

UNIFORM LAW COMMISSION DOXING STUDY COMMITTEE, Draft memo 11/20/2024

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Dear Committee Members:

I much look forward to our meeting; in the meantime, here is a summary of some other laws that might apply to “doxing.” In the meantime, I wanted to pass along some thoughts about the possible elements of an anti-doxing statute, and a quick summary of some of the other laws that might already cover “doxing.”

I. THE POSSIBLE ELEMENTS OF AN ANTI-DOXING STATUTE

If we think that some “doxing” should be forbidden, it seems to me that we have to identify the following items:

A. *What Personal Information Should Not Be Distributable?*

Some possibilities might be (I list the options without endorsing any) a person’s

1. name, coupled with information about possibly unpopular things the person has done,
2. photograph,
3. employer name,
4. employment address,
5. employment phone number or e-mail address,
6. home address,
7. personal phone number or e-mail address,
8. names of adult family members,
9. employers or educational institutions of adult family members,
10. names of minor family members,
11. educational institutions of minor family members,
12. financial account numbers,
13. social security number.

B. *Whose Information Should Not Be Distributable?*

Some possibilities might be:

1. anyone’s,
2. only of people who are seen as having jobs that draw sufficient possible hostility, such as elected officials, judges, prosecutors, or police officers.

C. *Where Should the Information Not Be Distributable?*

Some possibilities might be:

1. anywhere (including in private communications to a few people),

2. anywhere where it can be accessed by the public (thus excluding communications to a few people),
3. any online location where it can be accessed by the public,
4. any social media location where it can be accessed by the public.

*D. Under What Circumstances Should the Information Not Be Distributable?*

Some possibilities might be:

1. under any circumstances,
2. only where a reasonable person in defendant's shoes should know the information is unusually likely to lead the subject to be attacked,
3. only where defendant knows the information is unusually likely to lead the subject to be attacked,
4. only where defendant has the purpose of promoting attacks against the subject.

*E. Should There Be **Exceptions** for Certain Uses?*

Examples might be:

1. uses by media enterprises,
2. "newsworthy" uses,
3. filings in court,
4. reports to government entities, or
5. reports to private entities such as employers and educational institutions.

*F. Should a Duty to Remove or Not Post Material Be **Triggered** ...?*

1. automatically, if all the other elements are satisfied,
2. only by a demand from the subject of the information to the distributor, again assuming all the other elements are satisfied, or
3. only by a court order prompted by a request from the subject of the information, where the judge has decided that the elements are satisfied?

*G. What Should the **Penalty** Be?*

1. criminal,
2. civil (and, if so, of what sort), or
3. both?

## II. OTHER LAWS THAT MIGHT ALREADY COVER “DOXING”

### A. Criminal Harassment Laws or Cyberstalking Statutes

Some state criminal harassment statutes might be broad enough to cover communicating personally identifying information about people in upsetting or alarming ways, even when they don’t focus on such personal information. The Massachusetts criminal harassment statute, for instance, provides for criminal punishment when

- (1) the defendant engaged in a knowing pattern of conduct or speech, or series of acts, on at least three separate occasions;
- (2) the defendant intended to target the victim with the harassing conduct or speech, or series of acts, on each occasion;
- (3) the conduct or speech, or series of acts, were of such a nature that they seriously alarmed the victim;
- (4) the conduct or speech, or series of acts, were of such a nature that they would cause a reasonable person to suffer substantial emotional distress; and
- (5) the defendant committed the conduct or speech, or series of acts, “willfully and maliciously.”

The Massachusetts high court upheld a conviction under the statute where the defendant “post[ed] information about the victims online along with false statements about items that the victims allegedly either had for sale or were giving away, with the object of encouraging unwitting third parties to repeatedly contact and harass the victims at their home and on their telephone.”<sup>2</sup>

But some courts have concluded that such harassment statutes are too broad or too vague, and have thus partly struck them down or read them to narrowly focus on unwanted speech *to* a person rather than *about* a person.<sup>3</sup> Thus, even if a defendant could be prosecuted under a statute that is narrowly tailored to doxing, it’s possible that he couldn’t constitutionally be prosecuted under a broader and vaguer statute such as this.

### B. Harassment Restraining Orders

Likewise, some state civil harassment restraining order statutes might authorize orders forbidding the publication of personal information about people. To offer one example, the California statute allows a court to issue a restraining order prohibiting a defendant from continue to “harass” a plaintiff (or “disturb the peace” of the plaintiff), with “harassment” defined to include

1. “a knowing and willful”
2. “a pattern of conduct composed of a series of acts . . . evidencing a continuity of purpose”

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<sup>2</sup> *Commonwealth v. Johnson*, 470 Mass. 300, 302, 307 (2014).

<sup>3</sup> See, e.g., *Rynearson v. Ferguson*, 355 F. Supp. 3d 964 (W.D. Wash. 2019); *People v. Relerford*, 104 N.E.3d 341 (Ill. 2017); *Commonwealth v. Bigelow*, 59 N.E.3d 1105 (Mass. 2016); *State v. Bishop*, 787 S.E.2d 814 (N.C. 2016); *State v. Burkert*, 135 A.3d 150 (N.J. App. Div. 2016); *People v. Golb*, 15 N.E.3d 805 (N.Y. 2014); *People v. Marquan M.*, 19 N.E.3d 480 (N.Y. 2014).

3. “directed at a specific person”
4. “that seriously alarms, annoys, or harasses the person,”
5. “that serves no legitimate purpose,” and that
6. is not “[c]onstitutionally protected activity.”<sup>4</sup>

But some courts have likewise concluded that such statutes are too broad and too vague, and thus have either struck them down as applied to speech or sharply narrowed them.<sup>5</sup>

### C. