

Moot Court: *Smith v The Daily Planet* Brief
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Reid Smith is a resident of Los Angeles, California, and a former resident of Blacksburg, Virginia who works as an accountant for a manufacturing firm. In the summer of 2020, Smith was wrongfully arrested during a “sting” operation when he was visiting next door to an apartment that the police had raided. He was charged by a Los Angeles District Attorney under Penal Code 647(b) PC for a misdemeanor in soliciting a prostitute. This is punishable by up to six months in jail and a fine of up to \$1,000. Smith was acquitted in a criminal trial because he was able to prove that the police mistook him for another person. The charges were dismissed by the court, police were reprimanded for their carelessness, and his arrest record was expunged. The news publication considered Smith a local interest, therefore, there was a lot of publicity surrounding the arrest and the trial. *The Daily Planet*, a Blacksburg news webzine, covered details on both Smith’s arrest and trial. This was detrimental to Smith’s reputation and now, every time he applies for a job he must explain that he didn’t solicit a prostitute.

In a diversity petition to the federal court, Smith requested that *The Daily Planet* remove the information but they refused. *The Daily Planet*’s case is built on the idea that removing this information would infringe on First Amendment rights that prevent government censorship. An additional defense is that this would be unconstitutional under the Fifth Amendment since the removal of information would open the door to orders for the deletion of all expungements, acquittals, and old case information. *The Daily Planet* also contends that under section 230 of the CDA, its meta tag generators and searchable database are, in effect, an ISP and therefore are indemnified from government regulation. Further, the newspaper combats Smith by arguing it is expensive to maintain its databases and they’re prohibited from accepting money under “mugshot extortion” laws in both California and Virginia.

Smith should prevail in this case for various reasons. Under California Labor Code § 432.7, both public and private California employers are limited in what information they may ask job applicants to disclose about their criminal history. Pertaining to this case, employers cannot ask about arrests that didn't result in convictions or convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law. It may be argued that employers are permitted to ask about criminal history if it falls under Section 1829 of Title 12, however, none apply in this case (Dolan Law Offices, 2020). Given that Smith's case has been judicially dismissed he should not be discriminated against in the hiring process or promotion process, to begin with. Virginia law fails to reciprocate the expungement penalties under California Labor Code § 432.7. The assumption that under these laws Smith will not be discriminated against in the employment process is unreasonable. While on paper, employers cannot ask about an applicant's criminal record, there is nothing stopping employers from finding *The Daily Planet's* story about Smith on the internet. It is likely that the stories published about Smith have and will continue to affect his employment opportunities.

The Daily Planet has argued that the protection of the First and Fifth Amendments must be upheld and that ultimately they have done all they are legally obligated to do. While the press does have rights under the First Amendment, those rights are not clearly defined nor are they absolute. The press also has a moral and ethical obligation to pursue accuracy, diligence, and truth in their work. *The Daily Planet* has not done so in this case. Rather than waiting to see whether the allegations against Smith were true or even contested, they published only the police department's statements as fact. Later, those "facts" were proven to be false. Journalists, like those at *The Daily Planet*, have often argued that they should publish criminal charges, regardless of the truth they hold, because it is of public interest and can inform communities of

potential risks. In 2012, Darcell and Darrell Trotter, twin brothers, were charged with first-degree sexual assault. The charges were later dropped after their accuser recanted the story. The Trotters called various news outlets that published the initial charges. Most editors decided to remove the story, but others, like the *Lincoln Journal Star*, did not (Ahmad, 2019). For years, the *Lincoln Journal Star* story remained on the first page of Google when someone searched their names. This, they believed, negatively impacted their social lives and ability to find employment. This case is also significant in that it shows the request for the story to be removed is not unreasonable — many publications have done so ethically. *The Daily Planet's* argument that the removal of the story will “open the door to orders for the deletion of all expungements, acquittals and old case information,” is irrelevant in this legal context. Since *The Daily Planet* caused harm to Smith, it should not be Smith's responsibility to protect the publication from future requests.

The Daily Planet has argued that Smith's case was of public interest, but this is simply not true. His record has been expunged and poses no risk to the community. Therefore, *The Daily Planet* has no journalistic obligation to keep these stories on their site. *The Columbia Journalism Review* has suggested that journalists report charges without the use of names and photos, specifically in cases where the allegations aren't a potential threat to the community (Ahmad, 2019). Smith's request to have his story and information removed from the site is not unreasonable and is a concept that journalists should better adapt to in an increasingly digital world.

The Daily Planet's refusal to remove information on Smith violates his right to be forgotten. The right to be forgotten means that individuals have a right under certain circumstances to request search engines to remove links about them from the past. It can be attested that removing truthful information oversteps free-press rulings. This does not apply in

Smith's case because the information in *The Daily Planet's* story was proven false (Hudson, 2017).

The Daily Planet's published stories on Smith present him in a false light, which is a privacy tort. False light laws protect your right to not have damaging information about yourself publicly disclosed. If the publication is true, it's not considered false light (FindLaw, 2019). The Second Restatement of Torts, Section 652E states that a false light claim requires that the defendant published the information widely, identified the plaintiff, placed the plaintiff in a "false light" that would be highly offensive to a reasonable person, and the defendant was at fault in publishing the information. California is one of the few states that sees false light as untrue implications rather than directly false statements (DMLP, 2021). The legal world has often considered false light criteria to be nearly identical to the components of defamation.

