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## The Duty Not to Continue Distributing Your Own Libels

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# THE DUTY NOT TO CONTINUE DISTRIBUTING YOUR OWN LIBELS

*Eugene Volokh\**

*Say something I wrote about you online (in a newspaper, a blog, or a social media page) turns out to be false and defamatory. Assume I wasn't culpable when I first posted it, but now I'm on notice of the error.*

*Am I liable for defamation if I fail to remove or correct the erroneous material? Surprisingly, courts haven't settled on an answer, and scholars haven't focused on the question. Libel law is stuck in a time when newspapers left the publisher's control as soon as they are printed—even though now an article or a post can be seen on the publisher's site (and can do enduring damage) for years to come.*

*This Article also deals with a related question: Say I wrote about your having been indicted for a crime, but months or years later you are acquitted; am I liable for defamation if I fail to update the original story to reflect the new legal developments? That too is legally unresolved.*

*This Article argues that existing common-law principles allow for a limited duty to stop hosting material that one learns is defamatory; and that legislatures can further supplement that duty.*

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## INTRODUCTION

Donna writes something false online about Paul—sincerely, even reasonably, believing it to be true. This absence of a mens rea keeps her from being liable for defamation.

Paul then promptly tells Donna that her post is false, and backs that with persuasive evidence; maybe it's as simple as a case of mistaken identity. Yet Donna continues to keep her article (or blog post or social media post) online, now with “actual malice”—knowledge that the statement was false, or at least recklessness about that possibility. Every day, the article is distributed to more readers, for instances ones that find it via a Google search.

Should Donna (and her employer<sup>1</sup>) be liable for defaming Paul, based on the continued distribution, even though she is not liable for

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1 For the sake of brevity, I will mostly discuss the responsibility of the author, and include within that the employer's respondeat superior liability, *see infra* note 20. But I'll occasionally mention the employer as well, just as a reminder that in practice both parties

the initial publication? Or should she be immune from liability, even if she keeps the material up unmodified, because she wasn't culpable at the time she made the statement? The answers, surprisingly, are unsettled.

Or say Donna accurately posts online that Paul has been convicted of a crime. Her statement, and her description of Paul's actions, fairly and accurately reports on government proceedings, and is thus not libelous. Three months later, the conviction is reversed because there was insufficient evidence supporting it.

Paul informs Donna about that. Donna is now knowingly distributing an article online that no longer fairly and accurately summarizes the aggregate of the legal proceedings in the case. (As we'll see in Part IX, reports that mention a conviction without mentioning the reversal are generally not covered by the fair report privilege.) Should Donna be liable for continuing to knowingly distribute the now-defamatory material?<sup>2</sup> The answer is likewise unsettled.

The internet is a persistent medium, where defamation often causes damages through a steady drip-drip-drip of people finding items online each day, rather than through the short, sharp shock of a traditional print publication. But our libel law developed when publishers printed something and it then left their control. In such situations, the only questions were whether the publishers were liable for the initial printing, and perhaps whether they should have an affirmative duty to publish a retraction. The question whether they should have a duty as to material that they were continuing to distribute rarely arose.<sup>3</sup> Yet that question is especially important today.

In this Article, I discuss such liability for continuing to distribute material once one knows it's libelous, and tentatively argue that there should indeed be such liability (properly bounded):

- It's fair both to publishers and to the victims of the false statements.<sup>4</sup>
- It's consistent with First Amendment principles.<sup>5</sup>

will likely be the target of a lawsuit (assuming the author is writing for someone else, rather than as an independent blogger or social media poster).

2 Throughout, let's assume Donna is technologically able to correct her statement, generally because it's on a web site that she can update just as she could initially post to it. See *infra* Section VII.C.

3 For a rare example of such liability for continued distribution, see *Southern Bell Telephone & Telegraph Co. v. Coastal Transmission Service, Inc.*, 307 S.E.2d 83, 85, 88 (Ga. Ct. App. 1983), where a phone company was liable for continuing to distribute Yellow Pages after being alerted that the slogan for a transmission repair company was printed not as "Get it in gear" but as "Get it in rear."

4 See *infra* Part I.

5 See *infra* Part II.

- It's authorized by a longstanding libel law principle applicable to real property owners, who can be liable for continuing to keep defamatory material on their property once they learn of its presence.<sup>6</sup>
- It should apply in some measure to private-figure libel compensatory damages cases that are based on the defendant's negligence, and not just to cases that are based on the defendant's "actual malice."<sup>7</sup>
- And such liability shouldn't be seen as contrary to the "single publication rule," properly understood.<sup>8</sup>

Such liability does impose some burden on those who have posted the statements, and that gives me pause. But that burden strikes me as on balance justifiable. It's not far from the normal burden that modern libel law—sharply constrained by the First Amendment—generally imposes on speakers.<sup>9</sup> And it's suitably limited to scenarios where authors and publishers are practically able to remove or correct material that they have been informed is likely mistaken.<sup>10</sup> Courts should recognize it under existing common-law principles, and state legislatures may institute it, too; I offer a sample statute in Part VIII.

The liability should also apply, as I suggested above, to situations where a legally significant decision that strongly implies likely guilt is reversed, for instance when a prosecution leads to an acquittal, or a conviction is reversed on the merits. In that situation, publishers should have a duty not to continue hosting material that has become misleadingly incomplete in important ways, though they should be free to keep the original report up with an update indicating what later happened.<sup>11</sup> And for these particular legal updates (unlike the other updates I discuss above), the statute of limitations should be extended.<sup>12</sup>

There are three important limitations to my claims here:

1. I'm not speaking of a "duty to retract," in the sense of a print newspaper's affirmative obligation to publish a retraction to a printed story when it learns of errors. Such a duty has generally been rejected as a matter of libel law,<sup>13</sup> and I am not trying to revive it here. American

6 See *infra* Part III.

7 See *infra* Part IV.

8 See *infra* Part V.

9 See *infra* Part VI.

10 See *infra* Part VII.

11 See *infra* Part IX.

12 See *infra* Section IX.C.

13 *D.A.R.E. Am. v. Rolling Stone Mag.*, 101 F. Supp. 2d 1270, 1287 (C.D. Cal. 2000); *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515 (D.C. Cir. 1996). *But see* *Conant v. Rodriguez*, 828 P.2d 425, 427 (N.M. Ct. App. 1992) (concluding that, once defendant polygraph examiner company owner realized that its report to plaintiff's

common law generally (though not uniformly) disfavors such affirmative duties, and I don't seek to refight that battle.

Rather, I'm speaking here of a negative duty, closely linked to the traditionally recognized duty not to defame people in the first place—the duty to stop defaming someone, by removing or correcting online material over which one has control.

2. Potential liability would be triggered only when the subject of an article notifies the publisher that the article is in error (or that there have been new legal developments that essentially overturn an earlier legal determination of probable guilt). Publishers wouldn't have to proactively do follow-up investigations in the absence of such notifications.<sup>14</sup>

3. I am speaking here of a publisher's duty to stop distributing its own errors. I am not proposing changing 47 U.S.C. § 230(c)(1), which limits publishers' responsibility for material submitted by others (such as comments posted by readers below news stories or blog posts). There is a separate debate about whether § 230(c)(1) should be modified; I leave that to other articles.

## I. REASONS FOR THE DUTY

Let's turn to a more concrete hypothetical: say two reporters, Ophelia Often (who tends to check her voicemail often) and Randy Rarely (who tends to check his rarely), are writing stories about Starlight Rainbow,<sup>15</sup> accusing her of mistreating a fifth-grade student. (For convenience, assume that Starlight is a principal and thus a public figure or public official under state law.<sup>16</sup>) It turns out, though, that

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employer about plaintiff failing a polygraph test was mistaken, “there can be no doubt of the duty of [defendant] to inform [plaintiff's employer] of the error”), *overruled as to other matters*, *Baker v. Bhajan*, 871 P.2d 374, 377 (N.M. 1994).

Some cases have held that failure to retract is evidence that the *original statement* was made with a culpable mental state. *See, e.g., Vigil v. Rice*, 397 P.2d 719, 722–23 (N.M. 1964). But that's a separate theory, and one that would be unavailable in many cases (for instance, where it's clear that the original statement wasn't culpable). *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964); *Ross v. Gallant, Farrow & Co.*, 551 P.2d 79, 81 (Ariz. Ct. App. 1976).

Some statutes provide that a prompt retraction can preclude the defendant from being required to pay presumed and punitive damages, *see, e.g., CAL. CIV. CODE* § 48a (West 2021), but again that is relevant only when the original unretracted story is libelous.

14 *See infra* Part IV.

15 That's the real name of the plaintiff in *Rainbow v. WPIX, Inc.*, 117 N.Y.S.3d 51, 52 (App. Div. 2020); the facts in the text are based on *Rainbow*, but modified for the sake of the hypothetical.

16 Not all courts view principals as public officials, but let's assume that this court does. *See* Danny R. Veilleux, Annotation, *Who Is “Public Official” for Purposes of Defamation Action*, 44 A.L.R.5th 193, §§ 30[a]–[b] (1996).

both reporters erred: the actual allegations of mistreatment were about a different teacher with the same last name, Cynthia Rainbow.<sup>17</sup>

Starlight learns about the planned stories, and leaves voicemails for both reporters with persuasive evidence that she's not actually the guilty party. (She actually works at a different school.) Ophelia listens to her voicemail before her story is posted, but Randy listens to his only after. For whatever reason, Ophelia still posts her story, and Randy doesn't correct the story he had posted.<sup>18</sup>

Starlight now sues Ophelia (and her employer) for posting her story and Randy (and his employer) for continuing to keep his story up. The statement in each story—that Starlight was accused of mistreating the student—is false and defamatory. Ophelia and Randy are both aware now that it's probably false. Both employers are keeping up the stories without correction, even though they are aware that the stories contain false and defamatory statements.

