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The Right to Domain Silent: Rebalancing Tort Incentives to Keep Pace with Information Availability for Criminal Suspects and Arrestees

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The Right to Domain Silent: Rebalancing Tort Incentives to Keep Pace with Information Availability for Criminal Suspects and Arrestees

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Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.

—*Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)

INTRODUCTION

One nondescript evening, Dale Menard waited in a park for a friend to pick him up.¹ When his friend did not arrive on schedule, Menard looked into the window of a nearby retirement home to check the time.² Shortly thereafter, Menard was arrested based on a resident's prowler report and held by the Los Angeles Police Department for two days.³ The arrest was based purely on a misunderstanding, and the LAPD never brought charges against Menard.⁴ The police did, however, forward his arrest record and fingerprints to the FBI as part of a routine record exchange.⁵ One misunderstanding culminated in extended litigation to expunge Menard's criminal FBI file.⁶ While expungement alone seems an arduous task, this problem has become even more significant because of the internet. Menard would have faced nearly insurmountable hurdles to removing an online story about the incident, revealing an area of law in serious need of reform.⁷

This type of misleading information is especially troubling as it relates to internet publications. The internet makes vast amounts of information readily available and does not require much expertise or

1. William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby*, 23 U. KAN. L. REV. 1, 7 (1974).

2. *Id.*

3. ARYEH NEIER, *TAKING LIBERTIES* 89 (2003); Rehnquist, *supra* note 1, at 7.

4. Rehnquist, *supra* note 1, at 7.

5. *Id.*

6. *Id.*

7. *See infra* Section II.B.

effort to find it.⁸ This has led to an unprecedented ability to find out about anyone—from ourselves to random strangers. Menard, for example, might dread the repercussions if, instead of just social media profiles, a search of his name yielded information about his arrest and detention. If charges were dropped or never filed,⁹ the “publishee”¹⁰ may be under no requirement to disclose his arrest, yet an easily accessible record exists via a quick Google search by anyone who knows his name. That individual has no control over whether the information gets updated or removed regardless of how false or misleading it might be in light of subsequent events. The harm of incomplete information stemming from this lack of control is exacerbated by the accessibility of online information.

In contrast to the expansiveness of information accessibility, an individual who finds himself the subject of online stories about his arrest or criminal investigation has only extremely limited options. Extra-judicial solutions range from inadequate to nonexistent.¹¹ An individual suing under privacy tort or defamation is unlikely to prove the elements of the offense,¹² much less survive a First Amendment challenge.¹³ With no realistic cause of action, a publishee is left to request that the information be removed and is at the mercy of the publisher to honor that request.

Individuals wishing to protect sensitive or harmfully unflattering information would appreciate the availability of options

8. Frederick Schauer, *Internet Privacy and the Public-Private Distinction*, 38 JURIMETRICS J. 555, 557–59 (1998).

9. The clearest need for a remedy exists in circumstances like Menard’s, where an individual was arrested clearly for being in the wrong place at the wrong time with no indication of wrongdoing. However, the solution proposed in this Note may also extend to any situation in which an individual was arrested but the charges were later dropped. Though Menard’s case may provide the most sympathetic case needing remediation, the importance of not having a reputation stained by misleading reports of past criminal action is strong enough to justify extending protection beyond the set of clear-cut circumstances to which it would be limited if it were to apply only to Menard-like situations.

10. In this Note, “publishee” denotes an individual whose arrest or criminal investigation is the subject of an internet publication, despite the fact that those charges were dropped or never pursued.

11. See, e.g., Allyson Haynes Stuart, *Google Search Results: Buried if Not Forgotten*, 15 N.C. J.L. & TECH. 463, 493–96 (2014) (describing Google’s somewhat circular and likely ultimately ineffective removal-request process); Bill Keller, Opinion, *Erasing History*, N.Y. TIMES (Apr. 28, 2013), <http://www.nytimes.com/2013/04/29/opinion/keller-erasing-history.html> [perma.cc/3QAY-TTMU] (describing various news sources’ approaches to handling removal or update requests).

12. See *infra* Section II.B.

13. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (balancing privacy claims and free press and finding that a State “may [not] impose sanctions on the accurate publication of [information] obtained from public records”).

such as removal of the information—or search results that lead to it—or adding a disclaimer providing updated, and likely more flattering, information. But though an individual in this predicament would want those options, any interest in privacy must be balanced against freedom of the press.¹⁴ Publishers have compelling reasons to publish information of this type and strong rights that protect their ability to do so.¹⁵ Thus, it is necessary to consider the interests of both publishers and publishees in crafting a solution that creates a proper balance of rights and resulting incentives. The problem with the status quo is that it tips the scales too far in favor of publishers and leaves publishees without any meaningful leverage to assert their privacy interests.¹⁶

This Note examines the proper balance between an individual's privacy interests and a publisher's rights in the age of the internet. Specifically, this Note is primarily concerned with internet disclosures regarding the arrest or criminal investigation¹⁷ of an individual against whom charges were never pursued. This focus highlights the disconnect between the vast amount of information currently available and the extremely weak protection provided by dated and ineffective tort laws, which were developed at a time of much more limited information accessibility. Part I begins by describing the predicament that a publishee faces in trying to remove or update information under the current state of the law and explores the competing interests and rights of publishers. Part II examines the right to privacy as a legal foothold for publishees' rights, describes how the current legal regime has failed to adapt to technological changes that greatly expand information accessibility, and explores two potential solutions to illustrate the complex intermingling of issues that arise when attempting to address the current lack of remedy. To begin to bridge the disparity between the ineffective existing tort regime and the realities of modern technology, Part III proposes a modification to the current understanding of defamation and privacy tort law: determine

14. *See id.* ("In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society.").

15. *See infra* Section I.B.

16. As described in Section II.A, "privacy" encompasses both a more traditional "right to be let alone" and an interest in having any publication contain truthful information that is neither false nor misleading.

17. The updated torts proposed in this Note apply to persons about whom reports of criminal investigation or proceedings, which have subsequently been dropped, are published on publicly accessible websites. This Note addresses publications about criminal infractions because of the particularly high stakes that come with information of this nature. It does not address whether this could or should be expanded to other non-criminal information.

whether a story is false or misleading at the time a publishee requests the information be removed or updated, potentially long after the date of initial publication.

The proposed two-part solution—requiring publishees to bring the offending information to the publisher’s attention, then evaluating truthfulness as of that moment if private resolution fails—will allow defamation and privacy tort law to continue evolving, keeping pace with modernity.¹⁸ Because the system as it stands is extremely lopsided in publishers’ favor, the goal is simply to begin to offset this imbalance by readjusting incentives for publishers and providing a realistic avenue of recovery for publishees.

I. THE STATUS QUO: COMPETING INTERESTS AND THE INTERNET

Determining a proper solution to the predicament publishees currently face is not a simple one; with competing rights and considerations on both sides, finding the proper balance is a delicate task. As this Part describes, both publishees and publishers have compelling interests that must not be unduly infringed. Whether or not the status quo struck an adequate balance before internet publication, the change in nature brought about by the digital age has repositioned these interests far out of balance.

A. The Publishee Perspective: You Can’t Always Get What You Want

Three factors combine to create a perfect storm of potential embarrassment and hardship for publishees: (1) the relatively nonexistent bars to placing information online, (2) the accessibility of that information once it is published, and (3) the likelihood that that information will quickly become only partially reflective of the truth as subsequent, unnewsworthy developments are not published. Given this reality, the status quo does not adequately protect the rights of publishees.

As an underlying issue, there are few restraints—internal or external—on the initial publication of information.¹⁹ Private

18. The overarching ideas explored herein are the reasons for and possibilities of modifying the understanding of disclosure torts and the subsequent realignment of incentives, rather than an in-depth analysis of implementation and remedy options.

