Flagging the Middle Ground of the Right to Be Forgotten: Combatting Old News with Search Engine Flags

By Hannah L. Cook*

ABSTRACT

Incomplete and outdated news articles present an increasing problem for individuals who find themselves stigmatized on the basis of truthful but misleading reports. This Article proposes a moderate solution between the European right to be forgotten and the protectionless status quo in the United States. It proposes a flagging system, administered through Federal Trade Commission adjudications, where links to articles whose private harms outweigh their public benefits are flagged in the search results of an individual. This flag will help combat psychological biases that may cause decision makers to place an irrational weight on these articles while preserving the ability of the public to access the information.

TABLE OF CONTENTS

I. THE PROBLEM: MISLEADING INFORMATION WRECKS LIVES ........ 2
II. CURRENT SOLUTIONS: THE RIGHT TO BE FORGOTTEN AND ITS
    US FAILURE ..................................................................................... 6
    A. The Right to Be Forgotten in the European Union................. 6
    B. The Right to Be Forgotten in the United States and Its
        Hurdles............................................................................................ 10
III. THE SOLUTION: AMEND THE COMMUNICATIONS
    DECENCY ACT .................................................................................. 14
    A. Why Not Existing Tort Law? ....................................................... 15
        1. Defamation Law Does Not Apply to Truth ....................... 15

* Law Clerk, US Court of Appeals for the Second Circuit. Many thanks to Daniel Abebe and Peter Salib for their helpful comments. All views expressed are strictly the Author’s.
I. THE PROBLEM: MISLEADING INFORMATION WRECKS LIVES

Sometimes, a person's life takes a disastrous, unanticipated turn. Imagine sitting at the breakfast table, reading the newspaper, when suddenly the police appear at your house to arrest you for a crime you never committed. The crime could be major or minor—anything from drug distribution to murder to overdue speeding tickets. In the day or two it takes to sort out the problem—perhaps the drugs are your child's, the actual murder suspect shares your name, or you recently sold your car—the local newspapers have already published truthful information about your arrest and the crime of which you were suspected. The newspapers have no legal obligation to update their reporting or to allow you to set the record straight.  

Not long ago, that stressful arrest would have been the end of the story. The incident would have been relegated to the memories of local gossips; you would have moved on and faced no lasting consequences from such a horrific mistake. But today, any person can simply put your name in an Internet search engine, read the uncorrected news from that fateful day, and make decisions affecting your life based on it. An arrest and the subsequent news stories may remain an obstacle to obtaining jobs, housing, loans, and more for many years.

---

1. See, e.g., Martin v. Hearst Corp., 777 F.3d 546, 553 (2d Cir. 2015) (finding no newspaper liability for reporting arrest); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243, 258 (1974) (striking down a state statute's guarantee of a candidate's right to have space in a newspaper to respond to criticism as a violation of the First Amendment).
Such ordeals affect thousands of people. Empirical studies show the rate of false convictions for felonies is 3–5 percent.2 One study found a full third of people arrested in the District of Columbia in 2009 were never charged with a crime, and of those charged almost half were not convicted.3 Every false arrest, charge, or conviction creates a record (and sometimes many records) that can continue to haunt the victim indefinitely.

Now add to this mix the fact that there are more and more pieces of data available to help search engines connect subjects’ past and present lives. At a New York arts festival, almost four hundred people gave away pieces of identifying information—such as their home addresses, fingerprints, or the last four digits of their Social Security numbers—in exchange for a cookie.4 The printed terms of use, which were signed by all but twenty of the people who took a form, gave the collector “the right to do almost anything she wanted with the information.”5 In 2013, Google was indexing over thirty trillion unique webpages (in 2008, that number was just one trillion) for over one hundred billion searches a month.6 Each of these data points, be it a Facebook account, a registration for a discount deal service, or a newspaper article about a long-forgotten arrest, is being indexed by Google and being used to create a powerful dossier that puts the juiciest information (that most likely to be clicked and linked to) at the top.7

The long-term impacts of this digital accumulation are unclear. Perhaps individuals should not worry about the plethora of content being posted, cached, and indexed. Studies have suggested only 10–15

---

5. Id.
7. Id.; see also David R. Bell, Location Is (Still) Everything: The Surprising Influence of the Real World on How We Search, Shop, and Sell in the Virtual One 157 (2014) ("[T]he first link is typically the one most likely to be clicked on, the second the second most likely, and so on.").
percent of content posted online is still live a year later. On the other hand, entire industries have sprung up to help job applicants clean up their Google results and improve their online reputation scores (scores generated by private companies that rank applicants based on their social media profiles and Google search results). According to a 2009 survey, almost 80 percent of employers use search engines to learn about job applicants, and most of those (almost 70 percent) will reject applicants based on what they find. More than half of employers reported they would reject a candidate based on “concerns about the candidate’s lifestyle,” “inappropriate comments and text written by the candidate,” or “unsuitable photos, videos, and information.” Notice only one of these reasons necessarily involves information posted by the job applicant.

Negative or misleading search results can be devastating to an individual. One Spanish citizen noted “according to Google, I’m still in debt and married,” because of two articles that had been published over a decade before in a local newspaper. A cottage industry of mugshot extortion— websites prominently posting mugshots (regardless of whether the person was ever convicted) in Google search results unless paid to take them down—has exploded so much that a bill was proposed in Alabama to ban the practice. A woman changed her name after her Google search results became dominated by links to nude photos and videos posted by an ex-boyfriend. The US Court of Appeals for the Second Circuit recently held that a woman who had been arrested on drug charges could not have news articles about her arrest taken down, even though the charges were dropped and under a Connecticut “eraser” law the arrest was “deemed” to have never

10. See PASQUALE, supra note 9, at 32.
11. See DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 8 (2014).
12. Id. at 9.
15. See CITRON, supra note 11, at 48.
happened. She will likely have difficulty getting a job or being approved for a loan for years to come.

Today, individuals have little recourse against the search engine results that make them unemployable, undateable, and unsuitable for loans, especially if the information was true when it was published. The European Union has provided individuals with a right to be forgotten, which cuts the lifespan of this problem by allowing search results to be removed when the information becomes more harmful to the individual than helpful to the public. The United States, however, has rejected such a right based on practical and First Amendment difficulties.

This Article proposes an alternative: amending Section 230 of the Communications Decency Act (CDA) to force search engines to display a flag on search results the Federal Trade Commission (FTC) has found to be misleading and that have caused plaintiffs harm which outweighs the information’s benefit—even though the results contain truthful reporting. This alternative strikes a balance between the free speech interests of journalists and publishers, the privacy interests of plaintiffs, and the pragmatic concerns of search engines. It also reflects that information has changing benefits and costs over time: information about a recent arrest may be highly valuable, while information about an arrest that led to no charges twenty years ago may not provide much value at all.

Part II of this Article discusses the right to be forgotten—Europe’s answer to the problem of truthful but misleading information—and why the United States has rejected this approach. Part III proposes a system of flags, administered by the FTC, in which

---

17. A similar issue is presented by expunged records. Job seekers do not have to report expunged criminal records, but employers may still be able to dig them up in news reports found through user search engines. See Meg Leta Ambrose, Nicole Friess & Jill Van Matre, Seeking Digital Redemption: The Future of Forgiveness in the Internet Age, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 99, 142 (2012).
21. This approach is also consonant with some of the earliest literature on what would become the right to be forgotten, which suggested color-coding information by years or requiring it be sorted chronologically. See Viktor Mayer-Schönberger, Delete: The Virtue of Forgetting in the Digital Age 124–25 (2009).
small indicators are placed next to links in specific searches if the information harms the individual more than it benefits the public. This flagging system combats the psychological biases that may cause a reader to overvalue the misleading information. Part III also resolves the tension between First Amendment publisher protections and the CDA’s conduit immunities.

II. CURRENT SOLUTIONS: THE RIGHT TO BE FORGOTTEN AND ITS US FAILURE

Europe has addressed the dilemma of truthful information that is more harmful to the individual than helpful to society by implementing a “right to be forgotten,” while the current US scheme offers little protection to individuals. The right to be forgotten, sometimes called the “right to erasure,” is often discussed and rarely defined. One author has offered three alternative definitions: (1) “the right to delete the information one posts online;” (2) the right to delete information about oneself that one originally posted, wherever it now appears online; and (3) the right to eliminate any online information about oneself, regardless of who originally posted it. The European Union has passed a regulation that would provide its citizens with the third, while most US citizens are offered the first by social networking websites. Section A of this Part details the European Union’s approach to the right to be forgotten and Section B discusses the US approach (or lack thereof), focusing especially on challenges posed by the First Amendment to the right to be forgotten.

A. The Right to Be Forgotten in the European Union

Existing EU law already provides a right to be forgotten, and an upcoming regulation will do even more. EU Directive 95/46 provides that “data-processing systems” must respect “fundamental rights and freedoms, notably the right to privacy” and contribute to “the well-being of individuals.” Data that does not comply with the directive, especially “because of the incomplete or inaccurate nature of the data,” can be erased or blocked.

---

22. See Mitchell-Rekrut, supra note 13, at 875.
24. See id.
26. Id. art. 12(b).
Directive 95/46 covers the “processing” and movement across national borders of “personal data,” which includes any information that can be used to identify a person.27 This could be an identification number, but the Directive also covers any factors that are sufficient to identify a person, including her physical appearance or background.28 Processing and movement are also incredibly broad, covering “almost any action that can be performed on electronically stored information.”29 In order to comply with the Directive, companies that seek to process or transfer “personal data” must generally meet an exception, such as having the consent of the identified individual.30 Other exceptions include processing that is necessary for a contract, legal obligation, to protect the individual, or “for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.”31 In practice, this means that data holders must seek consent, document their data processing, respond to inquiries, and allow people to opt-out of further processing.32

In 2012, the European Commission proposed a regulation that would further strengthen the right to be forgotten.33 The regulation passed the EU Parliament in April 2016 and will come into force in May 2018.34 Article 17 of the General Data Protection Regulation (GDPR) will give citizens a right to prevent the distribution of their personal data (including the removal of links to personal data, and the cessation of copying said data) if one of four conditions is met.35 A

28. See id.
32. Unlike Directive 95/46, which is a binding goal that member states may unilaterally decide how to implement, a regulation would be immediately binding on all member states. See Francoise Gilbert, European Data Protection 2.0: New Compliance Requirements in Sight—What the Proposed EU Data Protection Regulation Means for U.S. Companies, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 815, 817 n.8 (2012).
34. Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals With Regard to the Processing of Personal Data and on the Free
person can have her data removed if (1) “the data are no longer necessary” for the purpose “for which they were collected or otherwise processed,” (2) she withdraws her consent (if consent was required) or the storage period to which she consented expires, (3) she formally objects to the use of her data as unnecessary for a stated use, or (4) the processing of the data violates another part of the regulation.36

The provisions allowing companies to retain personal data are mostly narrow, such as academic research, public health, and existing legal obligations.37 However, Article 17 does provide an exception for freedom of expression in limited circumstances, such as artistic expression.38

The right to be forgotten entered the public consciousness in the United States through the 2014 European Court of Justice (ECJ) decision in Google v. Spain.39 The case began in 2010, when Mario Costeja González of Spain requested Google remove links to two articles published in 1998, both describing a foreclosure auction of his house for failing to pay his debts, from the search results for his name.40 Mr. Costeja González claimed the decade-old matter had been resolved and was “now entirely irrelevant”; consequently, the articles should be removed from his Google search results.41 The court concluded the information, although it had been lawfully published, had indeed become less valuable over time. Thus, the public’s interest in being able to find information about a person (especially a nonpublic person) no longer outweighed Mr. Costeja González’s fundamental rights.42 The ECJ ordered Google to remove the links from the search results for Mr. Costeja González’s name.43

In the year following the ECJ’s decision, Google received 905,000 requests to have links removed from search engine results.44


36. Id.
37. See id. at 52.
38. Id. at 52, 94.
41. Id. ¶ 15.
42. See id. ¶¶ 96–97.
43. Id. ¶ 100.
44. See Jabeen Bhatti, EU Right to Be Forgotten Decision: One Year, Almost 1M Requests Later, BLOOMBERG BNA: COMPUTER TECH. L. REP. (May 5, 2015).
Of those requests, about 41 percent were approved after consideration by Google staff. This means that over 370,000 links were removed from search engine results in the first year, potentially hindering all sorts of information gathering—from background checks to news reporting.