Starlight's claim against Ophelia's employer will thus likely prevail: Ophelia posted knowing that the statement was probably false (which likely counts as "reckless disregard" of the truth and therefore "actual malice"<sup>19</sup>), and liability is imputed to Ophelia's employer under respondeat superior.<sup>20</sup> Starlight can thus use the threat of liability to pressure Ophelia's employer to correct the story on its site. And it's hard to see why Starlight's claim against Randy should be treated any differently:

1. The *harm* caused by the stories is identical: Starlight is being damaged equally by both.<sup>21</sup>

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17 Also a real person from *Rainbow*. *Rainbow v. WPIX, Inc.*, No. 152477/2015, 2018 WL 5255253, at \*1 (N.Y. Sup. Ct. Oct. 22, 2018), *aff'd*, 117 N.Y.S.3d 51.

18 I expect that most mainstream news sources would make the correction, just as a matter of journalistic ethics, and that most individual bloggers and social media users would do the same. But sometimes they don't—in *Rainbow*, for instance, "nearly seven months . . . elapsed from [Rainbow's] August 2014 retraction demand to [WPIX's] removal of the article from its website in March, 2015 upon her commencement of this case," 117 N.Y.S.3d at 53. The question is whether the law should pressure publishers to promptly correct.

19 *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666–67 & n.7 (1989).

20 *E.g.*, *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 925 (Minn. 2009) ("[F]or purposes of showing actual malice by a corporation, the corporation is liable for the acts of its employees, under the rule of respondeat superior.").

21 A colleague of mine suggested that some readers might be less likely to credit old stories than new ones, perhaps because they may perceive the old stories as outdated (or may assume that a person's long-past misdeeds are no longer representative of the person's trustworthiness today); or at least readers could be taught to credit such stories less. But I doubt this is so. First, many people may reasonably assume that even years-old information is quite probative of a person's current character. Second, in some of these cases, like *Rainbow*, the erroneous story is only days or months old. *See, e.g.*, 117 N.Y.S.3d at 53.

2. The *value* of the statements about Starlight is equally low in both stories: both statements are false.<sup>22</sup>
3. The current *mental state* of the reporters and employers is equal: Randy and Randy's employer are as aware of the falsehood now as Ophelia and Ophelia's employer were when Ophelia's story went up.
4. The current *culpability* of the reporters and employers is thus also equal: Randy and Ophelia are continuing to distribute material that they now know to be false, which is culpable whether or not their initial posting was culpable at the outset (as Ophelia's was but Randy's wasn't).
5. The *chilling effect* from the threat of liability is equally low: such liability would apply only because both reporters have been notified of specific, credible evidence that the statement was false—they wouldn't be chilled from continuing to write and keep posted material that they believe is true.
6. The *practical cost* of avoiding liability is basically equal: all the reporters would have to do would be to correct the story to name the right Rainbow. Correcting a story once it's posted might call for a bit more work—the publication may feel obligated not just to make a silent change, but to add a correction notice (e.g., "Editor's Note: This story initially misidentified the teacher; the actual name, corrected above, is Cynthia Rainbow"). And if the request doesn't come in until months after the publication (but before the statute of limitations runs), the reporter might need some time to get back up to speed on the story to confirm that a correction really is needed. But these don't strike me as sufficient bases to justify immunity for Randy.

This duty to make such corrections also mirrors similar duties in other areas of the law. When I disclose something in civil discovery, and I "learn[] that in some material respect the disclosure or response is incomplete or incorrect," I have to "supplement or correct [my] disclosure."<sup>23</sup> Lawyers have similar duties to inform the court if they had inadvertently offered evidence but later "come[] to know of its falsity."<sup>24</sup> People who make a statement related to the offer for sale of securities, and then learn that it was mistaken, must correct it.<sup>25</sup> More

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22 See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact.").

23 FED. R. CIV. P. 26(e)(1).

24 MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 1983).

25 "[O]nce a statement of fact . . . has been made, the person making the statement is then under a duty to correct any misstatements [and] therefore has a duty to update the

broadly, even if I have no affirmative duty to protect you from various kinds of harms, I may acquire such a duty if I created the peril to you in the first place (even if I wasn't at fault in so creating it).<sup>26</sup>

And I think such a duty is also ethically sound. Damaging another's reputation through knowingly or recklessly false statements is wrong. It's wrong if the author posts the statements knowing that they are false. But it's also wrong if the author learns that the statements are false, but nonetheless continues to distribute them without correction.

To be sure, recognizing a duty to stop knowingly libeling (and thus to correct posts that continue to libel someone) will mean more requests for correction, which publishers will have to consider. But I doubt this marginal effect will be particularly great:

1. Publishers already get requests for corrections and retractions, and generally take them seriously as a matter of journalistic ethics (and common decency), even when they have no legal obligation to correct.

public as to any material changes." 3 THOMAS LEE HAZEN, *TREATISE ON THE LAW OF SECURITIES REGULATION* § 12:75 (8th ed. 2021); see also Robert H. Rosenblum, *An Issuer's Duty Under Rule 10b-5 to Correct and Update Materially Misleading Statements*, 40 CATH. U. L. REV. 289, 301 (1991).

26 See, e.g., RESTATEMENT (SECOND) OF TORTS § 321 (AM. L. INST. 1977) (people who do something with "no reason to believe that it will involve" "an unreasonable risk of causing physical harm to another" nonetheless acquire a duty "to exercise reasonable care to prevent the risk from taking effect" when they "subsequently realize[] or should realize that" they have created such a risk); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 39 (AM. L. INST. 2012); cf. *Montgomery v. Nat'l Convoy & Trucking Co.*, 195 S.E. 247 (S.C. 1938) (recognizing that someone who nonnegligently creates a risk may have a duty to warn others about the risk). Consider illustration 2 to § 321:

[1.] A, reasonably believing his automobile to be in good order, lends it to B to use on the following day. [2.] The same night A's chauffeur tells him that the steering gear is in dangerously bad condition. [3.] A could readily telephone B and warn him of the defective steering gear but neglects to do so. [4.] B drives the car the following day, the steering gear breaks and the car gets out of control, causing a collision with the car of C in which B and C are hurt. [5.] A is subject to liability to B and C.

RESTATEMENT (SECOND) OF TORTS § 321 cmt. a, illus. 2 (AM. L. INST. 1977). One might likewise say:

1. A, reasonably believing her story about C is accurate, publishes it to her readers (the Bs).
2. The same night C tells A that the story is false and thus is wrongly dangerous to C's reputation.
3. A could readily inform many of the Bs of the actual facts, simply by correcting the story so that it no longer contains the false accusations.
4. The Bs read the story, and as a result stop doing business with C, who is therefore financially hurt.
5. A should be subject to liability to C (though not to the Bs, given that false newspaper stories are generally not seen as actionably harming their readers).

2. Those existing demands are already often backed by a threat of litigation. The subjects of erroneous stories often assume the authors were negligent (or even had actual malice) at the outset. And even if the publisher did have a categorical right to escape liability when such initial negligence or actual malice can't be shown, the publisher might not be sure that the jury will find such absence of negligence or malice.<sup>27</sup>

Publishers will thus have to deal with only a slightly larger volume of correction requests, and requests of a sort that they already have to consider. And while those requests will have some cost, they will also have a benefit: less enduring reputational damage to people who can show that the charges against them are indeed false and defamatory.

Publishing a correction, however, should not restart the statute of limitations (except as to claims that the correction itself is libelous). “Whether a modified article is a republication”—i.e., an event that restarts the statute of limitations—will largely turn “on whether the altered article contains defamatory statements not expressed in the original article.”<sup>28</sup> If the only material added softens the original charges, rather than adding new defamatory statements, the statute of limitations would thus not be restarted. And even if the new material is itself allegedly defamatory, adding such material should not restart the statute of limitations as to old material that remains unchanged.

## II. THE CONSTITUTIONALITY OF THE DUTY

A duty to stop hosting articles once one learns that they are false and defamatory is consistent with the First Amendment. “[T]he lie, knowingly and deliberately published” is constitutionally unprotected.<sup>29</sup> It follows that falsehood knowingly and deliberately maintained in one’s online publication should be equally constitutionally unprotected.

As noted above, the duty does impose some burden on publishers, and might create something of a chilling effect. When publishers get correction demands that claim that a statement is defamatory, they would have to investigate whether the demands are well-founded. And if there’s some uncertainty, then the publishers might be reluctant to stand by a story, even if they are still confident in it, for fear that jurors will rule against them and conclude that they were reckless.

But, returning to the example with Ophelia and Randy, that’s also precisely the situation Ophelia’s newspaper faced when Starlight got the exculpatory information to Ophelia in time, *before* Ophelia’s story

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27 More on this in Part VI below.

28 *Petro-Lubricant Testing Labs., Inc. v. Adelman*, 184 A.3d 457, 467 (N.J. 2018).

29 *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

was published. There too the newspaper might have been uncertain, and might have been chilled from running the story despite the mens rea protections that the First Amendment provides.