The Daily Planet may argue their publishings connected to public interest but the Virginia Supreme court says if "a plaintiff alleges that the defendant made an unauthorized use of the plaintiff's name or image in a context that is false and would be highly offensive to a reasonable person, his remedy is to prove that the context was defamatory, and not that the use was a misappropriation." The Virginia General Assembly groups defamation and false light together (Berlik, 2015). Defamation is defined as a false communication that harms another's reputation and subjects him or her to ridicule and scorn and incorporates both libel and slander (Ross, Reynolds, Trager, 2020). In this case, Smith was defamed — he was publically portrayed as something he is not and a false impression about him was made which damaged his reputation. The publication of his expunged charges has and will significantly impact his ability to find work given that anyone can access *The Daily Planet's* story on the internet. In libel suits, private figures are held to a different standard than public figures. Smith, a private individual,

does not have the same ability to publicly dispute his case to a broad audience the way a celebrity or public official may. For this reason, *The Daily Planet* should have taken more caution when reporting and publishing the charges against Smith. The publication should have been aware that publishing such damaging accusations, without doing their due diligence to make sure it was accurate, would have a greater negative impact on the life of a private figure like Smith. For Smith, his good reputation is all he has and *The Daily Planet* has played a significant role in disparaging that reputation.

In California, the right of privacy is granted and the foundation for an action in tort. The right of privacy is “the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity”. In *Melvin v. Reid*, it was decided that “The right of privacy can only be violated by printings, writings, pictures or other permanent publications or reproductions, and not by word of mouth.” Defendants in the case created a motion picture using real facts and the plaintiff’s real name. The plaintiff was a prostitute who had been acquitted in a murder case (*Melvin v. Reid*, 1931). This case also not only supports Smith’s privacy rights but also the right to rehabilitation of his good name. Just as the plaintiff in *Melvin v. Reid*, Smith should also be able to continue throughout his life without having his reputation and social standing be destroyed.

Section 1 of article I of the Constitution of California provides as follows: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness" (*Melvin v. Reid*, 1931). *The Daily Planet* only has money to gain through their publishers, but this is Smith’s whole life. In this case, the media, specifically *The Daily Planet*, has a responsibility to pursue not only accuracy, but truth. It

should be in their journalistic expertise to confirm the information they are publishing and have the facts beforehand as well as input from those involved in these cases. As David Krajicek once stated in a published case study, “anything not promptly denied is assumed to be true” in terms of journalists that cover convictions as such (2014). It is no secret that *The Daily Planet* was covering what the “facts” at the time were; however, now knowing their published statements were false information it is in their best interest as a widely known paper and for Smith’s best interest to retract that information and delist from meta tags.

The remedy Smith suggests is not outright censorship but rather a delisting from meta tags and shielding the page from search engines. With this will come better protection of Smith’s privacy for a crime he did not commit as well as adoption to the popular right to be forgotten that some states and countries enforce. Although there are no federal laws protecting the right to be forgotten, California takes this right to deletion seriously and Smith should have the opportunity to enjoy this right. It is pivotal to understand the impact that *The Daily Planet* has had on his personal and professional opportunities based on the false allegations and *The Daily Planet’s* publications. Ultimately we request that Smith’s attorney and legal fees be covered as a result of the negligence of the opposing sides’ action and understanding of the severity of Smith’s situation. Furthermore, we request \$300,000 as reparations for Smith’s loss of income as a result of *The Daily Planet’s* impact and the effect it had on my client’s reputation and ability to receive his typical fair wage.

References

- Ahmad, A. (2019, October 31). Why journalists need to think twice about reporting on arrests. *Columbia Journalism Review*.
<https://www.cjr.org/analysis/out-of-omaha-arrest-reporting.php>
- Berlik, L. (2015, September 28). *Invasion of Privacy in Virginia*. The Virginia Defamation Law Blog. <https://www.virginiadefamationlawyer.com/invasion-of-privacy-in-virginia/>
- DMLP. (2021, January 22). *False light*. Digital Media Law Project.
<https://www.dmlp.org/legal-guide/false-light>
- Dolan Law Offices. (2020, July 14). *About California Labor Code § 432.7*. Dolan Law Offices.
<https://dolanlawoffices.com/about-california-labor-code-§-432-7/>
- FindLaw. (2019, December 17). *What Is Invasion of Privacy?* FindLaw.
<https://www.findlaw.com/injury/torts-and-personal-injuries/what-is-invasion-of-privacy-.html>
- Hudson, D.L., Jr. (2017). *Right to Be Forgotten*. Middle Tennessee State University.
<https://www.mtsu.edu/first-amendment/article/1562/right-to-be-forgotten>
- Krajicek, D. (2014, February 19). *The Media's Role in Wrongful Convictions*. John Jay College of Criminal Justice: Center on Media, Crime and Justice.
https://thecrimereport.s3.amazonaws.com/2/0f/6/2343/1/krajicek_cjj_media_and_wrongful_convictions_final_edit_2-17-14.pdf
- Melvin v. Reid*, 297 P. 91 (1931). <https://casetext.com/case/melvin-v-reid>
- Ross, S., Reynolds, A., & Trager, R. (2020). *The Law of Journalism and Mass Communication*. Thousand Oaks, CA: CQ Press. ISBN 978154437758