The right to be forgotten is not without pitfalls, especially because it is often difficult to know what information will be useful in the future. Consider Sasha, a hypothetical private citizen who successfully requests Google remove all information about her from search results of her name on June 30. The next day, Sasha performs a newsworthy act of heroism. Reporters will struggle to tell the newsworthy story of Sasha’s heroism because it will be very difficult to find information about her. If Sasha had waited until July 2, the day after her heroism, she would not have been able to remove her information because it would be important to the public. However, because Sasha requested removal before her heroism, valuable information about our heroine will not be easily available on Google at the time when reporters and the public want it most. The right to be forgotten removes content from the public space without recognizing it may become vital public information in the future. This danger of removing important information from the public sphere is one of the main reasons the right to be forgotten has failed to become a part of US law.

Fundamentally, European countries have approached privacy from an individual human rights perspective, while the United States tends to favor industry self-regulation and views information (rather than privacy) as a right. Other scholars have framed this cultural difference as a clash between a US conception of privacy as a property right that can be bargained away and a European view that privacy encompasses a human dignity that cannot be exchanged or removed. The GDPR demonstrates the depth of Europe’s commitment to the

45. See id.
47. See CURTIS D. FRYE, PRIVACY-ENHANCED BUSINESS: ADAPTING TO THE ONLINE ENVIRONMENT 75 (2001). The US view has led some individual companies to experiment with self-imposed privacy rights. For example, the Tampa Bay Times formed a committee in September 2016 to explore removing old news stories from its website for right to be forgotten-type reasons. See Terry Carter, Erasing the News: Should Some Stories Be Forgotten?, ABA J. (Jan. 2017), http://www.abajournal.com/magazine/article/right_to_be_forgotten_US_law [https://perma.cc/3UBA-6498].
idea that part of human dignity is to control “one’s image, name, and reputation” and that governmental regulation can play a vital role in that process.\textsuperscript{49} Americans, who tend to view privacy as a freedom from government intrusion into private decisions and spaces, have rejected any right to be forgotten—style intrusion into the space of private businesses like Google.\textsuperscript{50}

\textit{B. The Right to Be Forgotten in the United States and Its Hurdles}

Although polls have found strong support among Americans for a right to be forgotten, no such right formally exists at the federal level.\textsuperscript{51} However, a variety of US policymakers have contemplated the right to be forgotten, albeit on a lesser scale than the EU version.\textsuperscript{52} In 2011, Representative Edward Markey proposed the Do Not Track Kids Act.\textsuperscript{53} The bill proposed a right for minors to obtain any personal information held by a website and to have any inaccurate personal information erased or corrected.\textsuperscript{54} Although limited to Americans under age seventeen, the bill (and its subsequent iterations) has come the closest to a national legislative right to be forgotten in the United States.\textsuperscript{55} California passed a similar law in 2013 that requires websites to remove, upon request, any information posted by a minor.\textsuperscript{56}

The FTC has taken the lead in attempting to impose at least minimal rights to be forgotten, even for adults. For example, in 2012 the FTC issued a report on protecting consumer privacy which

\begin{itemize}
\item \textsuperscript{49} James Q. Whitman, \textit{The Two Western Cultures of Privacy: Dignity Versus Liberty}, 113 YALE L.J. 1151, 1161 (2004).
\item \textsuperscript{50} Id.
\item \textsuperscript{51} See Mario Trujillo, \textit{Public Wants 'Right to Be Forgotten' Online}, HILL (Mar. 19, 2015, 9:12 AM), http://thehill.com/policy/technology/236246-poll-public-wants-right-to-be-forgotten-online [https://perma.cc/VHC4-ADG9]. For example, 88 percent of Americans surveyed supported a law that would allow them to petition search engines to remove personal information from search results, according to a 2015 survey. Id.
\item \textsuperscript{52} Since at least the aftermath of World War II, Europe has taken a stricter approach to privacy, often more closely approximating “strict scrutiny,” while the United States has taken a more sanguine approach to all privacy protections. See Marsha Cope Huie, Stephen F. Larabee & Stephen D. Hogan, \textit{The Right to Privacy in Personal Data: The EU Prods the U.S. and Controversy Continues}, 9 TULSA J. COMP. & INT'L L. 391, 456 (2002). This framework has led the European Union to take a more aggressive legislative stance than the United States, which is often concerned with constitutional free speech issues, as discussed below. See discussion supra accompanying notes 47–50 for the European position and discussion infra accompanying notes 59–71 for the US position.
\item \textsuperscript{53} H.R. 1895, 112th Cong. (2011).
\item \textsuperscript{54} Id. § 5(b)(7).
\item \textsuperscript{55} See, e.g., H.R. 2734, 114th Cong. (2015); S. 1700, 113th Cong. (2013).
\item \textsuperscript{56} See CAL. BUS. & PROF. CODE §§ 22850–51 (West 2017).
\end{itemize}
included “aspects of the proposed ‘right to be forgotten,’” such as calling on companies to “(1) delete consumer data that they no longer need and (2) allow consumers to access their data and in appropriate cases suppress or delete it.” The FTC has also attempted to enforce a minimal right to be forgotten, such as a 2011 consent decree that required Facebook to prevent third parties from accessing information users had deleted (either by deleting the specific information or deleting their accounts) within thirty days of the deletion.

However, many US scholars recognize that the First Amendment presents a substantial hurdle to any right to be forgotten like that in the European Union. For one thing, “longstanding First Amendment principles” typically refuse to “punish[] the dissemination of truthful information relevant to the public interest.” Although the “public interest” serves as a small opening through which a right to be forgotten could emerge, the thrust of current cases has been so “broad a brush [as to] essentially render[] the public significance test moot.” Furthermore, US jurisprudence has long considered information that was originally distributed to the public, such as a person’s name in a public court document, de facto public interest information (although this was in cases where the public document concerned a pending or recent case, not a decades old one). As Eugene Volokh has pointed out, this approach meshes with the general understanding that no one has a property right to facts in the copyright sphere. As one commentator noted, “[t]here is a strong, if misguided, tendency in US law to discount the significance of privacy in public.”


61. Id. at 296.


little sympathy for right to be forgotten cases, like Mr. Costeja González’s in the European Union, which often stem from truthful reporting of information that would (in the past) have been public but rarely accessible.65

US scholars have further attacked the right to be forgotten on more philosophical grounds.66 “The idea of granting a privacy right that stems from obscurity flies in the face of long-standing First Amendment theory and fundamental free speech principles,” asserted one scholar.67 One frequently cited concern is that the removal of once-public information would damage the discourse and ability of others to form or express opinions, implicating the principle of self-fulfillment or expression.68 Another fundamental concern is the vibrancy of the marketplace of ideas. For example, Lior Strahilevitz has asserted that “[t]he First Amendment implications of limiting a defendant’s ability to disclose facts are more troublesome than the implications of limiting a defendant’s ability to gather facts,” which is why invasion of privacy torts have encountered fewer First Amendment problems than public disclosure torts.69

65. See, e.g., Martin v. Hearst Corp., 777 F.3d 546, 553 (2d Cir. 2015). The Supreme Court accepted an accessibility-memorability rationale in the Freedom of Information Act context, when the Court wrote that

[t]he privacy interest in a rap sheet is substantial. The substantial character of that interest is affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age 80, when the FBI's rap sheets are discarded.

U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989). The Court also recognized that "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." Id. at 764. This recognition has largely not, however, been applied to create an affirmative right that can be used against private actors.


67. Larson, supra note 66, at 108.

68. Id. at 111; see also Eric Goldman, California’s New ‘Online Eraser’ Law Should Be Erased, FORBES (Sept. 24, 2013, 1:35 PM), https://www.forbes.com/sites/ericgoldman/2013/09/24/californias-new-online-eraser-law-should-be-erased/#47fcc6f67a33 [https://perma.cc/HZU2-SPSC] (“Many UGC [user-generated content] websites encourage users to engage each other in conversations through comments and threaded discussions. Removing a piece of the discussion can make the entire thread nonsensical.”).

69. Strahilevitz, supra note 66, at 2033.
The possibility of information not being released (and therefore not being a part of the marketplace of ideas) is a greater concern than channeling information gatherers into certain methods. Justice Kennedy wrote that the marketplace “provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.” The First Amendment places a premium on the free flow of information once it is known, whether this principle is framed as a search for truth or the workings of the marketplace of ideas.

Technology companies’ executives have also disputed the fairness and efficacy of a right to be forgotten. Richard Allan, Facebook’s EU then-director of policy, likened the right to be forgotten to “shoot[ing] the messenger” in 2011. Other commentators have raised questions about how a right to be forgotten could possibly work in a world where information is frequently reposted by others, often on different platforms (so a statement might make its way from Facebook to Twitter to a blog). These commentators point out that trying to remove information from the Internet can become a game of whack-a-mole, in which the information appears on new websites even as it is taken down from others. While the private sector has expressed a small willingness to voluntarily implement right to be forgotten—like systems in a few niche areas, such as removing links to revenge porn, it has generally refused to accept a broad right to be forgotten.

71. See Whitman, supra note 49, at 1196 (“Freedom of expression is a value of constitutional magnitude in the United States, whereas the protection of personal honor is not, which means that freedom of expression almost always wins out.”). Scholars have also framed this difference in terms of viewing privacy as a matter of inherent dignity (EU) and liberty (US). See id. Since the US conception focuses more on the ability of the actor to speak, rather than the European concept of being protected, it follows that the First Amendment prioritizes the free flow of information and views the actions taken to acquire information as more easily regulated. See id.
73. Id.
74. See, e.g., CITRON, supra note 11, at 47.
75. See Brian Fung, Microsoft Is Stepping up the War on Revenge Porn—And Validating the Right to Be Forgotten, WASH. POST: THE SWITCH (July 22, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/07/22/how-silicon-valleys-war-on-revenge-porn-is-validating-the-right-to-be-forgotten/?utm_term=.75f5b0e0a68e [https://perma.cc/7YYS-GR8W].
In short, Europeans have taken the problem of truthful but misleading information about individuals very seriously, often forcing search engines to remove the links from searches of an individual’s name to protect her privacy. Short of rewriting its Constitution, it seems unlikely the United States will follow suit. US law prizes the free flow of information and preserves past reporting of truthful facts even if the availability of the information causes significant harms to individuals.77

III. THE SOLUTION: AMEND THE COMMUNICATIONS DECENCY ACT

As discussed above, the European approach to the right to be forgotten is largely untenable in the United States for technical and First Amendment reasons. US law disapproves of the idea of removing truthful content from the public sphere, even if it does more harm than good. However, this currently leaves individuals in the United States without any redress for deeply harmful practices. To strike a balance that leaves the content available to the public while redressing some of the impact on victims, this Article proposes a flagging system—enforced by the FTC—for search engine links that are truthful but misleading. When a would-be employer or landlord sees a flag on a damaging link, she knows to discount that link; otherwise, she might give it too much weight in her evaluation, based on psychological biases.78 This Part first considers and rejects some alternatives to the flagging system that are already available under US law. Second, it describes the flagging system and how it would operate. Third, it explains why the flagging system is an effective solution—both compared to the right of reply system proposed by scholars and in its own right as a psychological debiasing mechanism. Finally, this Part discusses the flagging system’s compliance with existing First Amendment law.