That was enough for Justices Black, Douglas, and Goldberg to argue in *New York Times Co. v. Sullivan* that libel law should be absolutely rejected, at least as to matters of public concern.<sup>30</sup> Yet the majority disagreed, and concluded that the “actual malice” standard protected publishers enough, despite the residual chilling effect. Likewise, the *Gertz v. Robert Welch, Inc.* majority concluded ten years later that the negligence standard sufficed for proven compensatory damages based on speech about private figures.<sup>31</sup> If that’s true for lawsuits based on prepublication decisions to publish (as in the lawsuit against Ophelia’s newspaper), it should be equally true for lawsuits based on postpublication decisions to keep distributing a published story (as in the lawsuit against Randy’s newspaper).

A duty to stop distributing libelous material should be limited in one important way: once a libelous statement is published, totally removing it might hide important facts about its having been published. Say, for instance, that Donna’s story accused Paul of some crime. This could well have led to controversy, with people publicly criticizing Donna and her publisher for what she wrote; if Paul then sued, there would have been stories about the lawsuit.

Totally removing Paul’s name from the original story might make it harder for future researchers to fully understand those follow-up criticisms and news accounts. In a sense, there now would be “constitutional value in [the] false statements of fact”<sup>32</sup> in the original story, because the statements’ having been said would itself be an important fact. (This is indeed one basis for the neutral reportage privilege, under which some states allow speakers to report on allegations, even false ones, when the allegations are an important part of public debate.<sup>33</sup>)

Because of this, a publisher should be free not to remove the libelous statement but instead to correct it, by adding a prominent note—preferably at the start of the story—reflecting the newly discovered information. Indeed, standard libel principles would already allow this, since reasonable readers would then no longer interpret the story as making the original (now-corrected) accusation. But in any event, it should be constitutional for the law to impose

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30 376 U.S. 254, 297 (1964) (Black, J., concurring); *id.* at 298 (Goldberg, J., concurring in the result).

31 418 U.S. 323, 350 (1974).

32 *Id.* at 340.

33 See, e.g., *Edwards v. Nat’l Audubon Soc’y, Inc.*, 556 F.2d 113 (2d Cir. 1977).

liability if no such correction is made, and the publisher leaves up the unaltered defamatory story even after it learns that the story is false.

### III. THE EXISTING DUTY NOT TO CONTINUE DISPLAYING POSTS ON PHYSICAL PROPERTY

A duty not to keep hosting material that you've learned is defamatory is thus a good idea and is constitutional. It could certainly be instituted by statute.

But I think courts can also sensibly develop it under common-law libel law principles; indeed, Restatement (Second) of Torts § 577 already suggests it:

- (1) Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed.
- (2) One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.<sup>34</sup>

Subsection (1) sets forth the general way that people can be liable for defamation: by communicating it. And subsection (2) makes clear that this includes “continued publication” after one learns that the material is false.

Say a publisher prints some number of copies of a Yellow Pages phone book, without realizing that there is a defamatory error in one of the ads; but then the publisher keeps distributing the phone book even after it learns that the ad is defamatory. Such “continuation of distribution after the error had been brought to the attention” of defendants may well be actionable “communication . . . by a negligent act.”<sup>35</sup> “[A]llowing additional distribution of the yellow pages directories” is a continued communication which may itself be libelous.<sup>36</sup> And that logic would apply to continued distribution online as much as to continued distribution of paper copies.<sup>37</sup>

Subsection (2) also makes clear that one way of actionably communicating defamation is by knowingly retaining it on one's property. This doesn't hold a property owner strictly liable simply because someone posted something on the property, nor does it

34 RESTATEMENT (SECOND) OF TORTS § 577 (AM. L. INST. 1977).

35 *S. Bell Tel. & Tel. Co. v. Coastal Transmission Serv., Inc.*, 307 S.E.2d 83, 88 (Ga. Ct. App. 1983); RESTATEMENT (SECOND) OF TORTS § 577 (AM. L. INST. 1977).

36 *S. Bell Tel. & Tel.*, 307 S.E.2d at 88.

37 Part V below explains why the single publication rule shouldn't preclude this result.

impose a duty to monitor property for such postings.<sup>38</sup> But once someone informs a property owner about defamatory material posted on its property, the owner must take reasonable steps to take down the material. And this applies to material on “chattels,” such as computer equipment, and not just “land.” In the words of one district court,

[E]ven assuming that the *Gazette* acted completely reasonably in publishing the AP article on its website, it is clear that at some point the *Gazette* learned of both the article’s presence on its website and the article’s inaccuracies. It is due to this that the Court cannot in good conscience find that the wire service defense [which would have immunized *Gazette*’s original publication of the AP article] provides a complete defense for the Defendant. *Cf.*, Restatement (Second) of Torts § 577(2) (stating that “one who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication”).<sup>39</sup>

Now the classic examples of this § 577(2) liability have involved property owners liable for failing to remove *third-party* posts on their property—for instance, when a married woman sued a bar for not removing graffiti that suggested that she was interested in sex with strangers,<sup>40</sup> or when a factory failed to remove a posted leaflet that defamed an employee to his coworkers.<sup>41</sup> There likely wouldn’t be liability today for such third-party posts on a person’s web site: 47 U.S.C. § 230(c)(1) immunizes such sites from liability for third-party posts generally.<sup>42</sup>

38 “[T]he duty arises only when the defendant knows that the defamatory matter is being exhibited on his land or chattels, and he is under no duty to police them or to make inquiry as to whether such a use is being made.” RESTATEMENT (SECOND) OF TORTS § 577 cmt. p (AM. L. INST. 1977).

39 *Taub v. McClatchy Newspapers, Inc.*, 504 F. Supp. 2d 74, 80 (D.S.C. 2007); *see also Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103, 1109 (9th Cir. 2009) (suggesting that a web site operator could be liable for failing to remove libelous material, though concluding that in that case the defendant was immune under 47 U.S.C. § 230(c)(1), given that the material was posted by a third party); *Cornelius v. Deluca*, No. 10-cv-027, 2010 WL 4923030, at \*3–4 (D. Idaho Nov. 29, 2010) (suggesting that defendant could be held liable for keeping up a post once it learns that its agent had posted a defamatory item and “unreasonably failed to take steps to remove it”), *modified on reconsideration as to other matters*, 39 Media L. Rep. 1660 (BL), 2011 WL 977054 (D. Idaho Mar. 15, 2011).

40 *Hellar v. Bianco*, 244 P.2d 757, 757 (Cal. Dist. Ct. App. 1952); *cf. Tidmore v. Mills*, 32 So. 2d 769, 772, 777–78 (Ala. Ct. App. 1947); *Woodling v. Knickerbocker*, 17 N.W. 387, 388 (Minn. 1883). *But see Scott v. Hull*, 259 N.E.2d 160 (Ohio Ct. App. 1970) (rejecting liability in a similar situation).

41 *See, e.g., Tacket v. Gen. Motors Corp.*, 836 F.2d 1042, 1045 (7th Cir. 1987); *cf. Dillon v. Waller*, No. 95APE05-622, 1995 WL 765224, at \*1–2 (Ohio Ct. App. Dec. 26, 1995); *Kennedy v. Wal-Mart Stores, Inc.*, No. WD 59936, 2002 WL 1991158, at \*12 (Mo. Ct. App. Aug. 30, 2002), *rev’d on other grounds*, 100 S.W.3d 809 (Mo. 2003) (en banc).

42 *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

But the text of § 577(2) would also apply to liability for intentionally and unreasonably failing to remove *one's own* defamatory posts (which aren't immunized by § 230(c)(1)<sup>43</sup>). And the logic of § 577(2) would as well.

Say that both Earl and Donna post signs on Donna's property accusing Paul of something. And say that Donna reasonably believes that her own accusation is true (and state law declines to impose strict liability<sup>44</sup>). Donna is then not initially liable for either posting.

But once Donna learns about Earl's accusation and learns that it's false, she can be held liable for it under § 577(2). There's no reason why she should be *less* liable for her own accusation once she likewise learns that it's false.<sup>45</sup> And there's no reason why she should be less liable when the accusation is available to the whole world, rather than just being posted on a restroom or factory wall.

#### IV. SCOPE OF THE DUTY: NEGLIGENCE-BASED LIBEL CLAIMS

So far, we've considered situations where Donna learns facts that *make her realize* that her statement about Paul on her site is indeed false (or is very likely false). This would correspond to the "actual malice" that would normally suffice for defamation liability even for lawsuits brought by public officials and public figures.

If Paul is a private figure, he can also recover compensatory damages by showing that Donna was merely negligent when she posted the allegations.<sup>46</sup> Say then that Donna acted reasonably when posting the original story, and Paul claims that Donna negligently kept it up after *she should have realized* it was mistaken.

If Paul's claim is simply that Donna unreasonably failed to proactively monitor further developments in the story, I think he

43 *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008).

44 In some jurisdictions, negligence might be required for libel claims generally, *see, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 558(c), 600 (AM. L. INST. 1977), even ones on matters of purely private concern, where the First Amendment might not require a showing of negligence, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). Other jurisdictions might allow strict liability generally, but provide for some conditional privileges that are available for communications made "upon reasonable or probable cause." *See, e.g.*, *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257 (Minn. 1980).

45 *See Pa. Iron Works Co. v. Henry Voght Mach. Co.*, 96 S.W. 551 (Ky. 1906).