19. This Note focuses on *private* information publishers. Public entities, such as law enforcement officials, may also publish information online regarding arrests and investigations either directly or as an information source for private publishers. Though there may be situations where public publishers could operate under this same framework, their different interests (such as efficient investigation and enforcement) and restraints (such as due process)

publishers may put out virtually anything that is true—assuming it does not run afoul of certain privacy torts—and the First Amendment offers robust protection to publication of reports that are accurate when written, which poses a significant hurdle to any restrictions on the information non-governmental entities are allowed to publish.²⁰ Publishers may choose to update or remove information voluntarily, but the simple reality is that an arrest is newsworthy; being cleared is generally not. Because of these realities of the publication business, stories written about a publishee's arrest or investigation carry a significant risk of becoming misleading. For Dale Menard, for example, an online article may have detailed his arrest—which did occur and was therefore truthful when written—but the subsequent development that Menard was cleared and the arrest was the result of a misunderstanding might not be newsworthy in the publisher's eye. A reader might be misled by the story detailing only the arrest.

Once a story is available online, a publishee seeking to remove or update information about his arrest or criminal investigation is likely to encounter insurmountable hurdles that effectively prohibit any recourse. The first challenge is that the publisher²¹ is likely either unreachable or reluctant to remove it. For large entities such as Google, it may be difficult to contact someone who can help process a request.²² Even if one does reach someone in a position to help, that publisher need not be particularly fearful of a successful legal action against him because tort remedies are generally inadequate legal mechanisms.²³

Furthermore, given the realities of the criminal justice system, it is not unusual for an individual to be arrested or investigated but never charged. A significant percentage of felony cases in major urban centers are dismissed at some point after arrest.²⁴ Together with publishers' reluctance to update or remove information and their lack of incentive to publish stories about predominately unnewsworthy

put them beyond the direct focus of this Note. For further discussion of law enforcement interests, see Rehnquist, *supra* note 1, at 8.

20. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491–92 (1975).

21. For the purposes of this Note, “publisher” refers to whoever controls the website on which the information appears.

22. Stuart, *supra* note 11, at 493–96.

23. See *infra* Section II.B.

24. Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 773 (2005) (citing statistics showing, for example, that federal prosecutors decline to prosecute thirty-four percent of suspects investigated for weapons offenses, thirty-five percent of suspects investigated for violent offenses, and forty-two percent of suspects investigated for property offenses).

events such as dismissals,²⁵ these factors create the potential to place a large number of people in an unfortunate situation.

B. The Other Side: Publishers' Rights and Interests

While the status quo is insufficiently protective of publishees' rights, it is overprotective of publishers' rights. Though publishers too have compelling interests, which run contrary to providing more recovery to publishees, unlimited publishers' rights harm publishees by making it too difficult to ensure the public record presents an accurate reflection of reality.²⁶ This Section sets forth the rights of publishers; the necessity of balance regarding publishees' rights is discussed in Section III.C.

The primary interest on the publishers' side is free speech. In addition to their First Amendment rights, news organizations have articulated concerns over restricting the free exchange of information and maintaining a historical record.²⁷ Preventing the press from publishing relevant, true information abridges free speech and is constitutionally impermissible.²⁸ Thus, requiring the press to keep silent or remove published material could violate free speech protections.²⁹ Furthermore, the public has an interest in keeping informed.³⁰ News outlets, and information availability generally, serve to keep citizens apprised of what is going on in their communities and the world at large, a service that furthers the interest of individuals in being able "to vote intelligently [and] register opinions on the administration of government generally."³¹

An increase in privacy is at odds with these interests.³² When publishers are restricted from publishing information, or when publishing information comes with the risk of exposing them to liability, less information will be published in the first place, chilling

25. KATHY ENGLISH, *THE LONGTAIL OF NEWS: TO UNPUBLISH OR NOT TO UNPUBLISH* 4–5 (2009), http://c.ymcdn.com/sites/www.apme.com/resource/resmgr/online_journalism_credibility/long_tail_report.pdf [perma.cc/LD36-EVPJ].

26. *See supra* Section I.A; *infra* Section II.B.

27. ENGLISH, *supra* note 25, at 4, 15.

28. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975).

29. *Id.*

30. *Id.* at 491–92.

31. *Id.*

32. Rehnquist, *supra* note 1, at 2. For example, increased NSA collection of cell phone data may aid information gathering that could lead to more successful terrorist-threat recognition, but it comes at the cost of privacy. Conversely, greater freedom from surveillance would improve the level of privacy but also make it more difficult for law enforcement to investigate and monitor potential crimes, which could impact overall safety.

information exchange and free speech. Thus, a decrease in publication is undesirable where it unduly infringes on the First Amendment's guarantee to free speech, or restricts public access to accurate and relevant information.

*C. One of These Things Is Not Like the Others:
How the Internet Has Changed Publication*

The internet has fundamentally changed not only the nature of publication in the modern age,³³ it has also changed the publication process itself. The technical process through which internet pages are displayed is fundamentally different from a traditional print publication. When an individual navigates to a webpage, he is not accessing a static piece of information but instead sending a request for the elements that form the target page, which the host server then sends.³⁴ This technical process means that viewing a webpage is not like reading a newspaper because the webpage-viewing process is not static like traditional print sources. In fact, analogizing the online publishing process to traditional methods would more closely resemble someone writing something down and occasionally handing it out every so often when someone asked for a copy going on several years down the line.³⁵

Because internet publication is functionally different from traditional print media, it should also be treated differently. While a print-media publisher relinquishes control over the embodiment of the information when it is sent out, internet publishers retain control and can update or amend that information at their pleasure. Furthermore, access to an online news story is much wider than that of a traditional newspaper. A webpage may be viewed nearly simultaneously by millions of people whereas print media must be physically replicated to reach such great numbers. Likewise, an internet page remains accessible until it is removed, whereas a newspaper is more likely to be thrown out or archived after it is read. Something initially published years ago can be called up nearly as easily as if it had been published yesterday, meaning that the resulting harm is no longer inflicted only at the moment the information is first published—it instead occurs every time a person finds the information in his search

33. Schauer, *supra* note 8, at 557–58.

34. Rus Shuler, *How Does the Internet Work?*, STANFORD (2002), <https://web.stanford.edu/class/msande91si/www-spr04/readings/week1/InternetWhitepaper.htm> [perma.cc/5W6T-59LF].

35. I thank Professor Alex Little for this insightful analogy.

results, whether that moment is five minutes or five years after the initial publication.

The issues publishees face in the age of internet publication may seem to be a necessary byproduct of the more efficient information exchange facilitated by the internet. However, the problem created is not that people who are looking for the information can get it easier, it is that internet searching requires minimal effort and expertise as compared to traditional publication. Before the internet improved accessibility, a person would have had to expend greater effort finding information, contacting police departments or filling out information requests. Now, a person is much more likely to find the information without much motivation to do so; they may even happen upon it accidentally when searching the publishee's name. Additionally, nearly anyone can go to Google and type in a name, whereas it takes dedication and perhaps even some baseline expertise to navigate more formal or traditional records-request procedures. This ability to idly discover potentially harmful stories exacerbates the general problem of having vast amounts of information publicly available.

Given the greatly expanded accessibility to this information,³⁶ a publishee should have some way to limit its availability, yet this would be a nearly impossible task under current circumstances. Both industry norms³⁷ and legal precedent³⁸ contribute to the inability of an individual to effectively seek recourse. With a strong foundation of First Amendment protections, specifically the defense of truth³⁹ and courts' evaluation of that truth only at the time of initial publication,⁴⁰ publishers lack incentive to seriously consider publishee requests.

While privacy claims generally succeed at a cost to another societal value, such as free speech,⁴¹ this cost may not necessarily be prohibitive. Thus, the focus of the inquiry should be on determining an ideal balance of privacy rights against other interests, not determining which interest should prevail.⁴² Then-Justice Rehnquist analogized

36. The rise of the internet has led to a surge in publicly available information, while search engines have made that information more readily accessible. Schauer, *supra* note 8, at 557–58.

37. Keller, *supra* note 11.

38. See *infra* Section II.B.

39. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975).