---


78. The simultaneous presentation of the link and the flag is especially important to assist in debiasing because confirmation bias (the overweighting of information that supports what a person already believes) increases as individuals move through their research process. See Eva Jonas et al., Confirmation Bias in Sequential Information Search After Preliminary Decisions: An Expansion of Dissonance Theoretical Research on Selective Exposure to Information, 80 J. PERSONALITY & SOC. PSYCHOL. 557, 560 (2001) (finding increased confirmation bias when information is selected sequentially).
A. Why Not Existing Tort Law?

Existing tort law does not provide a remedy for individuals who are being harmed by truthful but misleading information. Two leading causes of action—defamation law and public disclosure of private facts—are unavailable because of the truthfulness and newsworthiness of the information at the time of publication. This Section briefly describes these two causes of action and explains why they do not provide relief to this class of plaintiffs, who are left with no legal protections in the current US system.

1. Defamation Law Does Not Apply to Truth

A plaintiff in a defamation case must prove four elements: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." The problem for plaintiffs who have true but misleading information, such as a mistaken arrest, is the statement published is not false. As the Second Circuit put it, "[i]t is axiomatic, of course, that truth is an absolute defense to a defamation claim." In fact, publishers can even avoid liability for a report that turns out to be false, as long as they did not display a "reckless disregard for the truth" and were reporting on a matter of public concern.

Furthermore, whether or not a publisher can be held liable turns on whether the publisher displayed reckless disregard at the time of publication. For example, a New Jersey newspaper was found not liable for defamation when it ran a front page "teaser" headline reporting that two local men had been "arrested" when they had not. Although the plaintiffs had been charged in a civil case and not arrested, the Supreme Court of New Jersey found there was no reason to believe the "harried editor" did not believe the headline he wrote was accurate when he published it. The US Supreme Court itself has found "factual errors"—including "half-truths" and

79. See Restatement (Second) of Torts §§ 558, 652D (Am. Law Inst. 1977); infra Part III.A.1–2.
80. Restatement (Second) of Torts § 558.
84. Id. at 452.
85. Id. at 452, 462.
“misinformation”—can be protected from defamation liability if the publication concerned the actions of a public official and was not made with “actual malice.”86 Therefore, an erroneous report about a truthful event is unlikely to result in liability, even if it has a large impact on the employability of the plaintiff.87

Another potential avenue of liability typically denied to plaintiffs in truthful news cases is defamation by implication. Defamation by implication occurs when “a publication implies something false and defamatory by omitting or strategically juxtaposing key facts” even when the statements are literally true when considered in isolation.88 This cause of action runs into the same timing problem as a typical defamation claim. The root problem in misleading information cases is often that the publication is not updated with later information, but the tort is analyzed at the time of publication.89 For example, in Martin v. Hearst Corp., a woman claimed defamation by implication because an online news story noted that she had been arrested and criminally charged, even though the case was later nolled.90 The Second Circuit rejected the argument that she had been defamed by implication because “reasonable readers” would not assume she had been convicted based on the arrest report and, although the story was not “as complete a story as [she] would like, . . . it implie[d] nothing false about her.”91 Because future liability is tied to the time an Internet news story is published, plaintiffs cannot bring claims based on later developments. If a journalist cannot know the future developments in a story, she cannot be liable for implying something might happen in the future. Although a helpful rule for journalists, this rule prevents innocent parties from counteracting the harms to their interests and reputations caused by outdated news stories years later.

87. Similarly, scholars have argued that the determinations of what is relevant by search engines cannot be “false” and thus would not be actionable under existing tort law. See Luke Pettyjohn, Note, Preventing an Ex Machina Future: Search Engine Speech and the Advisor Theory, 14 FIRST AMEND. L. REV. 462, 484–85 (2016) (discussing how a search engine’s determination of relevance cannot be “false,” and thus is not actionable under existing tort law).
88. See Martin v. Hearst Corp., 777 F.3d 546, 552 (2d Cir. 2015).
89. See, e.g., Tomblin v. WHCS-TV8, 434 F. App’x 205, 211 (4th Cir. 2011) (analyzing a defamation claim based on the knowledge of the speaker at time of publication); Stepanov v. Dow Jones & Co., 987 N.Y.S.2d 37, 42 (App. Div. 2014) (same).
90. Martin, 777 F.3d at 549.
91. Id. at 553.
2. Public Disclosure of Private Facts Does Not Apply to News

With defamation’s truth and time of publication barriers looking insurmountable, an appealing cause of action may be public disclosure of private facts. According to the Second Restatement of Torts,

[op]one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public. 92

The Restatement notes it is not entirely clear whether liability under this tort is constitutional at all, 93 but liability certainly cannot attach to the publication of true facts that are a matter of public record. 94 These limitations eliminate many of the most crucial categories of information that might be misleading, such as arrests and bankruptcies, because these are matters of public record.

Furthermore, courts have not restricted “legitimate concern to the public” to matters of public record. The Restatement notes that “[i]ncluded within the scope of legitimate public concern are matters of the kind customarily regarded as ‘news.’ To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term.” 95 This definition of public concern creates a huge obstacle to plaintiffs who wish to sue news organizations for disclosing private facts: if the exception extends to anything that is news, and news is defined by publishers and broadcasters, almost no case against a publisher or broadcaster will be outside the exception. This exception has been used broadly to find no liability for a vast array of information, such as reporting about an automobile accident involving only private figures, 96 the sexual orientation of a man who helped prevent the assassination of President Ford, 97 and a sporting event featuring a photo of a man with his fly down. 98 Given the broad reach of public concern in these cases, it will be hard for any plaintiff to prove a truthfully reported story was so beyond the pale of privacy invasion as to warrant liability.

For example, consider the hypothetical case of John Doe. John attends a party and afterwards is so intoxicated that he runs naked

93. Id. special note on Relation of § 652D to the First Amendment to the Constitution.
95. Restatement (Second) of Torts § 652D cmt. g.
down a public street before falling asleep in his car. Although he is not arrested, a newspaper publishes a story about John’s antics, perhaps to demonstrate the prevalence of wild parties in the neighborhood. It turns out that John rarely drinks, and in fact was only so intoxicated on that night because another partygoer placed a drug in his drink. Can John sue to recover for his harms, personal and professional, under the public disclosure of private facts doctrine? Probably not, because his wild antics are probably of legitimate concern to the public, especially if couched in a broader story or series of stories about drinking. For John, however, the broader story does not matter—the story features him by name (and perhaps picture), and he is losing credibility with employers who do not want to hire a reckless “party boy.” With liability off the table, a remedy that mitigates these future harms may be the only help John can get from the US legal system. John needs a flag.

**B. How the Flagging System Would Work**

A flagging system would provide much-needed relief to plaintiffs who cannot pursue a European-style right to be forgotten claim or a tort claim in the United States. But how would it work? The first step is to create an authorizing statute, allowing plaintiffs to bring requests for flags to the FTC, which has already established itself as a privacy and consumer protection watchdog. The FTC would adjudicate these complaints, with administrative law judges acting as factfinder for the parties (the plaintiff and the search engine). These adjudications, performed in compliance with the

---


100. See A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority, FED. TRADE COMM’N, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority [https://perma.cc/W5B3-XP7E] (last visited Sept. 21, 2017). It may seem intuitive to allow authors or publishers to intervene and defend their links, especially since a flag may reduce traffic to the news story in question. Remember, however, that a flag is only displayed on the results of a specific search, not on the article itself or every search on which the article might appear. For example, suppose an article concerns three people—Annie, Bob, and Collin—who are arrested by police officer Patrick. If Annie successfully has a flag added to the story, the flag will be displayed only on the search results of Annie’s name. A search for Bob, Collin, or Patrick will show the link without the flag, since the information may not be misleading with regard to them. This search-specific structure greatly reduces the interest of authors and publishers in the flag. Therefore, the adjudication is not intended to include authors or publications as parties. However, the flexibility of administrative adjudication would allow the FTC to include an author or publication as an intervener if it decided an author or publication had a legitimate interest in a specific case that was not being vindicated by the conventional parties.
Administrative Procedure Act,\footnote{See Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59 (2012)).} could then be appealed through the agency and eventually to federal district court. This system has several benefits: it creates a unified body of case law as to what constitutes misleading information, it is consistent with the FTC’s expertise, and it costs less than alternative methods of adjudication, such as federal district courts.\footnote{See Arti K. Rai, Allocating Power over Fact-Finding in the Patent System, 19 BERKELEY TECH. L.J. 907, 918 & n.53 (2004) (arguing that expertise and procedural efficiencies should make patent administrative proceedings “significantly cheaper” than trial court litigation); Elizabeth Warren, Vanishing Trials: The Bankruptcy Experience, 1 J. EMPIRICAL LEGAL STUD. 913, 931, 937 (2004) (describing bankruptcy proceedings as cheaper than district court proceedings for individuals); see also Harold H. Bruff, Specialized Courts in Administrative Law, 43 ADMIN. L. REV. 329, 334 (1991) (contending that PTO made patent law “more unified and clear”); Richard L. Revesz, Specialized Courts and the Administrative Lawmaking System, 138 U. PA. L. REV. 1111, 1160 (1990) (arguing that specialized administrators provide uniformity in technical areas more cheaply than generalist courts).}

A new statutory right could remove several hurdles that plague the US tort system, especially if it explicitly covers truthful information, is pegged to the time of the adjudication (rather than the time of publication),\footnote{See supra Part III.A.} and takes advantage of the expertise and value of an administrative agency. The statute itself might go something like this, amending 47 U.S.C. § 230(c) to add a subsection that reads as follows:

Upon receipt of a complaint from a natural person, the Federal Trade Commission shall, on the record after opportunity for an agency hearing, determine whether the contested link or links in a given search is misleading, meaning the private harm of the information substantially outweighs the public benefit at the time of the adjudication, such as by inaccurately implying a criminal history or continued financial insolvency. If it finds the link misleading, the Commission shall require an interactive computer service\footnote{See 47 U.S.C. § 230(f)(2) (2012) (defining “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions”).} to place a small flag or insignia next to the link or links in question as well as text stating “Warning: this page may be truthful but misleading as to the subject of your search.” The service may choose to provide a link to the agency decision or further information about decisions under this subsection but is not required to do so. An interactive computer service may file a complaint with the Commission to have a flag removed at a later time if new information is revealed that may change the balance of private harms and public benefits.

This hypothetical statute would provide the FTC with the flexibility to recognize that information may have different value to
different people at different times. For example, a recent arrest in an open case, even if charges are not pressed at the time, may be a valuable piece of information for prospective employers and landlords. However, once the case is closed and the actual perpetrator brought to justice, the information is much less valuable. This is a more moderate approach than that taken by the European right to be forgotten\textsuperscript{105}—the links are still available to every searcher, and the flags are only placed on the links when a specific search term (likely the person’s name) is used.\textsuperscript{106} Moreover, this system takes advantage of many well-known advantages of using administrative agencies: uniformity, expertise, and reduced cost.\textsuperscript{107}

Since search results are necessarily interstate affairs available to anyone, uniformity is critical to providing a fair system. Scholars have criticized defamation law, which is governed by state law, as a “field that cries out for . . . uniformity,” especially in the context of online defamation.\textsuperscript{108} Imagine the not-unlikely case of two sisters, one of whom lives in State A while the other lives across the border in State B. Under current law, it is entirely feasible that a single article describing a raucous family reunion could generate liability for the newspaper in State A but not in State B. Piecemeal state standards

\textsuperscript{105} See supra Part II.A; see also Beata A. Safari, Comment, Intangible Privacy Rights: How Europe’s GDPR Will Set a New Global Standard for Personal Data Protection, 47 SETON HALL L. REV. 809, 820–22 (2017).