46 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (proven compensatory damages for defamation on matters of public concern about private figures); *Dun & Bradstreet*, 472 U.S. at 760 (any kind of damages for defamation on matters of private concern). The First Amendment might allow even strict liability in private-concern cases, *see Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1334 (5th Cir. 1993); *Peshak v. Greer*, 13 S.W.3d 421, 425–26 (Tex. App. 2000), but in practice state laws generally require at least negligence, RESTATEMENT (SECOND) OF TORTS §§ 558(c), 600 (AM. L. INST. 1977).

should lose. It makes sense that, before Donna publishes something about Paul, she should make a reasonable effort to make sure it's right. But the law shouldn't demand that she or her employer continue keeping up on facts that later emerge as to all the many stories that she's written.

Perhaps the magnitude of such a proactive monitoring burden means that declining to monitor past stories isn't unreasonable. But it's simpler and more predictable to hold that, as a matter of law, the reasonableness standard just doesn't apply. Instead, it should be up to Paul to expressly alert Donna about the supposed error, and to explain why it is indeed an error.<sup>47</sup>

But say that Paul does alert Donna, yet Donna unreasonably rejects Paul's new evidence. Say, for instance, that Donna wrote that Paul, a lawyer, has been accused of embezzling from a client. She was not negligent, because she was relying on Walter and Wilma, two witnesses who appeared reasonably credible.

But then Paul informs her of newly discovered evidence that Walter and Wilma are actually highly unreliable—perhaps it shows that they were both biased against Paul, or were trying to cover up their own crimes, or have just been arrested for fraud. Donna still sincerely believes the witnesses' story, and thus her own story. Indeed, it's human nature to think that you're right (especially when you've publicly committed to some assertion), and therefore to sincerely reject evidence that shows you've been fooled. Yet a jury might reasonably conclude that this continued belief was negligent.

In this situation, should a speaker have a duty to reasonably re-investigate the correctness of a previously published statement when alerted of an alleged error, presumably in light of the extra evidence that the speaker has been given? “[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”<sup>48</sup> States would presumably be equally free to impose negligence-based compensatory

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47 Cf. *Blanchette v. Barrett*, 640 A.2d 74, 88 (Conn. 1994) (holding that “a physician who has performed a misdiagnosis” has no “continuing duty to correct that diagnosis” unless he actually “subsequently learned that his diagnosis was incorrect”), *overruled as to other matters* by *Grey v. Stamford Health Sys., Inc.*, 924 A.2d 831, 840 (Conn. 2007). Product sellers do have a duty to warn when they “reasonably should know that the product poses a substantial risk of harm to persons or property,” even based on facts that emerge after the sale. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 10 (AM. L. INST. 1998). But rules of liability for publishers are generally less onerous than products liability rules, in part for First Amendment reasons. See, e.g., *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1036–37 (9th Cir. 1991).

48 *Gertz*, 418 U.S. at 347.

damages for publishers who continue to maintain such defamatory falsehoods on their sites. Should states do so?

I'm inclined to think that the answer is yes, for much the same reasons given as to public figures and actual malice. It's libelous for Donna to publish a false and defamatory statement about private-figure Paul, when a reasonable person should have realized the statement was likely erroneous. It should likewise be libelous for her to continue distributing an already-published statement, once she has gotten specific contrary evidence, if a reasonable person should realize in light of that evidence that the statement is likely erroneous.

And this is especially so because (as suggested in Part I) the delay in getting the information to Donna might just be an accident of timing. Say Paul had evidence of Walter and Wilma's lack of credibility all along, and got it to Donna before she published; Donna would then be liable for negligently ignoring it. But say that, through no fault of Paul's, Donna doesn't get the evidence in time, but only the day after the story comes out. Why should she then be off the hook, given that the ongoing distribution of her story is continuing to damage Paul's reputation?

## V. THE SINGLE PUBLICATION RULE

Several courts that have considered the issue, though, have declined to hold people liable for knowingly maintaining libelous material online. Rather, those courts have tended to allow liability only when the defendant had a culpable *mens rea* as of the time the material was initially posted.<sup>49</sup> And the main reason for this has been the single publication rule.

Historically, common-law libel cases used to follow the “multiple publication rule”:

Each time a libelous article is brought to the attention of a third person, a new publication has occurred, and each publication is a separate tort. Thus, each time a libelous book or paper or magazine is sold, a new publication has taken place which, if the libel is false and unprivileged, will support a separate action for damages against the seller.<sup>50</sup>

“Thus, if a newspaper printed an article and that newspaper was purchased by ten individuals, each communication of the defamatory article was a tortious act resulting in the injured party having ten causes

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49 See *Rainbow v. WPIX, Inc.*, 117 N.Y.S.3d 51, 53 (App. Div. 2020); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614–15 (7th Cir. 2013); *Thomas v. City of New York*, No. 17-cv-06079, 2018 WL 5791965, at \*11 (E.D.N.Y. Nov. 5, 2018); see also *Lakireddy v. Soto-Vigil*, No. A138675, 2014 WL 1478693, at \*5–8 (Cal. Ct. App. Apr. 16, 2014).

50 RESTATEMENT (FIRST) OF TORTS § 578 cmt. b (AM. L. INST. 1938).

of action.”<sup>51</sup> It followed that each distribution of a libelous item would restart the statute of limitations.<sup>52</sup>

In the mid-1900s, courts began to shift to the “single publication rule”:

- (3) Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.
- (4) As to any single publication,
  - (a) only one action for damages can be maintained;
  - (b) all damages suffered in all jurisdictions can be recovered in the one action; and
  - (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.<sup>53</sup>

On its face, the single publication rule limits *how many* lawsuits can be brought based on a particular publication. But many courts have also applied this logic to deciding *when the lawsuits must be filed*, concluding that the statute of limitations begins to run when the single publication is first distributed.<sup>54</sup> In the typical internet libel case, that happens when a web page is first published; the clock isn’t restarted each time the page is displayed on a reader’s computer.<sup>55</sup>

It’s not clear whether this was contemplated by the drafters of the Restatement (Second), who said that the single publication rule was “[a]n exceptional rule . . . applied in cases where the same communication is heard at the same time by two or more persons.”<sup>56</sup> That is often the opposite of online distribution, where the work is often distributed at different times to different people. Still, as a policy matter, starting the statute of limitations when an item is first posted strikes me as good policy (though with a twist I’ll note below).

But some courts have read the single publication rule as dictating that *the publisher’s mental state* must likewise be determined solely as of the date of the single publication. The cause of action accrues at the time of publication, the logic goes. If at that time, the publisher believes (or, in private-figure cases, reasonably believes) that the statement is true, then it doesn’t matter what the publisher later learns.

51 *Graham v. Today’s Spirit*, 468 A.2d 454, 457 (Pa. 1983).

52 RESTATEMENT (FIRST) OF TORTS § 899 cmt. c (AM. L. INST. 1938).

53 RESTATEMENT (SECOND) OF TORTS § 577A (AM. L. INST. 1977); *see also* UNIF. SINGLE PUBL’N ACT § 1 (UNIF. L. COMM’N, withdrawn 2009) (adopting this rule); *id.* at Refs & Annos (noting that the Act has been adopted in Arizona, California, Idaho, Illinois, New Mexico, North Dakota, and Pennsylvania).

54 *See, e.g.,* *Gregoire v. G.P. Putnam’s Sons*, 81 N.E.2d 45, 47 (N.Y. 1948).

55 *See, e.g.,* *Firth v. State*, 775 N.E.2d 463, 465 (N.Y. 2002).

56 RESTATEMENT (SECOND) OF TORTS § 577A cmt. b (AM. L. INST. 1977).

All that matters is what the publisher knew (or should have known) as of when the cause of action accrued.<sup>57</sup>

This, it seems to me, is mistaken, for two related reasons.

1. Formally, a cause of action generally accrues only “once all of the elements of an action . . . are present.”<sup>58</sup> Under the modern rule, where the speaker’s culpable mens rea is an element of a defamation claim, a libel claim thus doesn’t accrue until the speaker becomes culpable.

If in March WPIX reported (based on reasonable belief) that Starlight Rainbow had mistreated a student, and in August WPIX learned that the guilty party was actually Cynthia Rainbow, then any libel cause of action would not have accrued in March, because the negligence element was absent. The action would only have accrued in August, and the single publication rule would have kicked in only then. Thus, even applying the single publication rule, the mens rea for libel liability—under the § 577(2) theory that “[o]ne who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on . . . chattels . . . under his control” is liable for “continued publication”—should be determined as of August, when the negligence element was satisfied.<sup>59</sup>

Some cases do say that, under “the single publication rule, . . . a plaintiff’s cause of action accrues only once, at the time of publication,”<sup>60</sup> but that’s an oversimplification: the cause of action accrues only once, and that is usually the time of publication. But no cause of action should be said to accrue before all the elements are satisfied. Thus, in trade libel cases, where damages are an element of the tort, the cause of action doesn’t accrue until damages arise.<sup>61</sup> Likewise, in the rare ordinary libel cases where the mens rea element isn’t satisfied until after publication, the cause of action shouldn’t accrue until the mens rea is present.

2. Now as a practical matter, I do think that it makes sense for the *statute of limitations* to run from the time of publication. Functionally, the single publication rule was designed to prevent multiple lawsuits, and to prevent long-delayed lawsuits filed after evidence may have

57 See *Rainbow v. WPIX, Inc.*, 117 N.Y.S.3d 51, 53 (App. Div. 2020); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614–15 (7th Cir. 2013); see also *Lakireddy v. Soto-Vigil*, No. A138675, 2014 WL 1478693, at \*8 (Cal. Ct. App. Apr. 16, 2014) (concluding that “failure to remove a Web site posting,” even “once substantial indications of falsity existed,” is not a “republication” of the original posting and thus cannot lead to liability).

