
INSURING ALGORITHMIC LIABILITY: A RESPONSE TO ARTIFICIAL INTELLIGENCE, JUDICIAL EVOLUTION, AND INSURANCE[†]

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In recent years, it has become increasingly clear that algorithmic platforms such as TikTok, Instagram, and YouTube can cause substantial emotional and psychological harm, particularly to young or vulnerable users.¹ The rapid development of artificial intelligence (“AI”) has both intensified this danger and created new risks that AI-generated content will directly harm individuals.² As awareness of the scale and seriousness of these injuries has grown, debate has intensified over who should ultimately bear the resulting costs.

Renee Henson’s excellent article, *Artificial Intelligence, Judicial Evolution, and Insurance*, offers a clear and compelling answer.³ Henson argues that insurers can, should, and ultimately will bear the risk that algorithmic platforms will cause emotional, psychological, and sometimes even physical harm to individual users.⁴ She grounds this claim in a shifting doctrinal landscape that increasingly threatens to hold firms liable for certain real-world harms that are caused by their algorithmic platforms.⁵ For decades, courts largely foreclosed such liability based primarily on

[†] An invited response to Renee Henson, *Artificial Intelligence, Judicial Evolution, and Insurance*, 106 B.U. L. REV. 241 (2026).

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¹ See Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 796 (2022) (“But privacy harms more often involve intangible injuries, which courts address inconsistently and with considerable disarray.”); JONATHAN HAIDT, *THE ANXIOUS GENERATION: HOW THE GREAT REWIRING OF CHILDHOOD IS CAUSING AN EPIDEMIC OF MENTAL ILLNESS* 27 (2024) (documenting rise in mental illness among adolescents in 2010s); Alan Z. Rozenshtein, *Moderating the Fediverse: Content Moderation on Distributed Social Media*, 3 J. FREE SPEECH L. 217, 221 (2023) (recognizing need for content moderation to create widely adopted digital platforms).

² See Julian De Freitas & I. Glenn Cohen, *The Health Risks of Generative AI-Based Wellness Apps*, 30 NATURE MED. 1269, 1270 (2024); Daniel Schwarcz, Tom Baker & Kyle Logue, *Regulating Robo-Advisors in an Age of Generative Artificial Intelligence*, 82 WASH. & LEE L. REV. 775, 779 (2025).

³ Renee Henson, *Artificial Intelligence, Judicial Evolution, and Insurance*, 106 B.U. L. REV. 241 (2026).

⁴ See *id.* at 248–50.

⁵ *Id.* at 264–85.

Section 230 of the Communications Decency Act,⁶ which shields firms from being treated as the publisher or speaker of third-party content contained on their platforms.⁷ Henson's article details how this protection is eroding. Section 230 does not apply to content that is directly produced by generative AI systems, and courts are increasingly narrowing the statute's scope, even for traditional platforms, when plaintiffs allege defects in recommendation algorithms or age verification regimes.⁸ At the same time, courts have shown growing receptiveness to applying products liability to algorithmic platforms and retreated from expansive First Amendment defenses.⁹

Henson predicts that this changing doctrinal landscape will gradually prompt the development of insurance that covers liability arising from the use of algorithmic platforms.¹⁰ Surprisingly, such coverage is not currently provided by many conventional liability insurance products, including Commercial General Liability coverage, Businessowners' Policies, Errors and Omissions insurance, or Cyber Insurance.¹¹ This gap, Henson argues, is neither natural nor inevitable.¹² Rather, it reflects the historically limited liability exposure of algorithmic platforms and the cautious, reactive posture of insurers.¹³ As the prospect of liability becomes more concrete, she contends, insurers will adapt by offering coverage for these risks.¹⁴ By identifying this inflection point now, Henson aims to hasten that adjustment, encouraging innovation in AI while protecting smaller and socially valuable firms from the threat of crippling liability.

Henson's arguments are largely convincing, sometimes even more so than she suggests. Consider her claim that many forms of AI-driven liability remain uncovered by existing insurance products.¹⁵ Although she examines several lines of coverage to reach this conclusion, the most plausible candidate for coverage is Tech Errors and Omissions ("E&O") insurance. Such

⁶ 47 U.S.C. § 230.

⁷ See Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453, 453 (2018); JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 2* (2019).

⁸ Henson, *supra* note 3, at 272-75.

⁹ *Id.* at 275-77.