40. Roberts v. McAfee, Inc., 660 F.3d 1156, 1167 (9th Cir. 2011).

41. Rehnquist, *supra* note 1, at 2.

42. *Id.*:

Just as no thinking person is categorically opposed to “privacy” in the abstract, it seems to me that no careful student of the subject would suggest that the claim of privacy ought to prevail over every other societal claim whatever the fact situation

balancing privacy rights to reading supply-and-demand curves to discern an optimal price.⁴³ This analogy seems particularly relevant in the attempt to reconcile an arrestee or criminal suspect's interest in a truthful public image on one hand with the interests of effective law enforcement and First Amendment protections on the other. Like determining an optimal price, this balancing requires "reading curves representing [an individual's rights] and [publishers'] interests"⁴⁴ to find the convergence point at which the competing interests are best balanced. Finding this equilibrium requires delicate balancing and careful analysis of how each change will affect other rights. The next Part of this Note takes on that challenge.

II. OH WHAT A TANGLED (INTER)WEB WE WEAVE

In evaluating possible remedies for publishees who have been effectively cleared of wrongdoing, there are a number of (often conflicting) issues at stake. As a starting point, the ability to do anything at all requires that the publishee have a right to control what information is publicly available about them. This can be viewed alternatively as a privacy interest and an interest in the truth of the information available.

Once the publishees' right is established, it must be balanced against the countervailing rights and interests of publishers. While publishees have a right to restrict misleading information about their arrests, the publishers have an interest in ensuring the information is not unduly restricted. Striking a balance between the rights on both sides calls for concessions that, if not carefully considered and weighed, might compromise important legal ideals.

This Part analyzes the implications of these various interests and the way they interact with each other. To do so, this Part examines the insufficiency of the existing tort regime available to the subjects of unflattering stories and assesses two alternative schemes aimed at addressing the problem. The current tort scheme is simply too outdated to keep pace with the accessibility and pervasiveness of

may be. For those of my generation who can remember back to the days of the notorious public enemies of the 1930s, I have no doubt that after John Dillinger broke out of jail at Crown Point, Indiana, and went on his rampage through the Midwest, he would have liked nothing better than a great deal of privacy. . . . Certainly most who remember the incident, and those who may learn about it only through reading of it in books [or works of legal scholarship], would agree, I think, that any claims to privacy he might have made during the course of these events should have been resolved against him.

43. *Id.* at 14.

44. *Id.*

information online. Because a radical shift in publishees' favor would leave the system just as skewed as it currently is, albeit in the opposite direction, the goal is finding the *right* balance, not just shifting the balance.

A. In the Right?

Finding a Basis for Protecting Subject Suspects' Interests

In order to assess whether publishees should have any recourse to remove or update internet records regarding their arrest or investigation, it is first necessary to determine the legally cognizable interest these individuals have in ensuring that public information accurately reflects reality. Common law indicates this interest certainly exists.⁴⁵ After all, few would argue that information regarding an individual's record of having been arrested or investigated for a crime would not damage that person's reputation.

The first basis for this interest is reputation. A person's "right . . . to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."⁴⁶ This interest in protecting against reputational harm is not necessarily a distinct right on its own, but is operationalized by state tort law, primarily in the form of defamation as a cause of action.⁴⁷ As described in Section II.B.1 below, defamation allows an individual to recover against the publisher of harmful information that is false or misleading.⁴⁸ This recovery recognizes that an individual has an interest in protecting himself against the publication of harmful and untrue information.

Privacy is a somewhat more expansive and nebulous concept that serves as a basis for publishees' rights. The right to privacy, though a relatively recent development, was pieced together from old decisions based on defamation and property rights, among others; from this patchwork emerged "a broader principle which was entitled to separate recognition."⁴⁹ Samuel Warren and Louis Brandeis distilled this right in their 1890 Harvard Law Review article, *The Right to Privacy*.⁵⁰ This right has matured from the core principle

45. Reza, *supra* note 24, at 792.

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

47. *Paul v. Davis*, 424 U.S. 693, 712 (1976).

48. See *infra* Section II.B.1.

49. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 384 (1960).

50. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

Warren and Brandeis promulgated to a distinct area of tort law⁵¹ that has expanded to cover areas unimagined at the time of its conception⁵² and, in line with the right's intended purpose,⁵³ continues to evolve. This right serves as the primary basis for publishees' recovery under the solution proposed herein.

1. Origins of the Right to Privacy

The early history of the right to privacy reveals the full applicability and versatility of the right and its suitability for serving as the basis of a remedy for publishees. In their foundational article, Warren and Brandeis looked to precedent to support their proposition of an overarching privacy interest entitled to recognition as a distinct principle.⁵⁴ By the time Dean William Prosser⁵⁵ wrote his examination of Warren and Brandeis's work on the theory of the right to privacy, there were "very few exceptions" to its scholarly acceptance.⁵⁶

The particular circumstances that prompted the establishment of the right are on point for the proposition of this Note. Warren and Brandeis's article itself describes "the desirability—indeed . . . the necessity—of some such protection" as a result of "[t]he press . . . overstepping in every direction the obvious bounds of propriety and of decency."⁵⁷ Warren and Brandeis cite "instantaneous photographs and [the] newspaper enterprise" as requiring additional steps necessary to secure the "right 'to be let alone.'"⁵⁸ The specific incident that Dean Prosser posits as the impetus for the article was Warren's displeasure regarding newspapers' extensive coverage, "in highly personal and embarrassing detail," of his wife's elaborate social gatherings and his daughter's wedding.⁵⁹

The genesis of the right to privacy's establishing article still proves relevant today. Much like instantaneous photos made it easier to record and disseminate information near the turn of the twentieth century, the internet made it infinitely easier to store and access

51. See *infra* Section II.B.2.

52. See *infra* Section II.A.2.

53. Warren & Brandeis, *supra* note 50, at 193.

54. *Id.* at 194–96.

55. Former UC Berkeley School of Law Dean and author of *Prosser on Torts*, widely recognized as a leading tort-law scholar.

56. Prosser, *supra* note 49, at 384.

57. Warren & Brandeis, *supra* note 50, at 196.

58. *Id.* at 195.

59. Prosser, *supra* note 49, at 383 ("Mr. Warren became annoyed. It was an annoyance for which the press, the advertisers and the entertainment industry of America were to pay dearly over the next seventy years.").

extensive amounts of data near the turn of the twenty-first century.⁶⁰ There is only evidence that Warren and Brandeis intended for the right to privacy to continue to develop, not to remain static and quit evolving at the stage of technology and society in which they promulgated it.⁶¹ Warren and Brandeis articulated the need “from time to time to define anew the exact nature and extent of” the principle of full protection in person and property in the face of “[p]olitical, social, and economic changes [that] entail the recognition of new rights.”⁶² Facing such a situation, “the common law, in its eternal youth, grows to meet the demands of society.”⁶³

2. Evolutionary Theory: Privacy Roots of Information Restriction

The right to privacy continued its evolution after its initial acceptance. In the mid-twentieth century, the concept evolved so far as to prompt a line of cases respecting various rights to be free from overbearing government intrusion.⁶⁴ Then-Justice Rehnquist catalogued these developments as he examined the evolution of the right to privacy as applied to arrestees’ interest in restricting dissemination of their arrest records.⁶⁵ He noted the right to privacy’s invocation in attempts to constrain the preservation and circulation of arrest records,⁶⁶ a cause picked up by Professor Sadiq Reza.⁶⁷

Professor Reza’s in-depth search for a right to provide criminal suspects or arrestees with recourse discusses the source of that right and instances where that right appears to be currently observed.⁶⁸ Professor Reza finds a basis for recovery in a “right of temporary anonymity” up until an independent, judicial determination of probable cause.⁶⁹ This right, he argues, “is not only necessary to protect innocent or unprosecuted accusees, it is also compelled by the

60. Schauer, *supra* note 8, at 557–58.

61. Warren & Brandeis, *supra* note 50, at 193.

62. *Id.*

63. *Id.*

64. *See* *Roe v. Wade*, 410 U.S. 113, 166–67 (1973) (invalidating state regulations that prohibited doctors from performing certain abortions); *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (protecting the right to share information about birth control devices); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (protecting the right of married couples to use birth control devices without state interference).