58 E.g., *Connelly v. Paul Ruddy’s Equip. Repair & Serv. Co.*, 200 N.W.2d 70, 72 (Mich. 1972).

59 RESTATEMENT (SECOND) OF TORTS § 577(2) (AM. L. INST. 1977).

60 *Milligan v. United States*, 670 F.3d 686, 698 (6th Cir. 2012); *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1166 (9th Cir. 2011).

61 See *Guess, Inc. v. Superior Ct. of Cal.*, 222 Cal. Rptr. 79 (Ct. App. 1986).

been lost and the key events forgotten. Without it, one article in one issue of a newspaper could lead to many lawsuits, and a statement in a book (or on a web site) could lead to a lawsuit decades after it was published. “A newspaper article published forty years ago whose veracity is called into question today could subject the publisher to a defamation suit.”<sup>62</sup>

For these purposes, treating the publication date as being the date of first publication makes sense. If my online article about you is published on January 1, 2025, and the statute of limitations for libel is a year, then on January 2, 2026, you can no longer sue.

Yet say I learn the article is mistaken on January 2, 2025 (because you tell me), I refuse to correct it, and you sue me on January 10, 2025, well within the statute of limitations. It’s hard to see then why the single publication rule should measure my mental state solely as of January 1. My site’s being available continuously might not count for statute of limitations purposes. But its being correctable continuously should indeed count for determining whether I’m continuing to publish the article with actual malice.

## VI. PRACTICAL APPLICATIONS AND PRACTICAL PROBLEMS

Let us elaborate briefly on how this duty could play out in various scenarios, and what problems it may pose.

### A. *Immediate Demand from Plaintiff*

I expect that this duty will often be triggered by prompt demands from a plaintiff. One common situation would be the one given above: Donna writes about Paul, but can’t reach him by publication time (or he can’t get back to her in time). After the story runs, Paul produces evidence that persuades Donna that the story was mistaken, or at least that it was very likely mistaken. Or, if Paul is a private figure, it might suffice that Paul produces evidence that reasonably should persuade Donna that the story was mistaken.

Reviewing this evidence would certainly involve time and effort—but probably not much more than Donna would have needed to spend had she gotten the information in time. (The difference would be that reviewing it after publication might require some extra effort to craft a suitable revision.)

Indeed, as noted above, Donna and her employer would likely have to closely review Paul’s new evidence even in the absence of a duty to stop distributing defamatory material. First, responsible publishers and journalists would likely review the new evidence in any event, since

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62 *Roberts*, 660 F.3d at 1168.

they owe it to their readers (and to the subjects of their stories) to make sure that they don't distribute false information.

Second, the publisher and Donna might be concerned that, if the story proves false, they might be held liable even for the initial publication. That's an especially serious risk if Paul is a private figure and only needs to show negligence, since failure to uncover the evidence before the article was published might be seen as having been negligent. But even if Paul is a public figure, and has to show "actual malice," the publisher would reasonably worry that perhaps a jury might find the author had some serious doubts about the story and recklessly ran it anyway. One way or the other, then, the publisher would need to closely investigate Paul's new evidence, if the evidence appears to be genuinely new and substantial.

### *B. Years-Later Demand from Plaintiff*

At the other extreme, say Paul contacts the publisher years later, and offers purportedly new evidence that the allegations in Donna's story were false. This might well happen if the story was originally largely forgotten, but then Paul notices that people are seeing it again (for instance, because he has started a career in which would-be clients or employers routinely search for his name).

Such a request could be quite burdensome. By then, Donna might have forgotten much about the story. She might have mislaid her notes. The sources to whom she might return to reverify things might have forgotten important details, or moved, or died. She might have changed employers, and her old publisher (which hosts the story on its site, and on whom the duty to stop distributing libelous material thus falls) might no longer have access to her memories or contacts.

But here the statute of limitations would preclude the suit. In half the states, the statute of limitations for libel claims is a year, and in most of the remainder it is two years.<sup>63</sup> If the statute of limitations has run, Paul would have no basis for a lawsuit, whether based on what the publisher supposedly knew or should have known when the story was published, or based on a duty to stop distributing defamatory material once the publisher learns of an error. And statutes of limitations are created precisely to deal with the unfairness of making defendants deal with vanishing memories and unavailable witnesses.<sup>64</sup>

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63 *Statutes of Limitations for Intentional Torts, 50 State Statutory Surveys, 50 STATE SURVEYS* (2021), Westlaw 0020 SURVEYS 115.

64 *See, e.g., Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

*C. Months-Later Demand from Plaintiff*

Say the original story accurately reports that Paul has been fired from his job because of a theft allegation against him (which had been made internally within the employer, not in court, so the privilege for fair report of government proceedings doesn't apply). Repeating this allegation would have potentially made Donna and her employer liable under the republication rule, if the allegation proves false.<sup>65</sup> But Donna reasonably researched the story, and thus wasn't negligent as to the falsity of the allegation (and certainly wasn't reckless or knowing).

Now, three months later, Paul comes forward with what he claims is powerful evidence that he was innocent: Perhaps the accuser has recanted. Perhaps a later internal employer investigation has concluded Paul was innocent after all. Or, more ambiguously, perhaps new evidence has surfaced suggesting the accuser is untrustworthy or biased (though not proving that the accuser was wrong).

The duty to stop hosting defamatory material would indeed impose a significant new burden on Donna and her employer. Even without such a duty, it seems likely that Donna would research Paul's new evidence and come to a decision about whether to update the article—presumably, most reputable authors and publishers would want to correct the record, so long as their article remains online and keeps appearing when Paul's name is Googled.

But without such a duty, she and her editors could make this decision without fear of being second-guessed through the judicial process. (Recall that her original investigation was, by hypothesis, solid, so she needn't worry much about being sued based on the original story.) If, for instance, she concludes that the recantation might have been pressured, or the employer investigation might have been a whitewash, or the new evidence against the accuser isn't particularly probative, she could just say, "No, I stand by my original story." Indeed, if she's busy with newer stories (quite likely for a working journalist), she could just give the new evidence only a casual glance.

Under the theory outlined in this Article, though, Donna would be obligated to consider the new evidence seriously, and decide whether it's credible enough to cast doubt on the original story. Even if she's skeptical about the new evidence, she could feel pushed to update the story in light of it.

If Paul is a private figure, she would worry that a jury might find his new evidence persuasive, and might find that her not crediting the

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65 See Eugene Volokh, *Libel by Omission of Exculpatory Legal Decisions*, 97 NOTRE DAME L. REV. 351, 354 (2021).

new evidence was unreasonable. Even if Paul is a public figure, she would worry that a jury might conclude that the new evidence indeed persuaded her of the “probable falsity” of the original allegation.<sup>66</sup>

This having been said, it seems to me that this burden to seriously consider the new evidence is justifiable. In most ways, the burden mirrors what authors routinely live with when writing the original story. There too they have to consider all the rival evidence, and run the risk that (1) they will err, and (2) a jury will find that they were negligent or even reckless in making this error. Libel law in that situation does create some chilling effect, but one that’s justified by the importance of preserving reputation against false accusations.

Likewise when an author receives new information that shows a recent story may well be mistaken. The author and her employer chose to keep the story available online, where it continues to damage the subject’s reputation. They can reasonably be asked to review the new information, the same way they had reviewed the original information when the author wrote the initial story. And that is especially so if the duty can be discharged<sup>67</sup> by simply adding an update at the top of the article, explaining the more recent developments.

#### *D. Repeated Demands from Plaintiff*

Finally, let’s consider one other scenario: Paul, upset with the initial article, keeps repeatedly sending supposedly new information—a supportive statement from a character witness, then a week later a new piece of information that supposedly casts doubt on the accuser, then a week later something else, on and on. Maybe Paul is obsessed. Maybe he’s wealthy and has an assistant or a lawyer churning these out. Or maybe it’s the Paul Corp., a business that is willing to take the time and effort to keep trying to remove a story that’s damaging its business reputation.

Such repeated demands can indeed impose a significant burden on Donna and her employer, especially if Paul (or Paul Corp.) is a private figure and can recover based on a showing of negligence. Donna would have to repeatedly check all the new information, and perhaps follow up with any new witnesses cited in that new information.

Without the prospect of liability for continuing to host defamatory material, Donna would have had to put in all that work at the outset, but any ongoing legal obligation would have been over once the story is removed. With such liability, Donna might have to come back to the story many times, at least until the statute of limitations runs.

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66 *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

67 As I argue it should be. See *supra* notes 32–33 and accompanying text.

This, it seems to me, is the most serious downside of recognizing the theory of liability I describe. Indeed, if such a theory were to be recognized by statute, it might make sense to statutorily limit the number of times the duty can be triggered (e.g., no more than twice after publication, or no more than once every three months).

In a sense, the concern here is similar to that which has historically justified doctrines such as *res judicata*, limitations on habeas corpus petitions, limitations on motions to reopen, and the like: there must be limits to attempts to revisit decisions that have been made. On the other hand, such limits are especially justifiable when the initial decision was the result of a detailed and formal process, in which all parties had an opportunity to argue to an impartial decisionmaker—conditions that may be absent for many initial publication decisions.