\textsuperscript{106} One can dream up law professor hypotheticals in which a future employer searches for two candidates (Annie and Bob) and finds incriminating information about the same candidate (say, Bob) in both searches. Because the flag would show up only in the search for Bob’s name (and not the search of Annie’s name), Bob may not get the full benefit of the flag as in the typical case. This is a necessary limitation of making the right easily administrable for search engines (requiring flags only for a few designated searches) and narrowly tailored to fit the problem in a typical case (where the problem arises either from the search results that show up for a person’s name or from search results that show up for his name and other identifiers, like current city).

\textsuperscript{107} The first year or two may likely face a larger volume of requests as the pent-up demand for protection is released. Based on data released by Google on its right to be forgotten requests, it appears many will be meritorious. See Sylvia Tippmann & Julia Powles, Google Accidentally Reveals Data on ‘Right to Be Forgotten’ Requests, GUARDIAN (July 14, 2015, 9:28 AM), https://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests [https://perma.cc/H76V-MNUM] (reporting that in the first ten months after Google v. Spain, Google granted nearly half of all 218,320 requests by private individuals to have links removed). Furthermore, one of the benefits of an agency adjudication is to strike a balance between creating a cheap tool that is easy to misuse (such as, for example, a Digital Millennium Copyright Act takedown notice) and a prohibitively expensive one that prevents individuals from bringing meritorious claims (such as, for example, a federal court complaint). See Warren, supra note 102, at 937; see also Bruff, supra note 102, at 334; Revesz, supra note 102, at 1160.

are not an ideal way to protect individuals or regulate the conduct of defendants.

Because the flagging system would be administered by the FTC, defendants would have one go-to source for precedent and complaints they may want to reopen. Suppose, for example, an individual goes through the flag request and prosecution process and has a flag placed on a newspaper article about her bankruptcy from three years ago, which she argued was due to her then-husband’s gambling. Two years later, she files for bankruptcy again. The search engine would like to go back and remove the flag from her first bankruptcy, since it now appears relevant and not misleading. If the initial flag had been placed by a federal district court, the correct venue for the flag removal would be difficult to ascertain—is it the district court where the individual currently resides? Where she resided at the time of the original flagging adjudication? Where the search engine is headquartered? Where the publication is based? An agency proceeding solves these problems by providing a single locus of authority and jurisdiction.

As discussed above, the FTC has established itself as the leading federal watchdog of consumer privacy, in part by calling on companies to help individuals control the information about them that is held or published by Internet companies. Perhaps more importantly, the FTC has been tasked with balancing harms to consumers against potential benefits to companies and other consumers. Section 5 of the Federal Trade Commission Act specifically charges the FTC with policing “unfair” trade practices, where unfairness is defined as conduct “likely to cause substantial injury to consumers which ... is not outweighed by countervailing benefits to consumers or to competition.” This standard is substantially similar to the standard for misleadingness in the proposed flagging system (whether the private harm of the information substantially outweighs the public benefit at the time of the adjudication).

In fact, the FTC already regulates “misleading”
conduct when it prosecutes companies for engaging in deceptive practices—which are material conduct “likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”  

The FTC has declined to further define “unfair” and “deceptive” through rulemaking and has instead chosen to proceed through adjudications to establish a body of common law-like precedent (through consent decrees as well as outright litigation) of what constitutes an “unfair” or “deceptive” practice in different industries. Courts have emphasized the FTC needs flexibility in order to respond to emerging problems. Similarly, the lack of definition in “misleading” beyond a similar balancing test in the flagging system will allow the FTC the discretion it needs to develop a body of case law concerning the exact contours of “misleading” information in online search results.

A large part of the misleading analysis will be governed by the contents of each link and the amount of time since the events in question, but initial direction could be taken from the Fair Credit Reporting Act (FCRA), also enforced by the FTC, which bars consumer reporting agencies from providing information on bankruptcies, lawsuits and judgments, paid tax liens, and records of arrest or indictment after a certain period of time. Like the flagging system, the FCRA seeks to prevent decision makers from using outdated information, while recognizing the information may still be relevant in select contexts. The easiest case in the flagging system is information that could not be included in a consumer report under the FCRA—such as a bankruptcy from fifteen years earlier. A slightly harder case, but one likely still covered by the flagging system, is a

115. Id. at 621 (“[T]he Court must consider the untenable consequence of accepting Hotels and Resorts’ proposal: the FTC would have to cease bringing all unfairness actions without first proscribing particularized prohibitions—a result that is in direct contradiction with the flexibility necessarily inherent in Section 5 of the FTC Act.” (emphasis in original)).
117. 15 U.S.C. § 1681c(b) (2012) (stating that the barred categories of information can still be provided if the consumer report is being used in a credit transaction worth over $150,000).
type of information covered by the FCRA but outside its time barriers, such as an arrest that is only five years old. The marginal case is one completely outside the information covered by the FCRA, such as a news story covering a person’s drunken antics in college.

Content and age will be most influential in these borderline cases. If the drunken antics occurred only two years ago and involved screaming racist epithets at passersby, they probably would not be flagged. If they occurred five years ago and involved screaming quotations from Shakespeare, by contrast, they might be flagged. This inquiry is similar to the balancing federal courts do under Rule 403 of the Federal Rules of Evidence, which asks courts to weigh probative value against the likelihood of prejudice.¹¹⁸ Judges are trusted to engage in this balancing effectively, just as the flagging system calls for trust that the administrative law judge will properly balance private harm and public benefit.

The most important thing to remember is the flagging system is less powerful than existing rules like the FCRA or right to be forgotten. No content is removed and no one is barred from viewing or using the information.¹¹⁹ The flagging system seeks only to remedy irrational decision-making, where decision makers place too much emphasis on a single piece of information. What is “misleading” or “relevant” to an individual decision maker may vary, which is why the continued accessibility of the content is preserved. Consider two couples—Priscilla and Danielle, and Paul and David. Suppose both Priscilla and Paul think their partners are exhibiting strange behavior that borders on stalking, and they each search for more information about their partner online. Danielle had a college arrest for possession of marijuana that was never prosecuted, while David was accused by his college newspaper of stalking a professor. Even if both of these are flagged as “misleading,” Paul is likely to view the information about prior stalking accusations as very relevant and similar to his concerns. This is therefore high-value information to him, and he is able to use it. On the other hand, Priscilla does not learn much about Danielle from the college arrest—this is low-value information—and the flag may help prevent Priscilla from generalizing that the arrest means Danielle is a “bad person” or has “criminal tendencies.”

The final benefit of using an administrative agency to administer this proposal is reduced costs. On the most basic level, the FTC has the necessary experience and specialized knowledge to quickly adjudicate these claims, so the proposal saves significant time compared to having a federal or state court judge attempt to understand the law of search engines and perform the proper balancing. Furthermore, adjudication by administrative agencies is generally understood to be less costly for the parties than adjudication in federal court. An administrative agency adjudication strikes an optimal balance between providing a costly screen to weed out frivolous claims, while also keeping this remedy available to as many worthy plaintiffs as possible. The FTC also has the ability to define certain procedures to raise or lower costs to further perfect this balance—for example, by establishing the procedure through which individuals file their complaints and setting the rules of evidence admissible in the adjudication.

On the broadest level, this flagging system meshes both the European and US conceptions of privacy: it vindicates the dignity of individuals by allowing them to take an autonomous action, while also refusing to censor or punish a speaker for publishing information. It stakes out a middle ground between the content removal of the right to be forgotten and the remediless state of US tort law. Furthermore, the flagging system takes advantage of uniformity, expertise, and cost reductions afforded by administrative agencies.

120. See William McGeveran, Friending the Privacy Regulators, 58 Ariz. L. Rev. 959, 977 (2016) (stating that the FTC imposes the most privacy obligations on commercial entities in the United States); Frank Pasquale, Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries, 104 NW. U. L. Rev. 105, 108–09 (2010) (detailing FTC regulation of search engines).


122. Arguably the cheapest possible process is one similar to the right to be forgotten in Europe, which is handled directly by search engines. See Carter, supra note 47. Nothing prevents search engines from offering this service directly. However, a legal right adjudicated by would-be defendants would violate the notion of a neutral adjudicator, which is considered essential for due process, so a decision in a search engine’s private process could not preempt the FTC flagging process. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).

123. See Mila Sohoni, The Power to Privilege, 163 U. PA. L. Rev. 487, 545 (2015) (“Agencies are therefore old hands at writing agency-level rules of procedure and even agency-level rules of evidence, rules that frequently deviate from the federal rules in order to promote more efficient fact-finding by agency adjudicators.”).
C. Why Flags?

Striking a middle ground between total removal and a total lack of remedies is a noble goal, but the flagging system must be able to stand on its own merits. This Section first situates the flagging system in the wider scholarship that has sought to solve this problem, especially the right of reply literature. The flagging system is more consistent with the First Amendment and presents less potential for abuse than a right of reply system. Second, this Section makes the affirmative case for why a flagging system would provide a benefit to plaintiffs. It discusses two psychological phenomena—confirmation bias and negativity bias—and explains why these may cause readers to irrationally overvalue the negative but misleading information from online news articles unless a flagging system is used to counteract these biases. Finally, it briefly discusses why search results rather than individual pages are the ideal target of regulation.

1. Why Not a Right of Reply?

The flagging system may remind readers of Professor Frank Pasquale’s 2006 paper, in which he proposed that search engines provide a right of reply by placing an asterisk next to “objectionable” results that linked to the complainant’s own website giving her “side of the story.” A similar proposal, limited to defamatory material, advocated a similar right of reply in exchange for Section 230 immunity. Pasquale’s proposal was criticized as technically ineffective (people may switch to other search engines) while simultaneously “inhibit[ing] the development of better, more helpful responses,” such as personalization technologies that deliver results tailored to the searcher’s interests. The proposed flagging system mitigates these concerns by providing a forum for a single adjudication against multiple search engines while providing the FTC the flexibility to respond to future issues like personalization.

Furthermore, the idea of a full-fledged right of reply presents two larger problems—compliance with the First Amendment and the possibility that the right proves too powerful. On the First Amendment front, the Supreme Court explicitly held a right of reply

requirement unconstitutional in *Miami Herald Publishing Co. v. Tornillo*. Justice Brandeis once famously declared that in First Amendment cases “the remedy to be applied is more speech, not enforced silence.” But, writing for the Court in *Miami Herald*, Chief Justice Burger worried a right of reply would reduce speech overall rather than increase it. The Court found a Florida right of reply statute unconstitutional on the ground that it “exact[ed] a penalty on the basis of the content of a [publication].” Forcing a newspaper to publish a response to certain content (in *Miami Herald*, political editorials) increases the costs of publishing that content and may cause the newspaper to shift to less contentious material that is less likely to generate a reply.

Furthermore, the Court found even if there were no increased costs, and thus no change in content, the right of reply would still be unconstitutional as a violation of publications’ editorial control. A right of reply for search engine results or web page content could be significantly less costly, but it still presents the overriding problem of editorial control.