65. Rehnquist, *supra* note 1, at 4–6.

66. *Id.* at 6.

67. Reza, *supra* note 24, at 761–62.

68. *Id.* at 761, 768–95.

69. *Id.* at 767–68.

evolving theory and practice of privacy law.”⁷⁰ This evolution of privacy law is “[t]he essence of informational policy,” the right of a person to control what information about him is disseminated to others.⁷¹

In the context of criminal accusees and arrestees, the right to control personal information is the right to protect their identity from association with criminal conduct—to prevent “the very fact of their involvement in the criminal process” from becoming public knowledge.⁷² According to Professor Reza, this right is nothing new; it is already embodied in several aspects of criminal procedure⁷³—most notably, the secrecy of grand jury investigations and restrictions on arrest-record dissemination.⁷⁴ The secrecy of grand jury proceedings protects accused individuals from being identified before enough evidence exists to determine probable cause of their guilt.⁷⁵ The purpose of this safeguard, “to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation,”⁷⁶ is directly applicable to any individual under investigation, whether or not a grand jury is empaneled.

Likewise, the Supreme Court has recognized a privacy interest in preventing disclosure of an individual’s arrest records by upholding restrictions on public access to these records.⁷⁷ By recognizing that the public interest does not extend to an individual’s entire criminal record, even when a crime that individual allegedly committed is of public interest, “the Court endorsed the idea that individuals have the right to keep information about their prior involvement in the criminal justice system secret from the public on common-law privacy grounds.”⁷⁸ This grants an individual a privacy interest “in the aspects of his or her criminal history that may have been wholly forgotten,” although they once were public.⁷⁹

70. *Id.*

71. *Id.*

72. *Id.* at 762.

73. Professor Reza specifically describes the reflection of the right to informational privacy in protections afforded to sexual assault complainants, juveniles, accusees in quasi-criminal proceedings, the subjects of grand jury proceedings, and restrictions on public access to arrest records. *Id.* at 780–95.

74. *Id.* at 789–95.

75. *Id.* at 789–90.

76. *Id.* at 789 (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681–82 n.6 (1958)).

77. *Id.* at 791–92.

78. *Id.* at 791–93 (discussing *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989)).

79. *Reporters Comm. for Freedom of Press*, 489 U.S. at 769.

At the core of these protections is the implicit recognition that the mere *accusation* of criminal conduct can be harmful to an individual and that the legal system should protect against this harm. The fact that the procedures currently in place fail to do so means only that the right is not properly protected, not that it does not exist. In the century since Warren and Brandeis introduced their concept of the “right to be let alone,” the right continuously evolved to apply in a range of contexts.⁸⁰ This right, along with the reputational interest protectable by the tort of defamation, must now continue its evolution to fully protect the rights of individuals against unwarranted trespass by the proliferation and endurance of information made possible by technological advancement.

*B. The Right that Just Won't Write:
Inadequacies of Existing Tort Remedies in the Internet Age*

Two torts provide potential relief for the publishees of information misleadingly implying criminal activities: defamation (specifically libel) and privacy law (specifically false light publicity). However, for the reasons described below, neither tort currently provides a sustainable cause of action. If an individual were actually arrested or investigated, the truth of that fact at the time of publication is a fatal blow to recovery under tort law as it stands, regardless of whether that fact remains a complete and accurate description of the scenario as it developed. The current understanding of each tort prohibits publishee recovery because truth is assessed only at the moment of first publication.

1. Defamation

Defamation is the first line of defense against the publication of untrue information about an individual. Recovery requires a plaintiff to demonstrate that the defendant (1) published (2) at least negligently a (3) defamatory, false statement that (4) caused special harm or is actionable irrespective of actual harm.⁸¹ “Defamatory” is defined as tending to harm the reputation of the subject of publication, “lower[ing] him in the estimation of the community or . . . deter[ring] third persons from associating or dealing with him.”⁸²

80. Rehnquist, *supra* note 1, at 4–6.

81. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

82. *Id.* § 559.

Defamation is further subdivided into the torts of libel and slander. In the case of internet publications, libel would be the appropriate cause of action as it covers written or printed words and other forms of expression that have greater permanence than the spoken word.⁸³ The significance of internet publications falling under the tort of libel rather than slander is that libel does not require a showing of special harm, meaning that a plaintiff need not prove the loss of something of economic or pecuniary value; the harm to his reputation is sufficient.⁸⁴ This could be important in the context of publishees as it might be difficult to prove that they incurred any specific harm as a result of the publication. For instance, it could be prohibitively challenging to prove special harm when the injury is only general embarrassment or the individual has only a suspicion that employers screened him out after finding information online about his past arrest or investigation.

Recovery under libel works well for the subject of a story that is untrue at the time it is published; however, truth is an absolute defense.⁸⁵ In the case of unflattering information regarding an arrest or criminal investigation, the information was true when written and thus the subject may not recover for libel. Additionally, the traditional understanding of libel does not require a retraction or similar correction even if grave doubt is subsequently cast upon the information.⁸⁶ Even if harm initially occurs, it occurs only once and a plaintiff may not recover for any eventual nebulous harm occurring long after the initial publication.⁸⁷ But the internet does not conform to a traditional understanding of publication. While the historical application of libel may have worked when a print source was disseminated once, then either filed and likely forgotten or simply discarded, this logic does not hold true for internet sources capable of perpetual, continuous publication.⁸⁸

The outdated reasoning behind the traditional understanding of libel is highlighted by the Ninth Circuit case *Roberts v. McAfee, Inc.*, which aptly showcases how the traditional notion of publication is too limited to successfully address internet disclosures.⁸⁹ Kent Roberts, a former McAfee employee, claimed that McAfee defamed him by failing to remove from its website a press release describing Roberts's

83. *Id.* § 568.

84. *Id.* § 569.

85. *Id.* § 581A.

86. *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1167 (9th Cir. 2011).

87. *See id.* at 1166–67.

88. *See supra* Section I.C.

89. *Roberts*, 660 F.3d at 1166–69.

improper actions with company stock options after he was acquitted by a jury of fraud and criminal charges and the SEC dropped a civil suit.⁹⁰ The press release containing these allegations remained on the company's website for several months after the SEC had voluntarily dismissed its claims.⁹¹ The court rejected Roberts's argument that this failure to remove the press release in the face of "substantial indications of falsity" was tantamount to republication.⁹² To support its conclusion, the court cited the application of the "single-publication rule," the rationale for which is that it " 'spar[es] the courts from litigation of stale claims' where an offending book or magazine is resold years later."⁹³ However, none of the cases cited in support of this rule addressed an internet publication.⁹⁴

The reasoning behind the single-publication rule hardly seems applicable to internet publications.⁹⁵ Whereas the resale of a hard copy is a one-off transaction—a single, tangible print transferred at one point from one person to another—an internet publication is constantly and simultaneously available to an unlimited number of people. Because of this fundamental difference, the current understanding of defamation under the single-publication rule does not properly account for the change in the nature of information availability brought about by the internet.

2. Privacy Torts

There are four generally recognized privacy torts: false light invasion of privacy, intrusion upon seclusion, publicity to private life, and appropriation of name or likeness.⁹⁶ Only one—false light publicity—seems like a promising remedy for publishees; however, for reasons discussed herein it fails to provide recourse. This tort requires that (1) publicity be given to information that is (2) false and (3) highly offensive to a reasonable person, and that (4) the defendant

90. *Id.* at 1162, 1166.

91. *Id.* at 1166; Comm'n Voluntarily Dismisses All Claims Against Former Gen. Counsel of McAfee, Inc., Litigation Release No. 20995 (April 10, 2009).

92. *Roberts*, 660 F.3d at 1167–68.

93. *Id.* at 1166–67.

94. *Id.*

95. *See supra* text accompanying notes 33–35.