Ultimately, though, as with libel law more generally, the question is one of net costs and benefits. Would the extra distraction, time, and expense triggered by a duty (here, to take down material that turns out to be libelous) be so chilling that it justifies cutting off a plaintiff's ability to protect his reputation (here, against continued damage caused by the continuing distribution of the story)?

I think that, on balance, it will not. The repeat demander, I think, will generally be treated with skepticism, much as publishers and authors already treat people who continually pester them by demanding that material be removed or by continually threatening lawsuits. But someone who acts more reasonably, and who asks for a correction once, based on serious evidence, would and should be taken more seriously.

#### *E. How Long Should Defendant Have for the Renewed Investigation?*

Finally, how long can the speaker keep the original story up while investigating the new responses? Say Donna gets credible-seeming information from Paul suggesting that her story is mistaken, but, being a good journalist, she is suitably skeptical. She should have some time to review her original notes; review any other documents; talk to newly identified sources; get back to the original sources; and, if necessary, draft a correction. And she also needs time to get the correction reviewed by her editor and perhaps a lawyer.

A similar question arises when state legislatures draft libel retraction statutes. Under those statutes, libel defendants can generally cut off presumed and punitive damages if they publish a retraction or correction promptly after the plaintiff has demanded

one.<sup>68</sup> How promptly? Statutes differ, but the range seems to mostly be a week to a few weeks, though some states give only a few days.<sup>69</sup>

If a state has such a statute, it makes sense for courts to also incorporate a similar time period, by analogy, into any duty to stop distributing defamatory material. Just as it takes time to investigate a possible retraction, so it takes time to investigate a possible update to an online story. If the state has no such statute, courts could either require a “reasonable time,” or set up a categorical line based on what strikes them as generally reasonable (perhaps in light of retraction statutes in other states).<sup>70</sup>

## VII. SUMMARY: WHAT NEEDS TO BE CORRECTED?

So, to summarize, I am arguing that authors and publishers (including self-published authors) should be liable if they

- (a) posted certain material themselves,
- (b) have been informed that the material is false and defamatory,
- (c) are now subjectively aware that it’s false and defamatory (or at least is likely false and defamatory)—or, when the material is about private figures, should reasonably recognize that it’s false and defamatory—
- (d) are able to remove or modify the material, and
- (e) fail to promptly do so.

Let’s briefly review each of these items.

### A. *No Duty to Remove or Correct Third Parties’ Posts*

Under 47 U.S.C. § 230(c)(1), web site operators aren’t liable for defamatory material posted on their sites by third parties.<sup>71</sup> That’s true even if the material is libelous when posted, because the author had the requisite mental state when posting it. It remains true under this Article’s proposal if the author (or the web site operator) later learns

68 See 50 AM. JUR. 2D *Libel and Slander* §§ 319–23 (2021).

69 See, e.g., CAL. CIV. CODE § 48a(b) (West 2021) (21 days); FLA. STAT. § 770.01 (2021) (as few as 10 days, for daily or weekly publications); GA. CODE ANN. § 51-5-11 (West 2021) (7 days); IND. CODE § 34-15-4-2 (2021) (3 days for a news service, 5 days for a daily, and 10 days for a weekly); N.C. GEN. STAT. § 99-2 (2021) (10 days); OHIO REV. CODE ANN. § 2739.14 (West 2021) (48 hours, or in the next issue); TEX. CIV. PRAC. & REM. CODE ANN. § 73.057(a) (West 2021) (30 days). A few state statutes refer to a retraction within “a reasonable time.” See, e.g., MASS. GEN. LAWS ch. 231, § 93 (2021); MICH. COMP. LAWS § 600.2911(2)(b) (2021); N.J. STAT. ANN. § 2A:43-2 (West 2021).

70 Cf. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (setting up a bright-line Fourth Amendment presumption that an arrestee be brought before a neutral magistrate within forty-eight hours).

71 See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332–34 (4th Cir. 1997).

that the material is libelous. Whether § 230(c)(1) should be amended in some measure is a separate question, left for other articles.

*B. Duty Arises Only When the Plaintiff Has Given the Defendant Notice*

The duty arises only once the plaintiff has been informed of the alleged error. The closest analogy, as I've argued above, is to the Restatement rule that “[o]ne who intentionally and unreasonably fails to remove defamatory matter that *he knows* to be exhibited on . . . chattels . . . under his control is subject to liability for its continued publication.”<sup>72</sup> In this particular respect, the duty is similar to the provisions in some states limiting presumed and punitive damages to cases where the plaintiff has warned the defendant of an error, and has given the defendant an opportunity to correct it.<sup>73</sup>

*C. Duty Arises Only When the Defendant Can Remove or Modify the Material*

1. Third-party quotations of defendant’s material

Say Donna’s article was quoted in a third-party publication, or archived on a third-party site, which Donna doesn’t control. Donna is alerted that her article is inaccurate, so she removes or modifies it; but she doesn’t do anything to revise the other site or publication.

Donna should not be held liable under the theory outlined in this Article. Donna has a duty not to continue distributing libelous material herself; this duty doesn’t extend to third parties’ actions.<sup>74</sup> Nor does Donna have a duty to ask the third party to remove or correct the material—her duty is discharged by her updating the material that she does control. (Likewise, if Donna is an employee and her employer is responsible for her under respondeat superior, the employer’s duty is discharged by its updating the material that it controls.)

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<sup>72</sup> RESTATEMENT (SECOND) OF TORTS § 577 (AM. L. INST. 1977) (emphasis added); *see supra* Part III.

<sup>73</sup> For example, “[i]n any action for damages for the publication of a libel in a daily or weekly news publication, or of a slander by radio broadcast, plaintiff shall only recover special damages unless a correction is demanded and is not published or broadcast, as provided in this section. Plaintiff shall serve upon the publisher . . . a written notice specifying the statements claimed to be libelous and demanding that those statements be corrected.” CAL. CIV. CODE § 48a (West 2021).

<sup>74</sup> *See, e.g.,* Dominick v. Sears, Roebuck & Co., 741 S.W.2d 290, 294 (Mo. Ct. App. 1987); Universal Commc’n Sys., Inc. v. Turner Broad. Sys., Inc., No. 05-20047-CIV, 2005 WL 8155012, at \*3 (S.D. Fla. Mar. 21, 2005), *aff’d and remanded*, 168 F. App’x 893 (11th Cir. 2006).

In a normal libel case, “a defendant could be liable for unauthorized republications if such republications were reasonably foreseeable.”<sup>75</sup> If a reporter publishes a libelous column, the harm to the victim’s reputation stems not just from those readers who read the column in the publication, but also from those who see it when it’s forwarded or reposted or reprinted. But if Donna is not legally responsible for the error—if she acted without the requisite mens rea when she first wrote it, and then corrected the error once she learned of it—she ought not become responsible for redistribution that she cannot control.

If Paul alerts the third party about the error in what it is distributing, that site may have its own duty to correct (unless that duty is preempted by 47 U.S.C. § 230(c)(1)). And as a practical matter, if Donna updates her article, the third party may be willing to follow suit. (Indeed, sometimes the third party may automatically revise its records when Donna updates her article, for instance when Google searches start displaying snippets from Donna’s revised article rather than the original article.) But, as a legal matter, the revisions to the third-party site should be a matter between Paul and that third party.

## 2. Material that the authors can’t edit

Sometimes, internet posting software may not offer authors the option of editing material—Twitter posts, for instance, can’t be edited. In that situation, Donna may be required (on pain of liability) to delete the tweet and repost a corrected version. Merely posting a correction as a new tweet would not be enough, I think, since the old tweet would still remain, uncorrected, and may still be visible by people who search for it or who see it embedded in others’ posts.<sup>76</sup> Again, the duty is to stop hosting defamatory material once one knows it’s defamatory, and that might require removing the material if it can’t simply be corrected.

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<sup>75</sup> *Luster v. Retail Credit Co.*, 575 F.2d 609, 613 (8th Cir. 1978); *see also Weaver v. Beneficial Fin. Co.*, 98 S.E.2d 687, 690 (Va. 1957) (“The author of the defamation is liable for any secondary publication which is the natural consequence of his act . . .” (quoting 53 C.J.S. *Libel and Slander* § 85 (1947) (becoming with minor edits 53 C.J.S. *Libel and Slander* § 105 (2021)))).

<sup>76</sup> Donna wouldn’t have a duty to get others to remove *copies* that they had made. But people often “embed” others’ tweets rather than copying, which is to say include links to the original tweets; if third party Xavier embeds Donna’s tweet in his blog post, for instance, then every time a reader goes to Xavier’s post, Donna’s tweet will be redisplayed *from her original Twitter feed*. Since she retains control of her tweet—which she now knows to be libelous—she has a duty to keep the libel from being further distributed from her own feed. She thus needs to either edit the tweet or, given that Twitter doesn’t let her do that, delete it.

This may cause some inconvenience; for instance, the comments to the original tweet would be lost, and any retweets would disappear from the retweeters' feeds. Nonetheless, on balance this would be better than letting Donna keep a libelous tweet available on her feed, even once she learns that it is libelous. Tweets are searchable, and may remain available for years—and keep doing damage for years. (This would be an even more serious problem for Google-searchable media that don't allow editing, but tweets aren't Google-searchable.)

Such deletion and reposting, however, should not be seen as restarting the statute of limitations.<sup>77</sup>

### 3. Images, videos, and audio recordings

Text, of course, is generally easy to edit. Libelous assertions can be removed, and updates can be prominently included at the top of a story or near the statement being corrected.

