states be changed in an *enduring* (not merely temporary) way; that the statement *diminish the plaintiff’s moral standing* (not just the favorableness of opinion in any sense); and that it do so by generating *false beliefs* (not merely attitudes, feelings, impressions, and dispositions) about the plaintiff. These objections were consolidated under the rubric of the “restricted ideational conception.” The point was that if that kind of change in the mental states of third parties was required for an actual reputational injury, then proving mere publication of a defamatory statement about the plaintiff to a third party at one point in

time does not establish such an injury, and presumed damages should thus not be available from proof of publication.

Part V conceded for the purposes of argument that such a critique would be forceful if the conception of reputational injury entrenched in the common law were restricted in the ways just envisioned. Delving deep into defamation doctrine, however, it showed that the common law utilizes a far less restrictive conception of what constitutes reputational injury; for normative reasons set forth broadly in Part II, it does so in a coherent and plausible manner. Given that the unrestricted conception is the conception rooted in the common law of defamation that we have, the critique of Parts III and IV fails, and the conceptual coherence of the doctrine of presumed damages is, to that extent, vindicated.

In concluding, I want to be candid about many of the significant questions about presumed damages I have not considered. These include, among others, whether the discretionary quality of presumed damages should be regarded as an especially serious problem from a First Amendment point of view;<sup>92</sup> whether

---

<sup>92</sup> Consider a more complete version of the Justice Powell critique from *Gertz v. Robert Welch, Inc.*, quoted earlier in the paper:

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. *The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.* More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

418 U.S. 323, 349 (1974) (emphasis added). The portions of the text I have not italicized are the ones to which I have responded so far, but the italicized text contains an additional argument based on discretion, and I have not addressed that. The argument contends that the discretion built into such a loosely defined form of damages provides juries with room to utilize their awards to punish speech, including unpopular speech. I have no reason to contest that statement, nor do I have reason to contest the subsequent statement that the prospect of relatively untethered discretion to punish unpopular speech often triggers substantial First Amendment concerns. Several mitigating considerations bear mention, however. One is that the Supreme Court cases in this vicinity that shut down

providing presumed damages but only in a nominal amount (without further proof) would be the most defensible position; and whether the account of presumed damages provided through the unrestricted ideational conception can be squared with the libel/slander distinction and the *per se/per quod* distinctions in their respective areas.

Nonetheless, the article has been quite ambitious. It has offered an analytical model of the nature of reputational injury, contended that the model fits the law of defamation, and argued that on this model, there are plausible reasons that presumed damages should be understood as a form of general damages that is familiar from many dignitary torts and consonant with the way damages law works in tort law. To this extent, I have fended off some of the most common arguments that presumed damages in defamation law are anomalous and indefensible. Far from it: They implement the fundamental idea that the law of torts permits those who were wrongfully injured by another to hold their injurer accountable at a court of law.

---

liability do so not because of the quantity of damages but because of the standard of liability. Moreover, it is not just general damages that are susceptible to discretionary inflation; nonpecuniary damages generally present a similar problem.