96. Intrusion upon seclusion and publicity to private life address the publication of information that is private, which arrest and criminal investigation generally are not. RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (AM. LAW INST. 1977) ("[T]here is no liability for the examination of a public record."); *id.* § 652D cmt. b (same). If the tort of appropriation applied to merely writing a story about someone, no news would ever be written. *Id.* § 652C (subjecting "[o]ne who appropriates to his own use or benefit the name or likeness of another" to liability).

acted with knowledge or in reckless disregard of the falsity of the information.⁹⁷

False light publicity would seem to provide a strong potential for recovery to publishees since, as its name implies, the tort applies to representations that create false impressions by implication, not just explicit statements.⁹⁸ While “‘minor errors in an otherwise accurate’ report” are insufficient, material or substantial falsity is actionable.⁹⁹ Several cases demonstrate that a publication may still be misleading enough to be considered “false” even if the statements contained therein are literally true when taken in isolation.¹⁰⁰ If those statements are a convenient editing of the full story that fails to convey the true character of the event, they may be actionable as false.¹⁰¹

The classic example of literally true statements creating a false impression is the Tennessee Supreme Court case *Memphis Publishing Co. v. Nichols*.¹⁰² In that case, a husband and wife sued a newspaper for publishing a story that the wife, Mrs. Nichols, had been shot after the “assailant,” Mrs. Newton, found her husband with Mrs. Nichols at the other woman’s home.¹⁰³ The clear implication of the story was that Mrs. Nichols and Mr. Newton were engaged in an adulterous affair and that Mrs. Newton shot at them upon discovering them together.¹⁰⁴ The story neglected to mention that Mrs. Nichols and Mr. Newton were not the only people present at the home, nor were they engaged in any untoward conduct.¹⁰⁵ By failing to include that Mr. Nichols, as well as two neighbors, were also present and that the group was sitting in the living room talking at the time of the shooting, the story conveyed a false impression regardless of the fact that each statement was true in isolation.¹⁰⁶

97. RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

98. *Cf. Braun v. Flynt*, 726 F.2d 245, 253 (5th Cir. 1984) (allowing plaintiff to recover under false light publicity for a true (i.e., unedited) photo published by defendant’s magazine that was “fully capable of conveying a false impression” of plaintiff).

99. *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967).

100. *E.g., Memphis Publ’g Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978) (holding that the relevant question is “whether the meaning reasonably conveyed by the published words is defamatory”).

101. *Id.*

102. *Id.* Although the plaintiffs in *Memphis Publishing* recovered under defamation, the characteristics that make a publication misleading in defamation also apply to false light publicity. *Graboff v. Collieran Firm*, 744 F.3d 128, 137 (3d Cir. 2014).

103. *Memphis Publ’g*, 569 S.W.2d at 414.

104. *Id.*

105. *Id.*

106. *Id.*

Similarly, the Supreme Court determined in *Cantrell v. Forest City Publishing Co.* that a story detailing the condition of a family following a local bridge collapse misleadingly implied that the reporter saw Mrs. Cantrell—the plaintiff and subject of the story—in tragic circumstances when he visited her home, while in fact she was not even present.¹⁰⁷ The story relayed the pitiable state of her home and children as an indication of Mrs. Cantrell’s difficulty in dealing with the tragedy, stated that Mrs. Cantrell would not talk about how she or her family were doing, and described the “mask of non-expression” on her face.¹⁰⁸ The Court held that the story clearly implied that Mrs. Cantrell had been present when the reporter visited her home as the basis for his description of her, and thus the story was actionable as false and inaccurate.¹⁰⁹

These examples show that the tort of false light publicity provides for recovery based on publications that are misleading or fail to show the whole picture. It is the overall impression of the story, not the discrete facts on their own, that is assessed when determining whether that story is truthful.¹¹⁰

Thus, it would seem that the tort of false light publicity should cover situations where a publication does not outright call the subject a criminal, but implies nonetheless that he may be one based on the reporting of his arrest or criminal investigation. One of the typical illustrations of false light publicity is the inclusion of an individual in a public “rogues’ gallery” of criminals when the individual has not actually been convicted.¹¹¹ In Dean Prosser’s description of why this situation would subject the publisher to liability for false light publicity, he explains that while “police are clearly privileged to make such a record in the first instance, and to use it for any legitimate purpose pending trial, or even after conviction, the element of false

107. *Cantrell v. Forest City Publ’g Co.*, 419 U.S. 245, 247 (1974).

108. *Id.* at 247–48.

109. *Id.* at 247–48, 253.

110. *See id.* at 253 (“[The story’s representations] were ‘calculated falsehoods,’ and the jury was plainly justified in finding that [the reporter] had portrayed the Cantrells in a false light through knowing or reckless untruth.”); *Memphis Publ’g*, 569 S.W.2d at 420:

[D]efendant’s reliance on the truth of the facts stated in the article in question is misplaced. The proper question is whether the [m]eaning reasonably conveyed by the published words is defamatory, “whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.”

(quoting *Fleckenstein v. Friedman*, 193 N.E. 537, 538 (N.Y. 1937)).

111. RESTATEMENT (SECOND) OF TORTS § 652E illus. 7 (AM. LAW INST. 1977); Prosser, *supra* note 49, at 399.

publicity in the inclusion among the convicted goes beyond the privilege."¹¹²

Unfortunately for publishees, false light publicity—like libel—does not cover information that, while reflective of the truth at the time of publication, has subsequently become false or misleading.¹¹³ Sticking to the moment-of-publication approach and refusing to look beyond that instant in assessing the truth of internet publications seems incongruous with the history of the right to privacy as an evolving interest. This right was developed to create a remedy against what was seen as unnecessary disclosure of facts that the public had no real interest (beyond gossip) in knowing.¹¹⁴ It built on, among other things, the existing law of defamation to encompass a situation that was perceived to need protection but for which the law as it stood recognized no cause of action.¹¹⁵

That situation arguably is upon us again. The right to privacy has expanded to encompass a variety of additional situations that Warren and Brandeis may not have envisioned,¹¹⁶ it should not stop evolving at this point. Nor should it fail to cover those who arguably have a real interest in preventing the disclosure of potentially misleading and highly damaging information. The Restatement (Second) of Torts allows for, if not anticipates, the evolution and expansion of privacy torts, even alluding to the potential implications of advancing technology.¹¹⁷ However, while privacy-tort law provides a promising avenue for development, as currently recognized it does not allow recourse for individuals who are the subject of misleading information regarding unpursued criminal infractions.

112. Prosser, *supra* note 49, at 399–400.

113. *Roberts v. McAfee, Inc.*, discussed in Section II.B.1 *supra*, also assessed and refused to grant recovery for a false light publicity claim. 660 F.3d 1156, 1166 (9th Cir. 2011).

114. Prosser, *supra* note 49, at 383.

115. *Id.* at 384; Warren & Brandeis, *supra* note 50, at 196.

116. Rehnquist, *supra* note 1, at 3–6.

117. RESTATEMENT (SECOND) OF TORTS § 652A cmt. c (AM. LAW INST. 1977) (emphasis added):

Thus far, as indicated in the decisions of the courts, the four forms of invasion of the right of privacy stated in this Section are the ones that have clearly become crystallized and generally been held to be actionable as a matter of tort liability. Other forms may still appear, particularly since some courts, and in particular the Supreme Court of the United States, have spoken in very broad general terms of a somewhat undefined “right of privacy” as a ground for various constitutional decisions involving indeterminate civil and personal rights. These and other references to the right of privacy, particularly as a protection against various types of governmental interference and *the compilation of elaborate written or computerized dossiers, may give rise to the expansion of the four forms of tort liability for invasion of privacy listed in this Section or the establishment of new forms.* Nothing in this Chapter is intended to exclude the possibility of future developments in the tort law of privacy.

C. Spoiled for Choice: Alternative Solutions

The predicament faced by those trying to update or remove publicly available information regarding a past brush with the law has been noticed in both scholarly literature and international legislative attempts. Two approaches are herein briefly discussed as examples of how trying to provide recourse can lead to an imbalance between the competing issues at stake. The first approach arguably does too little at too high a cost; the second approach has the potential to do far too much.