Images,<sup>78</sup> videos, and audio recordings that contain libelous elements may be harder to correct, but modern editing software usually makes it possible; text notations, for instance, can easily be added onto an image. And if it is impossible to edit the material, then, as noted a few paragraphs above, the author might have to delete it and then perhaps repost a recreated version without the libel.

### 4. Defendants with lost editing privileges

Likewise, say Donna leaves her employer, and thus loses the power to update her original article. She then also loses the obligation to update the article, and can't be held liable for failing to update it.<sup>79</sup> Paul would need to ask Donna's employer to do the updates.

What if the employer has gone out of business, or the author of a blog has died or has vanished, but the material remains online as a sort of "orphan site"? Paul's only remedy would be to approach the hosting company (for instance, WordPress) and ask it to take down the material. And though § 230(c)(1) might strip the hosting company of any legal obligation to comply, that is part of the tradeoff that Congress created by offering such hosting companies § 230 protection.

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<sup>77</sup> See *supra* note 28 and accompanying text.

<sup>78</sup> Libel by image has consistently been treated the same as libel by words or libel; the cases on that date back to before the Revolution. See Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057 (2009).

<sup>79</sup> Cf. *Boston v. Athearn*, 764 S.E.2d 582, 587–88 (Ga. Ct. App. 2014) (holding that parents weren't required by § 577(2) to take down son's page when they lacked the physical ability to access that page).

#### *D. Duty to Promptly Remove or Modify*

The duty I describe here should be a duty to act reasonably promptly (see Section VI.E). Investigating the alleged errors may take some time; so would crafting an accurate correction, and clearing it with one's lawyer. But once the publisher is aware that there is false and defamatory material posted on its site, the publisher ought to act without undue delay in stopping the continued distribution of that material.

#### *E. Not a Duty to Publish a Retraction*

Finally, as I noted in the Introduction, I'm not proposing an affirmative duty to publish a retraction, a remedy that courts have generally rejected.<sup>80</sup> Nor would there be a duty to, for instance, do "search engine optimization" of the corrected post so that it appears more prominently. (The plaintiff might not even want such search engine optimization, because the corrected post might still cast the plaintiff in a negative light even without the libel.)

The duty isn't an affirmative duty to undo the harm done by an inadvertent error. Rather, it is a negative duty: a duty to no longer exacerbate the harm by continued distribution of material that one now knows is false (or, if negligence is the applicable test, reasonably should know is false).

### VIII. A SAMPLE STATUTE

As I discussed above, I think common-law principles support liability for continuing to distribute material once one knows it's libelous. But a legislature may choose to recognize such a duty as well, perhaps with a statute loosely like this:

- (a) An online publisher that intentionally and unreasonably fails to remove or reasonably correct a defamatory post that it knows to be distributed on a computer system under its control is subject to liability for the continued publication of the post.<sup>81</sup>
- (b) Whether the online publisher knows the post is false, recklessly disregards the post's falsity, or is negligent about the post's falsity—whichever mental state is relevant under existing libel law—shall be determined as of 14 days<sup>82</sup> after the online publisher is informed of the alleged falsehood.
- (c) Safe Harbors:

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80 See *supra* note 13.

81 Cf. RESTATEMENT (SECOND) OF TORTS § 577(2) (AM. L. INST. 1977).

82 See *supra* Section VI.E.

- (1) The online publisher shall not be held liable if it removes or reasonably corrects the defamatory post within 14 days of being informed of the alleged falsehood.
  - (2) The online publisher shall be deemed to have reasonably corrected the post if it adds a prominent update, at the top of the text of the post, indicating the new material that is necessary to make the post accurate, even if the online publisher does not remove any of the original material.<sup>83</sup>
  - (3) The online publisher shall not be required to respond to more than one request for a correction or an update from a particular person (or those in privity with that person) as to a particular post in any three-month period.<sup>84</sup>
- (d) No Effect on Statute of Limitations for Original Post:
- (1) Any modification of a post by the online publisher, in response to a demand for removal or reasonable correction, shall not restart the statute of limitations, except as to any new material added by the modification.
  - (2) Deleting the original post and replacing it with a new copy that includes the original text together with an update described in subsection (c) (2) shall be treated as tantamount to modifying the original post.<sup>85</sup>
- (e) Definitions:
- (1) “Online publisher” shall mean an “information content provider,” as defined by 47 U.S.C. § 230(f) (3), that is acting as the publisher of information, as limited by 47 U.S.C. § 230(c) (1).<sup>86</sup>
  - (2) “Post” shall refer to an online newspaper article, blog post, social media post, web page, or other similar item.
  - (3) “Text of the post” shall refer to the body of the post, not including any title, subtitle, byline, illustration, or similar top matter in the post.

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83 See *supra* Part II.

84 See *supra* Section VI.D.

85 See *supra* subsection VII.C.2.

86 “The term ‘information content provider’ means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f) (3). “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c) (1). This express reference should remind courts to read the statute consistently with § 230, as limited to liability for one’s own posts (or those of one’s employees) and not for third-party posts.

- (f) Nothing in this statute shall be interpreted as modifying any other features of defamation law or of the statute of limitations applicable in defamation cases.

## IX. DUTY TO STOP REPORTING HIGHLY INCOMPLETE REPORTS OF LEGAL PROCEEDINGS

### A. *Knowingly Incomplete Reports as Libel*

Courts already recognize that it may be libelous to write about a conviction without also noting that it was reversed, or to write about an indictment without also noting the acquittal. A separate short article in this issue sets forth the many cases so stating.<sup>87</sup>

But what if the article was accurate at the time it was written, but has become on balance inaccurate as a result of later legal developments? Say Donna wrote an article about Paul's conviction; but six months later (within the statute of limitations) the conviction gets reversed on insufficiency of the evidence grounds, and Paul so informs Donna.

Donna's web site then still displays her article, which is no longer a "fair and full" report of the overall proceedings (to borrow the phrase from the fair report privilege).<sup>88</sup> Should she be held liable if she continues to distribute such an incomplete report without updating it to reflect the more recent development?<sup>89</sup>

Here too I think that such a duty would make sense. Again, compare two scenarios:

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<sup>87</sup> See Volokh, *supra* note 65.

<sup>88</sup> See *id.* at 356.

<sup>89</sup> For a pre-internet version of this, see *Antwerp Diamond Exchange of America, Inc. v. Better Business Bureau of Maricopa County, Inc.*, 637 P.2d 733, 738 (Ariz. 1981) (allowing liability because, "[a]fter publishing the newspaper article" in its report about the plaintiff, the Better Business Bureau, which continued to distribute the report, "did not follow up with the findings of the trial court which absolved Antwerp of the prejudicial aspects of the allegations in the news article"). But see *Pacheco Quevedo v. Hearst Corp.*, No. FSTCV195021689S, 2019 WL 7900036, at \*6 (Conn. Super. Ct. Dec. 19, 2019) ("The plaintiffs' defamation theory relies entirely on the *Time's* refusal to retract its truthful reporting about Pacheco Quevedo's arrest after the newspaper was informed that the charge had been dismissed. But the law of defamation does not impose a duty to update news coverage with later developments.") (applying single publication rule).

	<b>Donna</b>	<b>Dennis</b>
<b>January 1</b>	Donna puts up the article about Paul's conviction.	
<b>July 1</b>	Paul's conviction is reversed.	Paul's conviction is reversed.
<b>July 2</b>	Paul informs Donna of the reversal, and asks that Donna update her article to note it.	Donna's brother Dennis learns of the conviction and the reversal.
<b>July 3</b>	Donna fails to revise her article; her article thus still doesn't mention the reversal.	Dennis puts up an article about the conviction (an article identical to Donna's January 1 article) but doesn't mention the reversal.
<b>August 1</b>	Paul sues Donna.	Paul sues Dennis.

Note the similarity between Donna's and Dennis's situations:

1. The harm caused by the stories is identical: Paul is being damaged equally by both.
2. Both stories omit an important detail, which keeps them from being full and fair accounts: both mention just the conviction and not the reversal.
3. Donna and Dennis have the same current mental state: they both know about the reversal.
4. The chilling effect from the threat of liability is equally low: such liability would apply only because both Donna and Dennis have been notified of specific, credible evidence that the conviction has been overturned and their stories are thus seriously incomplete.
5. The practical cost of avoiding liability is basically equal: all Donna and Dennis had to do was to mention the reversal in the story (Donna by revising her story, Dennis by publishing it correctly at the outset).

It's hard to see why Dennis should be liable but Donna should be immune.

Now of course there is a difference between Dennis and Donna here: Donna put up her article Jan. 1 (before the reversal) but Dennis put it up July 3 (after the reversal). Thus, at the outset, Donna was entirely innocent, since she accurately reported on the facts as they existed, but Dennis was culpable, since he knowingly failed to mention

the reversal. What's more, Donna in this scenario wasn't even mistaken at the outset (the way Donna was in the hypothetical with which this Article begins); she wrote exactly the story that she should have written, as of Jan. 1.

But now, on August 1—when Paul sues them—both Donna and Dennis know that the articles they had posted on their sites mention only Paul's conviction and not the reversal, and are therefore highly incomplete. And Donna is being sued for wrongly keeping the story up now, rather than for wrongly putting it up at the outset.