Forcing search engines to provide links to a complainant’s website is identical to forcing newspapers to provide response editorials, while the flagging system is not. A right of reply forces the publisher to provide the same type of content it normally provides in the same form, but without the editorial control it normally asserts over the decision to display that content. In contrast, the flagging system does not force publishers to display content typically considered to be within their editorial discretion. The proposed flags are different in form from the content search engines typically provide, because they are not links.

The flagging system strikes a balance between Justice Brandeis’s desire to counter speech with more speech and Chief Justice Burger’s fear that removing editorial control will lead to reduced speech. In the vein of combating speech with more speech, a flag provides additional information to the reader by including an explicit explanation of what the flag means (that the information is true but may mislead the reader). However, the flag does not

---

130. *Id.* at 257.
131. *Id.* at 258.
exacerbate Chief Justice Burger’s worry that publishers (in this case, search engines) will publish less controversial content because of the rule. Flags are not automatically compulsory, demand no action on the part of the actual speaker (the author of the web page), and do not require the search engine to provide links with which it disagrees. In the political editorial context in which Miami Herald was issued, a right of reply requires publishing a responsive editorial that conflicts with the newspaper’s statements or beliefs, while a flagging system is analogous to requiring the initial story be labeled as an editorial. The latter is unlikely to threaten editorial discretion or the decision of what to publish, while adding an additional bit of information to the reader’s experience.

Rights of reply also present the possibility of going too far and providing complainants an overly powerful megaphone for their own (potentially unrelated) speech. Professor James Grimmelmann, for example, responded to Pasquale by asking whether President George W. Bush could demand a right to reply to “every progressive blog.” The ability to drive readers to the complainant’s website makes a right of reply an enticing opportunity to anyone who wants to spread her views. Everything looks like a nail when using a hammer confers a benefit on the user. This overuse problem is intrinsic to the right of reply—the more benefits a right confers, the more attractive its use appears.

Finally, the right of reply—as described by Pasquale—does not adequately constrain complainants to use the right only to address the actual problem. Pasquale proposes no formal restraints on what the website linked to through the asterisk could say, although he proposes it go to the complainant’s website. Suppose the first search result for Jane Doe’s name is a story of a drug arrest, which later turns out was based on a case of mistaken identity—Jane was never involved in the distribution of illegal drugs. Jane receives an asterisk on the

---

133. See Miami Herald, 418 U.S. at 257 (“Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy.”).
134. See id. at 255–56.
135. Grimmelmann, supra note 126, at 51.
136. See Pasquale, supra note 124, at 136.
137. See id. at 135–36.
138. See Mike Smith, Case of Mistaken Identity Lands Local Woman in Jail, STATE GAZETTE (May 22, 2016), http://www.stategazette.com/story/2306887.html [https://perma.cc/67A8-FEEF] (describing an incident in which US Marshals arrested the wrong woman of the same name as a suspect for drug charges). Cases of mistaken identity arrests are common: In 2016, a Santa Fe man was arrested on a warrant for drunk driving and drug charges that had been issued for his dead brother. See Jeannie Nguyen, Santa Fe Man Sues After He’s
link to the news story about the drug arrest, which links to a page where she can explain her side of the story. Although Jane benefits from being able to set the record straight about the drugs, she now has a platform that many people click on when they search her name (even though her website is not the most reliable source of information about her based on Google’s algorithm). No one is keeping tabs on what Jane posts on her website—she may begin only telling her side of the drug arrest but may later expand the page to discuss how great she is at her job. She may then expand the page to cover the arrest, her qualifications, and her beliefs about immigration policy. Clearly, giving the website such prominence is no longer justified for most of its content. However, the cost of policing every individual’s website would be prohibitively astronomical (recall that Google received 905,000 requests from Europeans to have links delisted in the first year after the right to be forgotten decision).¹³⁹ Unlike a right of reply, a flagging system does not give individuals the ability to present their own content, and so it does not have these policing problems.

2. The Affirmative Case for Flags

Putting a flag on negative, misleading information may seem counterintuitive. After all, if a person is concerned she will not be considered for jobs or loans on the basis of this information, why draw more attention to it? The answer to this question is twofold: first, the people who select this remedy will be those who believe everyone is already reading the information, and second, the flags will help remove the biases of readers who would otherwise give this piece of information too much weight (the “debiasing” function).

Scholars, employers, and lawmakers have long recognized certain information can be damaging to a person’s ability to get a job, loan, or apartment. For example, the FCRA requires individuals be given notice if a covered party takes an “adverse action” (such as not

---

¹³⁹ See Bhatti, supra note 44.
giving a loan) as a result of negative information about a person’s “credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.” However, the individual must file a request if she wants to learn the exact nature of the information that lost them the loan. Note that this rule does not prohibit the use of this information in making the decision; rather, it just prohibits making a decision on the basis of the information and refusing to tell the applicant why. There is no similar rule, however, for parties not covered by the FCRA or for areas not reached by the FCRA, including employment and housing.

At least in the employment context, evaluating prospective employees based on search results is rampant. Almost 80 percent of employers use search engines to learn about job applicants, and almost 70 percent of these will reject applicants based on what they find. More than half of employers reported they would reject a candidate based on “concerns about the candidate’s lifestyle” or “unsuitable photos, videos, and information.” Importantly, such concerns can be gleaned from anywhere, including search results and news articles. For example, in an empirical study of identical resumes that corresponded to Internet information suggesting the applicants were either Muslim or Christian, researchers found Muslim applicants received significantly fewer interviews. This finding suggests employers performed online searches for the applicants, learned the applicants’ religions, and then regularly chose to reject the Muslim applicant.

Based on this data, it is not absurd for an individual to believe a negative search result, such as a story about a past arrest or bankruptcy, would reduce her chances of receiving a job, loan, or apartment. If a potential employer is already searching an applicant’s

---

141. Id.
142. See Alessandro Acquisti & Christina M. Fong, An Experiment in Hiring Discrimination via Online Social Networks 1, 29–30 (Mar. 12, 2016) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031979 [https://perma.cc/BR9G-LD5F]. Empirical studies have found vastly different rates than self-reported data. For example, Acquisti and Fong estimated that between one-tenth and one-third of employers to whom they submitted resumes and cover letters searched applicants before interviews. See id. at 20. These significantly different results may be attributed to employers utilizing search results at different stages of the process, including after the interview (and therefore were not included in Acquisti and Fong’s sample).
143. CITRON, supra note 11, at 8.
144. Id. at 9.
145. Acquisti & Fong, supra note 142, at 4.
146. See id.
name, it is likely using the information to reject candidates. Once a job seeker determines most or all of her would-be employers are reading the negative information, the marginal cost of highlighting the story with a flag is close to zero. Furthermore, the cost of hiring a lawyer will further restrict the pool of litigants to those who are nearly certain they are losing high-value opportunities. 147 Having established there are individuals for whom the increased emphasis brought by the flag may not increase the odds the information is used negatively, a second question is raised: Will the flag do anything to change the adverse decision?

Two separate lines of scholarship suggest a flag may reduce the impact of psychological biases and cause decision makers to reduce the weight placed on negative information. Both lines of scholarship suggest decision makers are acting irrationally when they reject an applicant because of one negative link. 148 A flag may reduce these psychologically based irrationalities. The first line of scholarship relates to confirmation bias, in which information that supports a person’s preconceived notions is given higher value than information that contradicts the person’s initial idea. 149 The second line of scholarship concerns negativity bias, which finds that negative information read online is given more weight than positive information. 150

One reason decision makers may place too much emphasis on a search result is the psychological bias known as “confirmation bias.” Confirmation bias is the phenomenon in which people “assimilate new information in a way that confirms their view of the world.” 151 Confirmation bias can manifest either by seeking out information that confirms a person’s preexisting views while avoiding information that

147. Although lawyers are not required in agency proceedings, they are common. See 5 U.S.C. § 555(b) (2012). The defendant search engines are likely to use lawyers in their defense, so successful plaintiffs will likely use lawyers. See Russell Engler, Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed, 37 FORDHAM L. J. 37, 58–59 (2010) (remarking that the success rate in administrative appeals climbs substantially when an individual is represented by counsel).


149. See, e.g., Sunstein, supra note 148, at 139.

150. See Chevalier & Mayzlin, supra note 148, at 346.

conflicts\textsuperscript{152} or by interpreting and remembering gathered information in a way that favors the person’s initial beliefs.\textsuperscript{153}

Confirmation bias presents a deeply troubling problem in the area of search results because many individuals have been shown to have incorrect preexisting beliefs about factors such as criminality and creditworthiness. For example, studies have shown employers often assume African American men have criminal records and are less likely to hire these men.\textsuperscript{154} Although the data are less clear, some studies have suggested mortgage lenders may also have preexisting beliefs about the creditworthiness of minorities, such that they are inclined to direct equally qualified minority applicants to subprime rather than prime mortgages.\textsuperscript{155} Suppose an employer, who does not pay for background checks, searches the names of applicants after he interviews them; the employer thinks African American men are likely to be criminals. He finds that John Smith, an African American applicant, was arrested for robbery two years ago. The employer does not know this robbery arrest was a case of mistaken identity and that Smith was released without charges. Without a warning that this information is not credible, the employer will likely find this information very relevant and memorable, since it comports with his world views, and not offer Smith the job.

Adding a flag reduces confirmation bias by signaling the information is unreliable and reducing the decision maker’s reliance on it. For example, a recent study found Internet readers prefer to read high-credibility source material, even if there is low-credibility material available that confirms their biases.\textsuperscript{156} Another study found that presenting readers with targeted information that contradicted their beliefs resulted in “less ‘confirmation-biased’ recall” and better

\begin{itemize}
\item \textsuperscript{152} See Julie Nelson, The Power of Stereotyping and Confirmation Bias to Overwhelm Accurate Assessment: The Case of Economics, Gender, and Risk Aversion, 21 J. ECON. METHODOLOGY 211, 211 (2014).
\item \textsuperscript{153} See Margit E. Oswald & Stefan Grosjean, Confirmation Bias, in COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGEMENT AND MEMORY 79 (Rüdiger F. Pohl ed., 2012).
\item \textsuperscript{154} See Harry J. Holzer, Steven Raphael & Michael A. Stoll, Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers, 49 J.L. & ECON. 451, 471 (2006). This effect is reduced if the employer institutes criminal background checks to determine which men do and do not have criminal records. Id. at 465.
\item \textsuperscript{155} See Marvin M. Smith & Christy Chung Hevener, Subprime Lending over Time: The Role of Race, 38 J. ECON. & FIN. 321, 342 (2014) (finding the effect of race to be statistically significant); see also WALTER E. WILLIAMS, RACE & ECONOMICS: HOW MUCH CAN BE BLAMED ON DISCRIMINATION? 128–31 (Hoover Inst. Press 2011).
\end{itemize}
remembering of opposing arguments.\textsuperscript{157} Practically, these studies suggest that even if an employer would like to believe an article that confirms his biases, he is less likely to base his decision on the article if it is flagged as less credible. Furthermore, flagging is especially useful because Internet users are already familiar with credibility flags from online institutions, such as Wikipedia, which place warning flags on pages of dubious quality.\textsuperscript{158}