1. Law Enforcement Disclosure Restrictions:
Professor Reza's Probable Cause Bar

In his article *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, In Need of a Rule*, Professor Sadiq Reza concludes that individuals pursued by law enforcement generally have a privacy interest in remaining anonymous until a judicial determination of probable cause.¹¹⁸ He proposes that legislation be implemented to protect that interest by “forbid[ding] the public naming of arrestees and suspects by government officials until there is a judicial finding of probable cause of guilt . . . absent a countervailing law enforcement interest.”¹¹⁹ By placing the restriction on only government actors, this solution avoids any First Amendment implications and in fact follows the Supreme Court's repeated suggestions to limit disclosures to the public.¹²⁰ This limitation is necessary because once information is public, the press is free to do with it what it wants so long as its use of that information is true as of the moment of publication.¹²¹

In the Professor's view, this modest proposal will impose little to no additional cost;¹²² however, this claim seems somewhat dubious as it applies to both the courts and law enforcement officers. Instituting a requirement that police either seek a judicial determination of probable cause or open themselves up to liability by deciding that they have a compelling interest in disclosure will likely have a greater effect than “exact[ing] no cost at all from prosecuting the guilty.”¹²³ Similarly, though federal courts and some states

118. Reza, *supra* note 24, at 765–66.

119. *Id.*

120. *Id.* at 766.

121. *Id.*; see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (“State may [not] impose sanctions on the accurate publication of [information] obtained from public records.”).

122. Reza, *supra* note 24, at 766–67.

123. *Id.* at 767.

account for a judicial finding of probable cause, imposing even a seemingly small requirement that “a judge[] pass[] on a sworn statement of facts” in “literally hundreds of thousands of misdemeanor and felony arrest[s]”¹²⁴ risks creating more than an insignificant burden on judicial resources.

Professor Reza’s observation that “we have long since decided to protect the innocent in our criminal justice system at great expense to prosecuting the guilty” is well founded and would seem an appropriate justification for the costs imposed on the system, except that he himself admits that “it could be said that the proposed legislation would also benefit the accusees little, because the government could easily satisfy its requirements.”¹²⁵ Thus, Professor Reza’s bar has two effects, neither of them desirable. First, law enforcement officers’ fear of potential liability could chill productive speech aimed at investigatory activities before a judicial determination, such as quickly publicizing the name and photo of a suspect on the run. Second, if law enforcement officers did seek that determination, the relatively low probable cause standard would not pose a stringent impediment and the government could continue naming arrestees and suspects with nearly the same ease as it does under existing constraints. This has a correspondingly low limit on the flow of information to the public and therefore the press, providing virtually no protection against private publishers.

Though Professor Reza’s proposal is beguiling, when viewed in light of the potentially high costs and relatively minimal benefit gained, it seems a less-than-ideal solution because it improperly balances the interests at play. If compared to the ideal intersection of suspects’ privacy interests and effective law enforcement posited by then-Justice Rehnquist, this solution does not quite hit the mark.¹²⁶

2. So Far Left It’s Faster to Fly East? The European Union’s Right to Be Forgotten

At the opposite end of the spectrum from Professor Reza’s probable-cause bar is the European Union’s Right to Be Forgotten.¹²⁷ This gives individuals “the right—under certain conditions—to ask search engines to remove links with personal information about them” if that information is “inaccurate, inadequate, irrelevant or

124. *Id.* at 801.

125. *Id.* at 767.

126. Rehnquist, *supra* note 1, at 14.

127. Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 88 (2012).

excessive.”¹²⁸ Though it may not in practice be as extensively applicable as it has been made out to be,¹²⁹ the Right to Be Forgotten still serves as an example of how promoting one goal can come at excessive cost to another. If it were imported into American law, giving an individual a more enforceable right to control what information about him is available would severely infringe publishers’ First Amendment rights to freely publish true and publicly available information.¹³⁰

In addition to running afoul of free speech concerns, the Right to Be Forgotten is directed at the wrong party; it specifically applies to search engines as the “controllers of personal data”¹³¹ rather than the actual publishers. In American law, online entities that merely serve as conduits for information are not generally considered publishers of that information.¹³² Even beyond the impracticality of the Right to Be Forgotten within the United States’ legal system, the likely effect would be to chill not only free speech itself but also the methods of relaying that speech.¹³³ Given these considerations, the Right to Be Forgotten intrudes too far on private publishers’ rights in an attempt to give individuals greater control over public access to unflattering information.¹³⁴

III. A SECOND BYTE AT THE APPLE: RE-INCENTIVIZING THE SYSTEM THROUGH TORT-REMEDY AVAILABILITY

Because the status quo of tort law creates an imbalance where publishers are relatively free to make potentially harmful information constantly available with few repercussions, some change is necessary. Yet that change needs to occur with recognition that though the latent aftermath of publication is undesirable where the

128. Eur. Comm’n Press Release C-131/12, Factsheet on the “Right to be Forgotten” Ruling (July 8, 2014), http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf [perma.cc/THF6-PLZY] [hereinafter E.U. Press Release].

129. *Last Week Tonight with John Oliver: Right to Be Forgotten* (HBO television broadcast May 18, 2014), <https://www.youtube.com/watch?v=r-ERajkMXw0> [https://perma.cc/TA4B-266K].

130. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

131. E.U. Press Release, *supra* note 128.

132. *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008).

133. The potentially “ruinous monetary sanctions” faced by data controllers, such as search engines, that do not comply with requests to remove data “could lead data controllers to opt for deletion in ambiguous cases, producing a serious chilling effect.” Rosen, *supra* note 127, at 90–91.

134. *E.g.*, Kelly Conaboy, *Pianist Wants Bad Review Removed Under “Right to be Forgotten” Ruling*, GAWKER (Nov. 1, 2014), <http://gawker.com/pianist-wants-bad-review-removed-under-right-to-be-for-1653645704> [perma.cc/CHN5-C9H7].

information is no longer entirely reflective of reality, the initial publication itself may be desirable based on free speech and information-sharing concerns. Therefore, the ideal solution should not place an undue burden on publishers, which would create a chilling effect on what might be useful information. The solution should instead provide publishers with an incentive to be mindful of the harm inflicted on the subjects of their stories when those stories become misleading. The law needs to remedy the disintegrating truthfulness of a story, not its initial publication.

The torts of false light publicity and defamation would be the likely remedies for an individual about whom a misleading story of arrest or suspicion of criminal activity was published. However, as described above, an individual who was actually arrested or investigated would be unable to recover under those theories as currently construed, even if he was eventually cleared.¹³⁵ Although these torts as currently understood are insufficient as a counterbalance to this type of publication, they are established causes of action that, with a slight modification in understanding, would provide an enforcement mechanism to publishees and an adequate balance to the system. Much like Warren and Brandeis pieced together bits of precedent to find an underlying right to privacy, the building blocks to support the solution proposed herein already exist.

This Note's proposal comprises two slight modifications to the existing tort regime—(1) requiring a publishee to attempt to resolve the issue with the publisher, and (2) assessing the truth of the publication at the time that request was made. This Part describes the proposal and outlines how this modification best balances publishers and publishees' rights.

A. Proposed Changes to Interpreting Tort Liability

The two-prong modification proposed would work within the current tort system to provide an appropriate balance without pushing the publisher-favoring status quo too far in the opposite direction. First, publishees who believe a story about them no longer reflects the truth must attempt to contact the publisher directly and work out a mutually agreeable solution.¹³⁶ Second, should that attempt fail and

135. See *supra* Section II.B.2 (describing how limitations of existing torts preclude a plaintiff from succeeding against the publisher of information that was not libelous or did not place the plaintiff in a false light before the public when the information was originally published).

136. What exactly would be required to demonstrate a failure to resolve the issue would be an important component of implementation. This case-by-case determination is the type of factual inquiry for which juries are ideally suited. The finer logistical points of this

the publishee be required to bring suit, whether the publication is misleading will be assessed as of the time of the publishee's request to remove, alter, or update the information rather than at the moment of initial publication. These two prongs work together to ensure that publishees have some leverage against publishers, where little to none currently exists, but not so much that the fear of liability chills speech or infringes upon publishers' rights.