¹⁰ See *id.* at 288-89; see also Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 133 YALE L.J. 2165, 2254-55 (2024); Tom Baker, *What Is Insurance for Tort Law*, 112 VA. L. REV. (forthcoming 2026) (manuscript at 8) (on file with author).

¹¹ Henson, *supra* note 3, at 292-301.

¹² *Id.* at 249 ("Although the jurisprudential turn identified in this Article is predicted to cause a wave of incalculable losses, the insurance market is capable of insuring algorithmic liability.").

¹³ See Peter Molk, *Barriers to Insurance Innovation*, 42 YALE J. ON REG. 1071, 1087 (2025).

¹⁴ Henson, *supra* note 3, 249-51.

¹⁵ *Id.* at 244-45.

policies typically cover liability for “any negligent act, error, [or] omission . . . by the Insured that results in the failure of Tech Products to perform the function or serve the purpose intended.”¹⁶ At first glance, the algorithmic liability at the center of Henson’s article appears to fall squarely within this grant of coverage. That prospect, however, is often undermined by exclusions for any loss arising out of “physical injury, sickness, disease, or death of any person, including any mental anguish or emotional distress resulting from such physical injury, sickness, disease, or death.”¹⁷ Although such exclusions may not apply to suits alleging stand-alone psychological or emotional harms (rather than psychological or emotional harm that is a byproduct of physical harm), some Tech E&O policies contain broader (or less ambiguous) exclusions that would plainly encompass claims of this kind.¹⁸

Also persuasive is Henson’s account of why the doctrinal developments she identifies are likely to drive some firms to value liability insurance. Although she emphasizes the risk of devastating judgments, shifts in caselaw also create a significant and more immediate threat to the firms behind algorithmic platforms: the escalating cost of defending against lawsuits. Historically, firms routinely succeeded in resolving such suits at the motion-to-dismiss stage by invoking Section 230, the First Amendment, or the inapplicability of products liability doctrine, thereby avoiding substantial litigation expense.¹⁹ As courts increasingly permit these suits to proceed into discovery, defense costs will rise sharply, and the volume of suits is likely to increase as well. Because liability insurance typically covers defense costs as well as ultimate judgments, many firms facing these emerging risks are likely to view insurance not merely as a hedge against catastrophic judgments, but as a practical response to the growing burden of litigation itself.²⁰

What is less clear is whether these dynamics will, in fact, induce insurers to offer coverage for the specific forms of algorithmic liability on which

¹⁶ BEAZLEY, BEAZLEY MEDIA TECH, <https://www.beazley.com/globalassets/product-documents/policy-form/beazley-media-tech-policy-us.pdf> [<https://perma.cc/ZPS8-Q4D7>] (last visited Feb. 2, 2026).

¹⁷ *Id.*

¹⁸ *See* COALITION, COALITION CYBER AND TECHNOLOGY POLICY 3.0, <https://brooksbraithwaite.com/wp-content/uploads/2025/07/Coalition-UK-Cyber-and-Technology-policy-3.0.pdf> [<https://perma.cc/83FF-AL2F>] (last visited Feb. 2, 2026). Notably the Coalition policy does except from its bodily injury exclusion certain claims for “Multimedia Content Liability,” which include, among other things, claims for defamation, infliction of emotional distress, violation of privacy rights, invasion or interference with an individual’s right of publicity, and plagiarism. *See id.* However, this coverage would presumably not extend to many of the products liability claims that are the focus of Henson’s article.

¹⁹ *See* Henson, *supra* note 3, at 245–46.

²⁰ *See* KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION 633 (8th ed. 2025).

Henson focuses. The central uncertainty concerns the identity and scale of the firms that face meaningful exposure to such claims. It is not evident how many algorithmic platforms are genuinely at risk of liability beyond a small set of dominant technology companies such as TikTok, Google, Meta, and OpenAI. Yet these firms can plausibly absorb large losses without insurance, and often prefer to do so rather than pay premiums to transfer that risk to insurers.²¹ Although Henson is surely right that smaller platforms, such as Character AI, would place a high value on insurance that protects against insolvency,²² it remains uncertain whether their numbers and aggregate risk are sufficient to support the development of a robust new insurance market.