Even if a decision maker is completely neutral when she starts a search, research suggests she will place an irrational emphasis on negative information compared to positive information.\textsuperscript{159} This well-known phenomenon is called “negativity bias.”\textsuperscript{160} For example, Chevalier and Mayzlin found that a one-star (negative) book review in most online book markets had a larger impact than a five-star (positive) review.\textsuperscript{161} A similar study found negative reviews had a greater impact than positive reviews on DVD and video sales on Amazon.com.\textsuperscript{162} Similar results have also been found with regard to box office sales and professional movie reviews, although only during the first week (when moviegoers tend to rely on professional reviews).\textsuperscript{163} Negative search results are like negative reviews—each link provides one data point about a person’s quality, and a negative result tends to be taken more seriously than a positive one. This effect may be exacerbated online because readers may discount the positive information and assume it was posted by the individual to make herself “look good,” while negative information is typically not posted for self-serving reasons.\textsuperscript{164}

\begin{itemize}
\item \textsuperscript{158} See, e.g., DAN O’SULLIVAN, WIKIPEDIA: A NEW COMMUNITY OF PRACTICE? 179 (Routledge 2009).
\item \textsuperscript{161} See Chevalier & Mayzlin, supra note 148, at 351.
\end{itemize}
The discounting of positive information demonstrates why a flagging system presents a unique benefit to victims beyond private-sector remedies. Businesses already exist to help companies increase the visibility of positive information about themselves, and the Internet is full of blogs advising individuals how to do the same. The first problem with market-based solutions is that search engines often seek to negate their effects. For example, Google changed the way it analyzed link structure to reduce the efficacy of “Google bombs” that tried to increase the prominence of certain links. Companies that specialize in changing link results are in a constant battle with the search engines they seek to outwit. The second problem is that negativity bias demonstrates it may not matter whether a link containing negative information is listed first or fifth or fifteenth. Because negativity bias causes readers to discount positive information as self-serving—and therefore low value—while viewing negative information as more credible and valuable, a decision maker will still be unduly influenced by the negative link. A market-based solution, even if it is effective in reordering links, may not change the relevant decisions if would-be readers discount the positive information and emphasize the negative information they find.

---


168. See Chestek, supra note 159, at 609–10; see also Stephen M. Johnson, *Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?*, 56 WASH. & LEE L. REV. 111, 117–19 (1999). Market-based solutions also present distributional issues to a greater degree than the flagging system. See id. Although the flagging system acts as a costly screen to weed out frivolous claims in part because of litigation costs, there are a number of legal aid organizations (such as law school clinics) that are a part of an existing infrastructure for low-income individuals with promising legal claims. See, e.g., Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 998 (2004); LEGAL SERVICES CORPORATION, *By the Numbers: The Data Underlying Legal Aid Programs* (2015), https://lsc-live.app.box.com/v/LSC-2015-ByTheNumbers [https://perma.cc/5WLL-HXQZ]. There exists no such opportunity for low-income people in the private sector, especially since each use of a search engine optimization technique runs the risk of Google noticing the technique and negating its efficacy. Moulton & Carattini, supra note 167. Of course, high-income individuals may well choose to combine the flagging system and the private market solution in the hopes of boosting the efficacy of the flagging system, but the potential efficacy of this combination is beyond the scope of this Article.
However, this negativity bias can be combatted by providing outside indicia of whether the information is reliable, such as a flag. Existing studies have found the impact of an online review depends not only on whether it is positive or negative but also on whether the reviewer seems to be a credible source of information. If a person has written more reviews and the reviews are seen as high quality, readers will give her review more weight than if she is unknown or has a reputation for low-quality reviews. Similarly, whether or not an individual review has been voted as “helpful” by a community also alters its impact on readers. Both reviewer quality scores and votes for reviews are similar to the flagging system in that they provide small, familiar metrics for quality. As noted earlier, Wikipedia already uses a flagging system similar to the one proposed in this Article to indicate quality concerns.

A flag combats negativity bias by warning readers that the information is of reduced value, just as seeing a low reputation or helpfulness score warns the reader of a book or movie review that the information may be of lower value. In fact, a flag is post-specific, so it would likely have a greater force than a generalized statement about the quality of a reviewer. A reader may be able to justify to herself that a bad reviewer can write a valuable review, but she is much less likely to believe an explicitly unreliable piece of information is valuable. Therefore, flagging is likely to combat both negativity and confirmation biases and increase the rationality of a decision maker’s choice.

Finally, the flagging system helps correct for a frequent human phenomenon: carelessness. Anyone with a social media account has encountered a story that has gone “viral” (become popular), only to realize the breaking news is in fact years out of date. In a recent example, over half a million people viewed a five-year-old story about a recall of Similac baby formula, which the readers believed to be an active recall and promoted the story as news on social media. Users believe they are sharing vital current information, when they have in fact simply failed to check the date an article was published. This

170. See Pei-yu Chen, Samita Dhanasobhon & Michael D. Smith, All Reviews Are Not Created Equal: The Disaggregate Impact of Reviews and Reviewers at Amazon.Com (Aug. 3, 2014) (unpublished manuscript), http://repository.cmu.edu/cgi/viewcontent.cgi?article=1054&context=heinzworks [https://perma.cc/A3XN-TLA3];
171. See O’SULLIVAN, supra note 158, at 179.
172. See Chris Quinn, What’s the Lesson in the Viral, Facebook Spreading of an Outdated Similac Recall Story, CLEVELAND (May 06, 2015, 1:23 PM), http://www.cleveland.com/opinion/index.ssf/2015/05/whats_the.lesson.in.the.viral.html [http://perma.cc/8ZQT-JPW5].
problem is neither new nor limited to social media. In 2005, the US Department of Defense issued an official press release decrying the use of outdated photographs of long-closed military facilities alongside current news articles in the mainstream media.173 Similarly, conservative news site Breitbart was slammed in May 2015 for reporting as current news a four-year-old allegation about Catholic University’s treatment of Muslim students, which the university had investigated years earlier and found nothing to support.174 If everyone from ordinary Facebook users to influential blogs and news channels tends to forget to check the date of Internet information, decision makers are likely to do the same. One benefit of the flagging system is the flag prevents a would-be landlord from seeing a news story at the top of a person’s search results and assuming the story is current. Without a flag, an employer may well assume a story about a years-old arrest or bankruptcy is recent. With a flag, an applicant can rest easy that this sort of mistake will not be made about her.

3. Why Flags on Search Results?

Search engine results may seem like an unexpected location for a flag. After all, the concern is about the content of the relevant link, so why not place the flag on the link itself? Furthermore, what about the concern that plaintiffs may end up in a long-running game of whack-a-mole in which they are constantly trying to bring new claims against new links? The answer to the first is mainly a practical matter, while the second is a matter of the architecture of search engines. A third reason—providing an answer to logical flaws in the current setup of Section 230 and the First Amendment—provides further support for the proposed system.

Placing links on a search engine page solves two practical problems: it debiases the reader at the most likely point of entry and provides the plaintiff with a clear defendant. Depending on the headline of a link, a decision maker may not need to read the link in order to make a decision based on its contents. Suppose a would-be employer searches for Sarah Smith and comes across a search result that says “Sarah Smith, 28, indicted for embezzlement.” Many employers may well stop their search and move Sarah’s application to


174. See Rika Christensen, Breitbart Stupidly Spreads Fear After Falling for Outdated Article on Muslims at Catholic University, ADDICTING INFO (May 15, 2015, 8:55 PM), http://www.addictinginfo.org/2015/05/15/breitbart-stupidly-spreads-fear-after-falling-for-outdated-article-on-muslims-at-catholic-university/ [https://perma.cc/TW28-5X44].
the reject pile without ever opening the link. Placing a flag on the website itself does no good if the decision maker never reaches it.

Furthermore, placing the flag on search engine results ensures the flag will be recognized by web users. Many websites, most prominently Wikipedia, already use flags to indicate articles may be biased or need more work, so Internet users know to approach flagged articles with skepticism.\footnote{See, e.g., O’SULLIVAN, supra note 158, at 179.} Most users are also familiar with the look of their favorite search engine, but few are familiar with the pages they find through search engines. Even if a news story was flagged on its own webpage, newspapers have a vast array of layouts and color schemes. Even if a decision maker was aware of the need to look for flags, she might well miss it when confronted with a new website style. Using a search engine as the location for the links eliminates this problem by providing one standardized appearance for flags.

Finally, using search engines helps plaintiffs identify where to direct their complaint. Unlike the millions of website operators,\footnote{In fact, many websites are families that provide pages to individual users and are themselves hosted by other web companies. If a freelance blogger has his own webpage on a news domain hosted by a large web company, who should the plaintiff bring before the FTC? The webmaster? The writer? The network domain? The host? The answer may vary based on the legal and technical questions concerning the design of the website, the answers to which are completely unknown to the plaintiff. For example, is the blogger considered an independent contractor renting space from the domain or an employee?} there are only three main search engine providers in the United States: Google (with roughly 65 percent market share of desktop searches), Microsoft (roughly 20 percent), and Yahoo (roughly 12 percent).\footnote{comScore Releases January 2015 Desktop Search Engine Rankings, COMSCORE (Feb. 18, 2015), http://www.comscore.com/Insights/Market-Rankings/comScore-Releases-January-2015-US-Desktop-Search-Engine-Rankings [https://perma.cc/Z5GM-SRJU].} This provides a parsimonious advantage to both plaintiffs and defendants. Plaintiffs can bring claims against three defendants for any number of links and have them adjudicated at one proceeding. Defendants, similarly, face only one proceeding for all the links related to a specific incident. Furthermore, search engines have the technical knowledge to easily add a flag to the relevant search results, while many local newspapers or freelance bloggers may be unsure how to make their website comply with a flag order.

Additionally, this flagging system is consistent with how Google has previously approached campaigns to alter search results, suggesting it is well within the technical feasibility of major search engines.\footnote{See James Grimmelmann, The Google Dilemma, 53 N.Y.L. SCH. L. REV. 939, 943–44 (2008).} When a search alteration campaign, or “Google bomb,”
has impacted search results, Google has refused to revert the search results manually. Instead, it has linked to information about Google bombs explaining why the irrelevant or satirical results may appear first in the search results. This strategy has allowed Google to manage both the practical difficulty of manually changing search results (which could reduce the speed and quality of service) while also maintaining a semblance of objectivity. Since Google has already identified flagging as the most effective way of dealing with potentially problematic search results, search engines should not have technical problems implementing a wider flagging system.

A further concern is whether, even suing search engines instead of individual websites, plaintiffs will be engaged in an endless game of whack-a-mole due to the proliferation of unflagged links with the same content. In order to be flagged, however, content must have misleading implications, which means it will likely be old. Although one can spin out a hypothetical in which the content is persistently reposted on new websites, perhaps as a part of a harassment campaign, most cases of old news are unlikely to be posted anew on many websites.

However, even if the information is added to a new website, the architecture of search engines suggests it will not be a large problem. A website becomes the top Google search result through Google’s “PageRank” method, which weights a page based on how many other pages link to it. A link from a website that itself has been linked to many times (think prominent websites like Wikipedia or the New York Times) is worth more than a link from a less cited website. Consider it a popularity contest, in which the votes of the most popular kids count more than the loner kids. Providing a “linkback” to the original source of information is considered common courtesy on

---

179. See Panagiotis T. Metaxas & Eni Mustafaraj, Social Media and the Elections, 338 SCI. 472, 472–73 (2012). Google bombs are achieved by creating webpages that link a word or phrase to an unrelated webpage, causing Google’s algorithm to believe the two are related and rank the webpage highly. See id. A common example is a campaign to cause a search of the term “miserable failure” to return President George W. Bush’s biography. See Grimmelmann, supra note 178, at 942 (“Thus, the most famous Googlebomb of all time is probably the one many Democrats launched in 2003 to link to George W. Bush’s official biography page with the phrase ‘miserable failure.’”).