1. Require Publishees to Attempt to Resolve
the Issue with the Publisher

Under this proposal's first prong, publishees would recover only after showing that attempts to resolve the dispute directly with the publisher have failed to result in a compromise. This incentivizes mutually agreeable solutions, relieves some of the burden on courts from expanding recovery, and gives publishers the most control over their own content—they can choose to remove it, amend it, add a disclaimer, or simply refuse to institute any change if they believe the publication still accurately reflects the truth. Further, it puts the onus on the publishee to monitor his online presence and seek out negative information rather than requiring publishers to constantly monitor for any potential developments in stories that could become misleading. This is ideal as the publishee is far more incentivized to pay attention to information about himself online.

The archetypal application would be to the originating publishers of the material (the online news source) rather than the websites and search engines that help an individual access the information's host. Under defamation, republishers are held liable so long as they were at least negligent in passing the information along.¹³⁷ However, a mere intermediary in the conveyance of information from one place to another is not a republisher and does not meet the negligence standard.¹³⁸ A search engine algorithm would seem to be the digital equivalent of that intermediary, and therefore it would not qualify as a republisher.

determination—such as how much time publishers should have to respond, what should happen if the publishee finds the publisher's resolution unsatisfactory, and what a publishee must do to prove the misleading nature of the information—are beyond the scope of this Note.

137. RESTATEMENT (SECOND) OF TORTS § 578 (AM. LAW INST. 1977).

138. *Id.*

2. Assess Truth at the Time of the Request to Remove or Modify

Under this proposal's second prong, the falsity of the information should be evaluated at the time a publishee requests that it be withdrawn or amended.¹³⁹ Looking to the truth of the story at the time of the request—rather than at the time of publication—allows for an assessment that properly accounts for changed circumstances. This simply means that a story can, at time two, be considered misleading even if it accurately reflected the truth when published at time one. This does not require that the truth “change.”¹⁴⁰ Individuals whose records are expunged or erased would not win a challenge to a story reporting their arrest simply because that arrest was expunged.¹⁴¹ Erasure is a legal fiction, not a historical fact.¹⁴² However, individuals with expunged or erased records can still claim that the stories are misleading given subsequent events. The misleading nature of the story—not the court-ordered record purge—would serve as grounds for tort recovery under this solution.

The main benefit of this approach is to problematize the current strategy of many news outlets that refuse to take down stories of past arrests and criminal investigations—claiming that the reporting was true *at the time it was written*.¹⁴³ By shifting the inquiry to look at the time the publishee made the request, courts can more accurately assess whether the article at issue reflects the current truth. This is desirable, especially in the criminal context, because it is the incomplete nature of the publication that makes it damaging, and so looking at truthfulness at this later point in time reflects subsequent developments. While it may be true that an individual was investigated, it may also be true that they were later cleared of all wrongdoing. Without this second piece of information, the first is potentially misleading and incredibly damaging. There is a very wide range of truthfulness from absolutely still true to absolutely false in light of changed circumstances. Where publishers have access to updated information, and are effectively republishing a story every

139. While a publication date can vaguely signal that the story may not reflect the most current information, a story saying that an individual is under investigation or has pending criminal proceedings, without an update on the status of the investigation or proceedings, is potentially misleading. Even if the date indicates the investigation or proceedings happened some time ago, it does not necessarily suggest subsequent developments.

140. *Martin v. Hearst Corp.*, 777 F.3d 546, 550–53 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 40 (2015) (“The [newspaper] story without an update may not be as complete as [plaintiff] would like, but it implies nothing false about her.”).

141. *Id.*

142. *Id.*

143. Keller, *supra* note 11.

time someone views the webpage,¹⁴⁴ it makes sense for the standard to require the publisher to disclose information such that the story does not mislead the reader by describing the circumstances incompletely.

Admittedly, this creates a potentially significant grey area between absolute falsity and absolute truth. But case law on defamation and privacy torts already deals with these indeterminacies, and is capable of continuing to do so. Further, juries are capable arbiters of whether a publication is too far removed from the truth.¹⁴⁵ Whether a story is misleading in light of subsequent developments is a question of fact for the jury;¹⁴⁶ sending this type of question to them best allows for a flexible parsing of the middle ground between fact and fiction. It is an issue that an already intensely fact-based inquiry is capable of taking on.

3. Applying the New Standard

Applying these changes would be a relatively minor adjustment to how defamation and privacy-tort cases generally progress. However, they would give publishees a greatly improved chance of succeeding in updating or removing misleading information, or at least a more realistic path for recourse. Under the current understanding of the relevant torts, it is difficult for a publishee to even get before a jury, which can assess whether the publication is misleading.¹⁴⁷ Under the updated understanding, publishees would be significantly more likely to survive a pretrial motion to dismiss or motion for summary judgment.

The elements of defamation and privacy tort have much in common.¹⁴⁸ The updated understanding would apply similarly regardless of which theory the publishee pursued. After satisfying the first prong by attempting to resolve the issue directly with the publisher, a publishee would easily satisfy the elements of both

144. See *supra* text accompanying notes 33–35.

145. See *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1083–84 (9th Cir. 2002) (determining whether a “[negative] implication can reasonably be drawn from the publication” is an issue for a jury to decide).

146. *Id.*

147. See, e.g., *Martin*, 777 F.3d at 548 (upholding a grant of summary judgment for publisher defendant).

148. As the Restatement of Torts explains: “In many cases to which [false light publicity] applies, the publicity given to the plaintiff is defamatory, so that he would have an action for libel or slander In such a case the action for invasion of privacy will afford an alternative or additional remedy, and the plaintiff can proceed upon either theory, or both.” RESTATEMENT (SECOND) OF TORTS § 652E cmt. b (AM. LAW INST. 1977).

defamation¹⁴⁹ and false light publicity.¹⁵⁰ A publishee could meet the publicity and culpability requirements of each tort¹⁵¹ with relative ease, given the nature of internet publication and the requirement that the publishee first bring the information to the publisher's attention. Making information available to anyone in the world with access to the internet clearly meets the standard of publicity.¹⁵² If the publishee has explicitly told the publisher that the information is untrue in a believable and verifiable manner, continuing to display it as truthful constitutes acting in reckless disregard, if not with knowledge, of the information's falsity.¹⁵³ That the information published is defamatory¹⁵⁴ and highly offensive to the reasonable person¹⁵⁵ is effectively a given when the subject matter implicates criminal wrongdoing. Publishees need not worry about the special-harm element of defamation because written words qualify as libel, for which the special harm requirement is waived.¹⁵⁶ Thus, with these two slight modifications, publishees would have a much more substantial chance of success.

*B. Tort Law as the Ideal Framework for
Publishees' Rights Enforcement*

Tort law, especially as explained under economic theory, operates by creating effects that incentivize certain behaviors while discouraging others.¹⁵⁷ This incentive-based approach, combined with the evolutionary capabilities of common-law tort to expand "to meet the demands of society,"¹⁵⁸ makes it the ideal theory under which to promote publishees' rights and rebalance the system.

An economic approach to tort law emphasizes that "law creates incentives for parties to behave efficiently,"¹⁵⁹ and thus this approach

149. *Id.* § 558.

150. *Id.* § 652E.

151. *Id.* §§ 558, 652E.

152. *Id.* § 652E cmt. a (incorporating the § 652D cmt. a definition of publicity: "[T]he matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge"). Publication for defamation requires only that the defamer tell "one other than the person defamed." *Id.* § 577.

153. *Id.* §§ 558, 652E.

154. *Id.* § 558 cmt. f.

155. *Id.* § 652E cmt. c.

156. *Id.* §§ 568-69.