A further uncertainty is whether the emergence of a robust liability insurance market for algorithmic harms would in fact be socially desirable. Henson argues that such markets would foster innovation in AI and protect smaller, otherwise valuable firms from potentially crushing liability.²³ But the liability that Henson envisions would apply only to platforms that use algorithms to curate videos, generate conversations, or distribute other forms of content.²⁴ Even if uninsured liability meaningfully constrains innovation in this domain, it is unlikely to impede progress toward more transformative AI systems or applications. The race to develop advanced AI is driven primarily by the promise that this technology will transform knowledge work, scientific discovery, invention, education, and national security.²⁵ Liability exposure for algorithmic platforms that inflict psychological or emotional harm is therefore unlikely to meaningfully slow these broader trajectories of AI development.

Meanwhile, the emergence of a robust insurance market covering the risks posed by algorithmic platforms could weaken the deterrent force of tort law. By insulating platforms from the financial consequences of causing substantial emotional, psychological, and physical harm, insurance may reduce firms' sensitivity to the social costs of their design and deployment choices. This concern reflects the familiar problem of moral hazard that

²¹ See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1561 (1986).

²² Henson, *supra* note 3, at 298-99.

²³ *Id.* at 298-300.

²⁴ See *id.* at 304 ("If insurers can devise mechanisms to cover risks such as maritime ship fraud, they should be able to develop models to insure against mental and emotional harms arising from algorithmic liability.").

²⁵ See Dario Amodei, *Machines of Loving Grace*, DARIOAMODEI.COM (Oct. 2024), <https://www.darioamodei.com/essay/machines-of-loving-grace> [<https://perma.cc/2C9B-VC3C>]; Robert Booth, *'It's Going Much Too Fast': The Inside Story of the Race to Create the Ultimate AI*, GUARDIAN (Dec. 1, 2025, at 05:00 ET), <https://www.theguardian.com/technology/ng-interactive/2025/dec/01/its-going-much-too-fast-the-inside-story-of-the-race-to-create-the-ultimate-ai>.

accompanies all forms of insurance.²⁶ To be sure, insurers can and often do attempt to counteract moral hazard through tools such as risk-based pricing, premium increases following large losses, and the promotion of best practices.²⁷ But insurers' ability to deploy these mechanisms effectively varies considerably across contexts.²⁸ Where risks are novel, rapidly evolving, and poorly understood, as is particularly the case with emerging AI technologies, insurers' capacity to use conventional underwriting and loss-control tools to transmit the deterrent force of tort law is highly uncertain.²⁹

Taken as a whole, Henson's article makes a substantial and timely contribution to debates over algorithmic harm, liability, and insurance. She offers a careful and sophisticated account of how evolving doctrine may reshape the allocation of risk, and she does so with a clear appreciation of the institutional limits of both insurance markets and tort law. At the same time, the analysis leaves open important questions about whether insurers will, in fact, step into this space, which firms will drive any demand for coverage, and whether insurance will ultimately advance or undermine the social goals of deterrence and innovation. These uncertainties do not detract from the strength of Henson's project. Instead, they underscore its value by clarifying where future doctrinal developments, market responses, and empirical inquiry will matter most.

²⁶ See Daniel Schwarcz, *Coverage Information in Insurance Law*, 101 MINN. L. REV. 1457, 1486-88 (2017).

²⁷ See Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 231 (2012).

²⁸ See Kenneth S. Abraham & Daniel Schwarcz, *The Limits of Regulation by Insurance*, 98 IND. L.J. 215, 217-18 (2022) (explaining insurers often fail to meet lofty expectations of regulating insured behavior).

²⁹ See Daniel Schwarcz & Josephine Wolff, *The Limits of Regulating AI Safety Through Liability and Insurance: Lessons from Cybersecurity*, 95 FORDHAM L. REV. (forthcoming 2026) (manuscript at 5) (on file with Boston University Law Review); SHAUHIN A. TALES, INSURING CYBERINSECURITY: INSURANCE COMPANIES AS SYMBOLIC REGULATORS 7-8 (2025). Cf. Anat Lior, *Innovating Liability: The Virtuous Cycle of Torts, Technology and Liability Insurance*, 25 YALE J.L. & TECH. 448, 452-53 (2023) (recounting evolution of fire insurance during First Industrial Revolution); Gabriel Weil, *Instrument Choice in AI Governance: Liability as the Indispensable Core* 3-4 (June 5, 2025) (unpublished manuscript) (on file with Boston University Law Review) (explaining liability for harm is needed before firms will internalize negative externalities).