180. See Grimmelman, supra note 178, at 944.


182. See Grimmelmann, supra note 178, at 943–44.

183. See, e.g., CITRON, supra note 11, at 133–34.

184. PASQUALE, supra note 9, at 64.

185. Id.
the Internet, so in most cases the first link related to an incident will either be the original report or a related story by a very popular or reputable website, even if other websites post the information. Essentially, each website that reposts the story is also providing a vote for the original source, so the source website tends to stay on top unless a very reputable website that many people link to picks up the story.

This architecture means that a plaintiff who successfully flags the top link or two containing the relevant information will likely not need to renew her claim against new websites. The originally flagged websites are likely to remain the highest ranked sources of that information over the long-term (especially after significant time has passed since the event). Although there may be other websites later on in the search results that are not flagged, a decision maker who already knows a bankruptcy or arrest is misleading will likely be able to impute that to other websites carrying the same information.

D. Compliance with Existing Law

The final question for the flagging system is whether it violates the First Amendment rights of search engines. The flagging system respects the First Amendment by not removing any links, altering any published speech, or changing the ranking of a page in the search results. As discussed further below, compelling each of these actions (removal, alteration, re-ranking) has been found to violate the First Amendment. However, search engines have never asserted a First Amendment interest in the actual content of the links. In fact, under Section 230 of the CDA, search engines have frequently disclaimed publisher responsibility for the content of links they provide in search results, even when the information provided is false or harassing. Although this theory of search engines’ First Amendment rights is admittedly narrow, it encompasses all of the current case law on such rights while solving a tension inherent in the


189. See CITRON, supra note 11, at 25.
This Section proceeds in two subparts. The first discusses the existing protections in case law and the CDA for search engine results. The second subpart discusses why the flagging system does not fall within these protections.

1. Existing Protections for Search Engine Results: The First Amendment and Section 230

Whether or not search results should be protected from government regulation under the First Amendment has been a hot topic of scholarly debate. Scholars such as Tim Wu, Oren Bracha, and Frank Pasquale have argued search engine results are not entitled to robust First Amendment protections. Wu argues search engine results do not convey a coherent message or signify endorsement (as Wu puts it, “no one says, ‘It was interesting what Google had to say about X’”). Meanwhile, Bracha and Pasquale argue search engines claim to be “passive conduits” for the purposes of tort and copyright immunity, so they cannot be “active speakers or discretionary editors” for the purposes of the First Amendment.

On the other hand, James Grimmelmann, Eugene Volokh, and Donald Falk have suggested that search engines are entitled to First Amendment protections. Grimmelmann argues search engine results reflect “very human opinions” (presumably the opinions of the writers of the algorithm that produces the results) and therefore are entitled to First Amendment protections as speech expressing opinions. In the published version of a white paper commissioned by Google, Volokh and Falk argue “each search engine’s editorial

---

190. See supra Part III.B.
191. See Tim Wu, Machine Speech, 161 U. PA. L. REV. 1495, 1529 (2013) (“[A]s neither a conscious curator nor a legally responsible publisher of content, a Google search is a far cry from a newspaper.”).
197. Id.
198. Grimmelmann, supra note 195, at 933.
199. See Volokh & Falk, supra note 187. The views expressed are not necessarily those of Google, per the authors. Id. at 883, n.a1.
judgment is much like many other familiar editorial judgments,” such as the decision of which newspaper articles to run and where to place them.\footnote{Id. at 884.}

This scholarly debate aside, existing court decisions on the protection of search engines have fallen into two camps: those based on the First Amendment, and those based on Section 230 of the CDA. The First Amendment cases are divided in how they analyze search engine results. In Search King, Inc. v. Google Tech., Inc., the district court held the ranking given to a webpage in Google search results (also known as Google “PageRank”) was an opinion on a matter of public concern.\footnote{Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003).} A unique algorithm determines the rankings on each search engine, so the court reasoned there was no way the ranking assigned to a page could be factually false.\footnote{Id.} Because the ranking was an opinion that was not factually false, the court found the rankings were entitled to “full constitutional protection” and could not be the basis for a claim.\footnote{Id.}

While Search King concerned a reduction in ranking (moving a page further down in the search results and making the link less likely to be viewed by the searcher), Langdon v. Google\footnote{Langdon v. Google, Inc., 474 F. Supp. 2d 622, 627 (D. Del. 2007).} concerned websites the plaintiff claimed had been removed from search results entirely. The district court in Langdon took a different approach, instead analyzing the removal request as an issue of compelled speech.\footnote{Id. at 629.} The court held that, like forcing a newspaper to print replies to editorials or forcing a newspaper to run a classified ad, forcing Google to list a website in its results would violate its editorial discretion.\footnote{Id. at 630–31. At least one court has been willing to differentiate between genuine editorial judgments and decisions to remove pages for other reasons. See e-ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016) (“While publishers are entitled to discretion for editorial judgment decisions, plaintiff has alleged that Google’s reason for banning its websites was not based upon ‘editorial judgments,’ but instead based upon anti-competitive motives.”).}

The final case on the applicability of the First Amendment to search engines is Zhang v. Baidu.Com Inc., which also concerned a search engine refusing to rank websites (this time because the Chinese search engine was categorically blocking information about
the “Democracy movement in China”). The district court applied a comprehensive approach, both endorsing the Langdon editorial judgment approach as well as presenting a theory that the First Amendment protects the distribution of facts as well as the voicing of opinions. Furthermore, the court continued, search engines were not like cable operators—which can be forced to carry a given number of local television stations because they represented a potential monopoly and were a mere conduit for other speech—because, logically, if they had in fact refused to rank the articles for political reasons, they would not be acting as a mere conduit for other speech. Finally, the court decided search engines could not monopolistically silence anyone, since the pages are still available on the Internet (albeit more difficult to find). Scholars have disputed whether search engines are in fact monopolies. In December 2014, Google’s market share of Internet searches (excluding mobile devices) was over 75 percent, so claims of potential monopoly do not seem as easily dismissible as the Zhang court suggested.

Another avenue of protection is Section 230 of the CDA, which provides, in part, that “[n]o 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.” This provision is commonly used by search engines and Internet service providers to avoid liability in defamation cases in which an individual has been defamed within or by search results (such as suggesting searching for

208.  See id. at 438.
211.  Id. at 441. However, this claim suffers from a potentially false premise. Search engine results are a major source of traffic for websites, and it may be unrealistic to believe that one page in thirty trillion can be found without the aid of a search engine. See Nathan Safran, Organic Search Is Actually Responsible for 64% of Your Web Traffic (Thought Experiment), CONDUCTOR: SPOTLIGHT (July 10, 2014), https://www.conductor.com/blog/2014/07/organic-search-actually-responsible-64-web-traffic/ [https://perma.cc/35DU-CD8J] (updating Nathan Safran, Natural Web Site Traffic Accounts for Nearly Half of All Traffic [Data], Conductor: Spotlight (June 25, 2013), https://www.conductor.com/blog/2013/06/web-traffic-natural-search-data/ [https://perma.cc/V7UR-RAKR], which found that 47 percent of website visits were through a search engine while an additional 6 percent were from paid advertisements on search results, with a new estimate that up to 64 percent of website traffic resulted from organic searching).
212.  See, e.g., PASQUALE, supra note 9, at 81.
a woman’s name and an erectile dysfunction drug when her name is searched)\textsuperscript{215} and wants the results changed or removed. However, Section 230 has also been used to relieve search engines of liability in cases where a person claimed invasion of privacy based on search results\textsuperscript{216} or when Google refused to run an advertisement for a given search.\textsuperscript{217} The flagging system statute proposed is literally situated within Section 230 in order to emphasize its relationship to the case law developed around Section 230.

From the earliest Section 230 cases, courts have recognized “[Section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.”\textsuperscript{218} The tension in allowing search engines to claim a publisher’s First Amendment protections while specifically excluding them from publisher liability is a paradox that has been previously noted in the literature.\textsuperscript{219} Bracha and Pasquale attempted to harmonize these strains by suggesting that perhaps search engines have a First Amendment interest in the ranking of results but not in the content of the results themselves, although they rejected this distinction as hollow because the act of ranking a page is not sufficiently expressive.\textsuperscript{220}

Section 230 is supposed to increase the willingness of companies to police the content they provide by exempting them from negligence regimes (whereas if they removed some offensive content but failed to catch all of it, they could be held responsible for the offensive content).\textsuperscript{221} It has, however, led to search engines being unwilling to remove results in the name of objectivity\textsuperscript{222} and to a catch-22 for the subjects of posts. If a poster publishes invasive information on a website, the search engines that link to the post and the website hosting the content are immune from lawsuits under Section 230.\textsuperscript{223} However, the poster may be unfindable or otherwise

\textsuperscript{216.} See Parker v. Google, Inc., 242 F. App’x 833, 838 (3d Cir. 2007).
\textsuperscript{218.} Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997); see also Ben Ezra, Weinstein & Co., Inc. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000) (“Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.”).
\textsuperscript{219.} See Bracha & Pasquale, supra note 192, at 1193.
\textsuperscript{220.} See id. at 1193–94.
\textsuperscript{221.} See Walter Pincus, The Internet Paradox: Libel, Slander & the First Amendment in Cyberspace, 2 GREEN BAG 2d 279, 282 (1999).
\textsuperscript{222.} See Mayer, supra note 181.
\textsuperscript{223.} See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (holding that the newspaper was protected under the First Amendment); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) (finding a website hosting third-party content not liable); Langdon v. Google, Inc., 474 F. Supp. 2d 622, 631 (D. Del. 2007) (finding the search engine not liable).
unable to remove the post, which leads to a situation in which victims could get a default judgment against the poster but be unable to use the courts to compel the search engine or host website to actually remove the content (even though they have an injunction ordering the poster to remove it). This results because requiring the search engine or host website to enforce the injunction would be treating it as a publisher of the information. Such a Kafkaesque remedy is clearly no relief at all (not to mention widely unavailable due to the truthfulness and public interest bars discussed earlier).

In sum, the state of the current protection of search engines is scattershot. The scholarship is split on whether search engine results are sufficiently expressive to warrant any First Amendment protection at all. Only a few district courts have seen First Amendment cases against search engines for failing to include pages or reducing the ranking of a page. One found the result rankings were outright opinions and therefore the rankings were protected speech. Another view is the pages returned are not the opinion of the search engine itself, but an exercise in editorial discretion. Under this view, the practical realities of print publishing (limited page space, increased cost, and awkwardness if more pages must be added) are similar to search engine web “publishing” of search results, and therefore the court cannot compel the search engine to speak differently. A third view posits that search engines are entitled to protection of their publishing and editorial choices because there is no concern that speakers are being silenced by the search engine’s decision, although the reasoning for the search engine’s decision may matter.

Although courts seem inclined to consider search engines publishers for the choice of which pages to display and how to rank them, under Section 230 search engines are not liable as publishers of the content they link to. Search engines are able to say to individuals who are being harassed or extorted based on their pasts: “We think this is the most important thing about you, and you can’t make us change our opinion or keep us from telling people, but we

225. See, e.g., Langdon, 474 F. Supp. 2d at 631.
226. See supra Part III.A.
228. See Langdon, 474 F. Supp. 2d at 631.
didn’t actually say it, so if it’s criminal or tortious don’t blame us!” Although this situation was born from the noble goal of encouraging websites and search engines to self-police, it has failed to live up to its promise. Amending Section 230 to include a flagging system would bridge this gap without violating search engines’ First Amendment rights.