It thus makes sense for the duty to stop distributing libelous material to encompass a limited duty to update a story in light of new, highly significant legal developments (or to remove the story, if the author prefers that to updating it):

1. These new legal developments are likely to be *unusually important* to the target's reputation and to readers. If Paul has been arrested or indicted, that tells people that the legal system thinks there is strong reason to believe he is guilty; a conviction does so even more clearly. For the same reason, the reversal of a conviction (especially on the merits) is an important signal to the public that the original charges may have been unsound; likewise for an acquittal or for charges being dropped for insufficient evidence.
2. The new legal developments are likely to be *easily verifiable*, so Donna or her employer doesn't have to reweigh the evidence or interview new witnesses. Indeed, to trigger the duty Paul should have to give Donna the relevant court documents.
3. The new legal developments are likely to be *easily summarized*, e.g., "UPDATE: Paul was acquitted of all charges."

The benefit to Paul's reputation (and to readers who want to know the truth about Paul) is great, and the cost to Donna and her employer is small. Again, this just reflects the principles set forth in Parts I–VII—the duty not to keep distributing material once one knows it to be false—coupled with the basic libel law principle set forth in the preceding subsection: a report that mentions, say, an indictment but not an acquittal is in essence false. (As with the more general duty described in Parts I–VII, this duty should be triggered only by Paul's alerting Donna to the new developments; Donna should not have a duty to constantly monitor all the court dockets in cases she had written about in the past.)

Note what this is *not*:

- It is not a "right to be forgotten," or a sort of expungement remedy.

- It does not order the removal of accurate information about past arrests, convictions, or civil verdicts.
- It does not order the removal (as opposed to updating) of such information about legal decisions that have been reversed.
- It does not require a site to publish whole new stories about (say) an acquittal or dropped charges if the site had published stories about the indictment.<sup>90</sup>
- It is not a new form of liability or speech compulsion, such as the right of reply struck down in *Miami Herald Publishing Co. v. Tornillo*.<sup>91</sup>

It is only an adaptation of the old principle that, when a publisher is constantly redistributing material to the public, and the material is in its aggregate libelous (even if by omission of critical details), the publisher can be held liable for defamation. Distributing information only about legally inculpatory decisions and excluding the exculpatory information is not a full, fair, and accurate account of government proceedings.

### B. *Extending the Statute of Limitations for Legal Updates*

So far we've been assuming that, when I've published something false about you, you've promptly alerted me to the error, and sued within the statute of limitations. (Again, in about half the states, the statute of limitations for libel claims is a year, and in most of the rest it is two years.<sup>92</sup>) This usually makes sense, since you'll usually have learned about the libel quickly, and wanted it corrected quickly.<sup>93</sup>

But if a conviction is reversed on appeal, or a defendant is otherwise vindicated, that might well happen more than a year after the original publication. And this particular situation doesn't trigger the main concerns that justify statutes of limitations—that

1. a defendant shouldn't have to litigate “after memories have faded, witnesses have died or disappeared, and evidence has been lost,”<sup>94</sup> and
2. a plaintiff should be encouraged to act promptly.<sup>95</sup>

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90 For a different approach, see the Stop Guilt by Accusation Act, S. 2750, 2020 Gen. Assemb., Jan. Sess. (R.I. 2020), which would have required such new coverage.

91 *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Whether platforms ought to be required to offer a right of reply as a condition of 47 U.S.C. § 230(c)(1) immunity is an interesting question, but one that is beyond the scope of this Article.

92 *Statutes of Limitations for Intentional Torts*, 50 *State Statutory Surveys*, *supra* note 63.

93 If the libel is obscure enough that you don't learn about it for a long time, then it's usually (though not always) not that damaging.

94 *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

95 *See, e.g., Hecht v. Resol. Tr. Corp.*, 635 A.2d 394, 399 (Md. 1994).

Say I write about your January 2, 2025 conviction on January 3, 2025, it's not reversed on appeal until March 2, 2026, and you immediately inform me about it. You've acted as promptly as you could have, even though it was more than a year after my original article. And there will likely be no need for me to re-interview the witnesses from my original article; all that I will generally need to do is to add an update to my article discussing the newly-announced reversal of the conviction.

Most courts that have considered the issue have adopted the single publication rule for internet publication;<sup>96</sup> and they treat the rule as making the statute of limitations start running on the date the article is first posted. But it may make sense for a legislature to modify the statute of limitations, to provide something like this:

- (a) An action for libel shall be brought within one year of the publication date of the allegedly libelous statement.
- (b) *Single publication rule.* "Publication date" shall mean the date a statement is first made available to readers.
- (c) *Exception:* Notwithstanding subsection (b), "publication date" shall mean the date that a statement is first available to readers after the publisher is made aware of an exonerating legal development, if all of the following conditions are present:
  - (i) the statement is available on an interactive computer system;
  - (ii) the statement contains an assertion about a named person's arrest, prosecution, conviction, detention, incarceration, or loss of any governmentally conferred license or legal privilege, or about a civil judgment or verdict against the person;
  - (iii) the publisher has been made aware of an exonerating legal development;
  - (iv) including the exonerating legal development would materially diminish the reputation-damaging effect of the statement on the mind of the reasonable reader;<sup>97</sup>
  - (v) the publisher has not updated the statement to note the exonerating legal development within 14 days<sup>98</sup> of being informed of the exonerating legal development.

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96 See, e.g., *Firth v. State*, 775 N.E.2d 463, 465 (N.Y. 2002); see also RESTATEMENT (SECOND) OF TORTS § 577A (AM. L. INST. 1977).

97 This prong is based on the classic formulation from the substantial truth precedents: "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." *Fleckenstein v. Friedman*, 193 N.E. 537, 538 (N.Y. 1934) (quoted in, among other cases, *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978)).

98 See *supra* Part VI.E.

- (d) *Definition*: “Exonerating legal development” shall mean
- (i) a court or administrative agency decision reversing or vacating the named person’s conviction, loss of governmentally conferred license, or loss of governmentally conferred legal privilege, or reversing or vacating the civil judgment or verdict;
  - (ii) an acquittal of the named person;
  - (iii) a dismissal of charges filed against the named person; or
  - (iv) a *nolle prosequi* entered with regard to the named person, but shall not include an action taken as a result of a plea agreement, a deferred prosecution agreement, or a settlement of a civil case.
- (e) *No Restarting of the Statute of Limitations*: If a publisher has updated the statement to note the exonerating legal development, and done so within 14 days of being informed of the exonerating legal development, that update shall not be deemed to restart the statute of limitations, except as to any new material added by the modification.
- (f) Nothing in this statute shall be interpreted as modifying any other features of defamation law or any other features of the statute of limitations applicable in defamation cases.

This should be constitutional, because it would simply apply traditionally recognized libel law principles: Throughout much of American history, the multiple publication rule would have allowed liability in such situations in any event. (The First Amendment limits on libel liability imposed by cases such as *New York Times Co. v. Sullivan* have never been seen as rejecting the multiple publication rule.) Subsection (c) would simply revive that rule in a narrow set of cases.

Nor should the restriction be seen as unconstitutionally content-based in violation of *R.A.V. v. City of St. Paul*.<sup>99</sup> Though the proposal would distinguish between statements about convictions (or similar government actions) and statements about other matters, “the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable”:<sup>100</sup> The covered statements, because they reflect the judgment of authoritative government actors (judges, juries, prosecutors, police officers), are especially likely to damage a person’s reputation.<sup>101</sup> And there is no reason to think that “the restriction is ‘even arguably “conditioned

99 505 U.S. 377 (1992).

100 *Id.* at 388; see also *Virginia v. Black*, 538 U.S. 343, 361–62 (2003).

101 *Cf. Black*, 538 U.S. at 363 (holding that the government can specially punish those constitutionally unprotected true threats that are accomplished through cross burning “because burning a cross is a particularly virulent form of intimidation” and is thus a “form[] of intimidation that [is] most likely to inspire fear of bodily harm”).

upon the sovereign's agreement with what a speaker may intend to say,"<sup>102</sup> and "no realistic possibility that official suppression of ideas is afoot."<sup>103</sup>

### CONCLUSION

Our reputations used to be shaped by people's memories of articles that they had read, and gossip that they had heard. Such speech, if false and defamatory, could do a great deal of damage. But "today's newspaper wraps tomorrow's fish,"<sup>104</sup> public attention is limited, and memories fade. Many accusations would thus quickly disappear.

The internet, though, makes articles—whether in the mainstream media or on private sites—permanently and instantly available. Among those who don't know us personally, our reputations are often largely shaped by the results of a Google search. And if those articles contain false allegations, or allegations that are so incomplete as to be effectively false, the reputational harm can be devastating and enduring.

Libel law should develop in a way that helps prevent that harm, so long as the chilling effect on true statements and on opinions is sufficiently small. And existing libel law principles already provide a foundation for this sort of development.

The law has long recognized a duty not to knowingly host defamatory material when it comes to speech posted on one's physical property. Such cases rarely arose, because such posted speech was comparatively rare. But now that speech posted on one's webpages has become the dominant medium for communication, that traditional duty can be rediscovered as a foundation for a narrow and manageable updated duty—a duty not to continue distributing online material once you know (or perhaps have reason to know) that it is false and defamatory.

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102 *R.A.V.*, 505 U.S. at 390 (quoting *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 555 (1981) (Stevens, J., dissenting in part)).

103 *Id.*

104 The earliest citation I found for this was in the Brief for Respondent at 68, *NLRB v. Rockaway News Supply Co., Inc.*, 345 U.S. 71 (1953) (No. 318), 1953 WL 78670, at \*68, where it was already treated as an old saw.