157. Alan O. Sykes, *Reformulating Tort Reform*, 56 U. CHI. L. REV. 1153, 1155 (1989) (book review).

158. Warren & Brandeis, *supra* note 50, at 193.

159. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 312 (1987).

tries to find mechanisms that encourage entities on both sides of competing interests to act in ways that achieve the best outcome. An effective tort regime provides a mechanism to force potential injurers to internalize the costs of their actions, incentivizing them to “perceive both the costs and benefits” of their actions “and behave accordingly.”¹⁶⁰ These incentives promote cost-avoidance behavior, but that behavior is desirable only to a certain extent.¹⁶¹ Thus, an interest should be promoted only so far as its benefits outweigh its costs.¹⁶² Applied to the situation at hand, this means that publishees’ rights should be increased only as far as the benefit to those rights outweighs the cost to publishers’ rights.¹⁶³

The efficient outcome in balancing publishees’ rights against publishers’ is one where each side is able to effectively promote its interests and neither is left without any mechanism to enforce its respective rights. The threat of a viable lawsuit gives publishers an incentive to assuage publishees’ concerns without involving the courts. This in turn helps address concerns regarding free speech implications and not editing the historical record, while simultaneously increasing the chances that the published information most accurately reflects the full truth.

The evolutionary capability of tort law is ideally suited for the changing times and technology we face. As technology advances, the threat to privacy interests likely will as well. Rooting the enforcement of this right in a more flexible legal scheme will allow it to keep pace with society’s needs.

C. A Better Balance Between Publishers and Publishees’ Rights

In addition to providing publishees with a means of recovery, the updated understanding of defamation and privacy tort proposed in this Note better balances the interests of both publishees and publishers because it creates incentives for publishers to consider the costs of publication to the subjects of their stories. The possibility of a suit would encourage publishers to weigh the costs and benefits of refusing to remove or update information that no longer fully reflects reality. Requiring publishers to internalize the cost of continuing to display misleading criminal information would prompt them to

160. Sykes, *supra* note 157, at 1155–56.

161. *Id.*

162. *Id.*

163. The goal is to find the point where the ideal importance of these rights intersect, described by then-Justice Rehnquist as analogous to supply-and-demand curves. Rehnquist, *supra* note 1, at 14.

consider the harm to publishees and publish misleading criminal information only if the benefits outweighed the costs.

Allowing publishees to recover under the proposed modifications is necessary to achieve this rebalancing. Cases brought by publishees under the current understanding are essentially nonstarters.¹⁶⁴ Publishers have no legal incentive not to act accordingly. If cases like this are given the opening they need to get to a jury and offer plaintiffs a real chance to have their claims heard, as well as effective bargaining leverage, publishers will change their policies accordingly. Under this modified understanding, publishees' pleas will no longer fall on deaf ears, and publishers will likely take a more considerate approach to the requests they receive to remove or modify information. Thus, the balance between publishers and publishees' rights can become more even. The point of this solution is not to give publishees an unbounded right to remove any crime-related information from the internet. Rather, the point is to give them a foot in the door, where in the current situation the door is fully shut and bolted against them (save for a sympathetic publisher who voluntarily unlocks it).

The more expansive possibility of recovery for publishees is limited by requiring them to first attempt to let the publisher resolve the situation. A solution that required publishers to seek out and preemptively remedy stories that had become misleading would potentially impose a tremendous cost, especially on smaller publishers. This would quite possibly in turn prevent many initial publications of useful information for fear that it might eventually become misleading. Allowing publishers the first chance to address misleading information would also allow them to control or limit their editing of the historical record while increasing the chances that the information most accurately reflects the current state of affairs.¹⁶⁵

If this solution appears superficially similar to the European Union's Right to Be Forgotten,¹⁶⁶ its significantly narrowed application prevents it from having similarly extensive drawbacks. The Right to Be Forgotten, analogizing to potential application in the United States, seems to rely solely on an individual's privacy interest in shaping his public image, regardless of truth or falsity.¹⁶⁷ While the proposed reassessment of tort remedies also stems from a similar

164. See *supra* Section II.B.

165. Sarah A. Downey, *Online, You are Guilty Even After Being Proven Innocent*, THE ONLINE PRIVACY BLOG (May 20, 2011), <http://www.abine.com/blog/2011/online-guilty-before-proven-innocent/> [perma.cc/2KTA-UPL7].

166. Discussed in Section II.C.2 *supra*.

167. E.U. Press Release, *supra* note 128.

privacy interest, it protects that interest by allowing an updated assessment of whether the information is misleading. A story that still objectively relays the truth of a situation—for example, that an individual was arrested *but charges were never filed*—would not subject the publisher to liability. The publication becomes actionable only under circumstances that do not fully reflect subsequent developments—for instance, a story describing an individual's arrest that made no mention of the fact that charges were never filed or the arrest was made in error. What makes a publication actionable under the updated understanding of tort remedies is that it no longer reflects the truth of the situation, not that it is unflattering to the plaintiff. This is distinct from the understanding of the Right to Be Forgotten, which allows a much more extensive right to control content, whether it reflects the truth or not.¹⁶⁸

This solution does not necessarily aim to allow publishees to remove any unflattering stories about criminal investigation, but rather to exercise their interest in making sure that publicly available information reflects the truth. Given the new nature of information availability as a result of the internet, publishees should have some recourse to make sure that stories about them reflect a holistically accurate picture of events rather than a literal but misleading truth of what happened at one point in time. The archetypical application is to a story that, if written under the circumstances at the time the publishee gave notice to the publisher, would fall under libel or false light publicity. While a story may have been true to the best of the publisher's knowledge at the time it was written, subsequent developments may make the actual content or impression of that story untrue.

168. The solution proposed in this Note does not provide publishees with a right to remove any absolutely true but unflattering or outdated information from the internet. It simply provides them with some recourse to reshape a misleading public portrayal and better balances the incentives of the system, which at present are overly skewed toward publishers' ability to remain unyielding to any request for updating or removal.

CONCLUSION

An innocent person who nonetheless has misleading information about a past arrest or criminal investigation published poses a sympathetic plight. One might instinctually want to give him the best chance at a clean slate. Yet the conflicting interests at stake preclude an easy solution. As then-Justice Rehnquist pointed out, “[I]n most situations in which claims to privacy are urged, there are two sides to the issue, and, if the balance is struck in favor of ‘privacy,’ some other societal value will suffer.”¹⁶⁹ The task of finding the ideal balance of interests has become more difficult in light of the increase in both the availability and accessibility of information due to the development of the internet.

Any solution trying to balance the fundamentally important interests of privacy, public information, and free speech is prone to finding an imperfect balance at the cost of one or more of these interests. One cannot be improved without cost to another. But the status quo faced by the subjects of stories misleadingly implicating them in criminal activities is severely unbalanced and must be realigned in light of the realities of the internet age, even at a slight cost to competing interests.

Given the change in nature of internet publication, the laws developed for print journalism cannot and should not apply wholesale to digital media. The problem has changed¹⁷⁰ and the solution must also change to bridge the gap between the rights the law purports to protect and the mechanisms available to protect those rights. But the wheel need not be reinvented; adding a couple more spokes should efficiently redistribute information-publishing incentives by providing publishees with a realistic cause of action and strengthening the structural integrity of the system as a whole. The changes proposed in this Note interact with each other and the existing tort regime in an important way—they push the status quo without moving it too far in the opposite direction. Avoiding this pendulum swing is important to respecting rights on both sides of the issue. This Note’s solution aims not to give publishees the ability to force publishers to remove any unflattering information, but instead to give publishees some leverage where none currently exists.

Revitalizing existing tort remedies would adjust the scales in publishees’ favor without completely upsetting the balance against free speech and law enforcement interests. Tort law addresses the

169. Rehnquist, *supra* note 1, at 2.

170. Schauer, *supra* note 8, at 557–59.

incentives of parties to act in ways that accord with our concept of how people should act and better balance individuals' rights. These rights necessarily compete with each other in a complex society, and there is a better chance of reaching a beneficial balance if both sides hold some force. Without some teeth on both sides of the equation, the incentives cannot achieve this aim. An expansion in a publishee's ability to recover for the detrimental effects of misleadingly outdated information would provide some bite to his bark and help rebalance the system.

*Laura K. McKenzie**

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