2. Flagging System Avoids First Amendment Problems and Fits Within Section 230

The flagging system does not violate any of the search engines’ First Amendment rights because it impacts neither the rank of the page nor the decision whether or not to link to a website. Furthermore, the flagging system takes advantage of Bracha and Pasquale’s distinction between the search engine’s protected speech of whether (and where) to place a link, and the content of the link—which the search engine is not a speaker of, is not liable for, and has no interest in beyond its relevance to the query. The flagging system removes the “heads, I win, tails, you lose” feature of US law as it currently stands, whereby search engines claim First Amendment publisher rights in the order and presence of links in the name of editorial discretion, while simultaneously disclaiming publisher liability under Section 230. The flagging system vindicates the First Amendment-protected decision of what content to display and provides a de minimis form of liability that does not hold the search engine accountable for tort claims that might arise from the content of the links.

The most obvious reason why the flagging system is unlikely to violate the First Amendment is that search engines will not make objections that make explicit the tension between claiming First Amendment publisher rights and Section 230 publisher immunity. They avoided this result in the past by breaking down the elements of a search result page and claimed editorial discretion in individual elements, such as the ranking and presence of a page. However, a

232. See Bracha & Pasquale, supra note 192, at 1193.
233. See supra Part III.D.1.
234. Note that the addition of a standardized flag on the results of certain queries is unlikely to be overwhelmingly costly for defendants. Google has already developed a system in response to the ECJ’s right to be forgotten decision that removes certain links in response to certain queries. See Bhatti, supra note 44.
235. See, e.g., Zhang, 10 F. Supp. 3d at 438 (“In doing so, search engines inevitably make editorial judgments about what information (or kinds of information) to include in the results and how and where to display that information (for example, on the first page of the search results or later).”).
search engine might try to further push the boundaries of its First Amendment rights and claim the flagging system is a form of unconstitutionally compelled speech in an as-yet unclaimed area of editorial discretion.\textsuperscript{236}

There are three reasons compelled speech doctrine does not present a problem for the flagging system. First, the flag is best understood as a regulatory disclosure of the sort commonly approved by courts.\textsuperscript{237} Second, it is unlikely to produce a change in editorial policy (to the extent search engines can be said to have editorial policies).\textsuperscript{238} Third, search engines, especially Google, have such broad market share that they may qualify for the monopoly exception to compelled speech doctrine as laid out in \textit{Turner Broadcasting Systems, Inc. v. FCC}.\textsuperscript{239}

The sheer existence of a prohibition on compelled speech may surprise some readers since governmentally prescribed warnings are a common feature on foods, medicines, cigarettes, and more.\textsuperscript{240} If a disclosure is considered “factual,” it often need satisfy only rational basis review as reasonably relating to the legislature’s goal.\textsuperscript{241} The Supreme Court has held “restrictions on nonmisleading commercial speech” must “withstand intermediate scrutiny.”\textsuperscript{242} However, this higher level of scrutiny is unlikely to apply to flags because an agency will already have made a finding of fact that the speech is misleading. Whether or not search engine results are commercial speech has only been addressed by one district court, which noted the scholarly literature on the issue was split but felt “the search results at issue in this case” were of sufficient public concern to qualify as noncommercial speech.\textsuperscript{243}

However, the constitutionality of such a system cannot depend on whether or not the particular search results are about a subject of

\textsuperscript{236}. Perhaps a search engine could implement its own flagging system and then say the FTC flagging system compelled it to display flags where it would not otherwise have chosen to do so.

\textsuperscript{237}. \textit{See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985)} (allowing regulatory disclosure requirements as long as they are “reasonably related” to preventing consumer deception).

\textsuperscript{238}. \textit{But see Miami Herald Pub’g Co. v. Tornillo, 418 U.S. 241, 257 (1974)}.

\textsuperscript{239}. \textit{See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656 (1994)}.

\textsuperscript{240}. For example, tobacco and alcohol warning labels have been required nationwide since 1966 and 1988, respectively. \textit{See Sabrina S. Adler, Ian E. McLaughlin, Seth E. Mermin & Reece W. Trevor, You Want a Warning with That? Sugar-Sweetened Beverages, Safety Warnings, and the Constitution, 71 FOOD & DRUG L.J. 482, 488 (2016)}.

\textsuperscript{241}. \textit{See Beeman v. Anthem Prescription Mgmt., LLC, 315 P.3d 71, 74–75 (Cal. 2013)}.


public concern. Consider, for example, laws requiring the nutritional labeling of foods, which have been upheld against compelled speech challenges. Suppose a common nutrient, such as carbohydrates or sugar, becomes a subject of public concern (perhaps because we think people eat too much of the nutrient, or because people fail to understand the health risk of their consumption). This new controversy could not reasonably cause a nutrition labeling requirement to become unconstitutional. If it did, parties who opposed a given disclosure would simply have to generate controversy about the general subject and could then have the disclosure revoked as it now concerned an area of public controversy. Furthermore, the specific search results at issue in flagging cases are unlikely to be areas of public concern, because otherwise the links in question would fail the private harms-public benefits balancing test and a flag would never be required.

Recall the classic examples of constitutional regulatory disclosures are those that are factual or intended to prevent deceptive or misleading practices. Although a unique procedural posture, the flagging of a link does involve a factual determination that the link is truthful but potentially misleading. Thus, at the time the flag is required, the flag discloses a fact (that the link is truthful but misleading) found by the FTC. Not only is this a factual disclosure, but it is also one specifically meant to prevent misleading information—the main policy reason for allowing regulatory disclosures. Therefore, the flagging system fits both the technical and policy reasons for the regulatory disclosure exception to compelled speech.

244. See, e.g., New York State Rest. Ass'n v. N.Y.C. Bd. of Health, No. 08-CIV-1000 (RJH), 2008 WL 1752455 (S.D.N.Y. Apr. 16, 2008), aff'd, 556 F.3d 114 (2d Cir. 2009).


247. Whether a representation is true or misleading are both questions of fact. See Roberts v. Fleet Bank, 342 F.3d 260, 269 (3d Cir. 2003).

248. The commercial speech element of search engine results could be, and has been, the subject of an entirely separate paper. See Michael J. Ballanco, Searching for the First Amendment: An Inquisitive Free Speech Approach to Search Engine Rankings, 24 GEO. MASON U. C.R. L.J. 89 (2013). For the reasons discussed above, it seems entirely possible, if not likely, that search engine results are best characterized as commercial speech because they are essentially unpaid advertising for other websites. Advertising is the conventional example of commercial speech.
Second, the underlying policy rationale for the compelled speech doctrine in cases like *Miami Herald* was that compelling speech was impermissible because the “economic reality” was that a newspaper could not infinitely print, and therefore any pages devoted to replies would replace other content or make the publication “unwieldy.” The Court worried that, if faced with these doomsday scenarios, newspapers would simply not publish controversial editorials. Search engine flags will not cause these doomsday scenarios because the flagging system works with existing search engine architecture and will not be overwhelmingly costly.

The flagging system is deeply unlikely to change the content provided by search engines. The link architecture of search engines is premised on the idea that the most valuable links are those that spread most quickly. In fact, when it became clear that sometimes blatantly false articles generated enough discussion to climb to the top of search results, Google had to invent a work-around for people who wanted to discuss a link without increasing its prominence. Furthermore, unlike the newspaper in *Miami Herald*, search engines are willing to publish controversial material because it generates links and traffic.

Google already has the ability to create a flagging system based on its experience with Google bombs and the right to be forgotten, so the flagging system imposes significantly fewer costs than the right of reply. In fact, other websites have already implemented a flagging system at little or no apparent cost. For example, Wikipedia has used a flagging system for years to indicate an article appears biased, poorly cited, or plagiarized.

Third, the flagging system is constitutional under the monopoly exception found in *Turner*, which was rejected by the *Zhang* court for factually dubious reasons.

In *Turner*, the Supreme Court rejected a First Amendment compelled speech defense to a statute requiring cable companies to

---

250. *Id.* at 257.
251. *Id.*
252. See supra Part III.C.3.
253. Google created a tag that could be used by bloggers to prevent their use of a given link to be counted in search engine rankings of that link. *PASQUALE, supra* note 9, at 63–64.
254. See *Miami Herald*, 418 U.S. at 257.
255. See supra notes 174–80 and accompanying text.
256. See O’SULLIVAN, supra note 158, at 179.
258. See supra notes 207–13 and accompanying text.
carry local broadcast stations. Here again, the Court was concerned about economic realities—whether cable television ran the risk of establishing a monopoly that would “endanger[] the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues.” The Court noted cable was fundamentally different from the newspaper in Miami Herald because a “daily newspaper, no matter how secure its local monopoly, does not possess the power to obstruct readers’ access to other competing publications” while a cable company—once it provided service to a home—provides most or all of the programming that enters the subscriber’s home.

Search engines more closely resemble cable companies than newspapers in important ways. As search engines become embedded in web browsers and apps, search becomes more like cable—once a consumer uses a product (e.g., Google Chrome), she will almost certainly use its affiliated search function (e.g., Google) even though she could theoretically choose to install a tool bar or go to another page to get another search engine. A search engine is also more like a cable company in that the cable company acts as a conduit for programming—the programs shown on channels offered by a cable company are not seen as the speech of the cable company (they are the speech of the writers and producers, and perhaps of the station that chose to air the program). Similarly, search engines are not making substantive value judgments or conveying a message when they provide a link to a website—they are simply connecting a user to another website’s product, just as cable companies connect consumers with channels that offer programming.

The flagging system provides a much-needed counterweight to the current Section 230 immunities in a world where human memory of embarrassing incidents no longer fades. Although scholarly debate rages on as to the First Amendment protections appropriate for search engine results, the flagging system sidesteps those concerns. Rather than implicating a First Amendment interest that search engines have claimed, such as the ranking or presence of a link, the flagging system implicates only the content of the link—for which search

260. Id. at 632–33.
261. Id. at 656.
engines have disclaimed publisher status. Additionally, the flagging system does not implicate the same concerns as the newspaper policies that generated the compelled speech doctrine. Unlike newspapers, the practical reality is the flagging system poses little to no additional cost, causes the removal of no content, and the avalanche of potential requests will be mediated by the costly screen of an FTC adjudication. Furthermore, the flagging system serves to protect consumers from misleading information and thwart the power of a monopolistic information distribution system—two of the policy goals that lead to permissible compelled speech.

IV. CONCLUSION

In 1989, the Supreme Court understood that “the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information” and protected that privacy interest. This sentiment is more critical than ever. In an era when bankruptcies, arrests, and poor choices can be easily discovered with a few keystrokes, individuals need help to make sure that potential employers, landlords, and lenders do not place an irrational weight on one truthful but misleading report of an isolated incident. The flagging system proposed in this Article strikes a balance between the European solution of removing information from easy accessibility and the US solution of leaving victims completely without redress.

By placing a flag on links that provide small public benefit and great private harm following an FTC adjudication, this system corrects for confirmation and negativity biases while still allowing decision makers to determine the exact value of information for themselves. This moderate amendment to Section 230 would also resolve the tension between the First Amendment publisher protections and Section 230 publisher immunity claimed by search engines by taking search engines at their word for what is and is not the speech of the search engine. The flagging system protects individuals from truthful but misleading reports from the past, and protects decision makers from being misled, while asking search engines to perform only minimal technical work. This system would be best implemented through the proposed amendment to Section 230, but it could also be voluntarily implemented.

266. See supra notes 99–107 and accompanying text.
(substituting an internal or third-party adjudicator for the FTC) at any time by a search engine. As the experience in Europe has shown, courts and legislatures will eventually find ways to protect individuals and their privacy if search engines do not act on their own.

---

267. See, e.g., Carter, supra note 47.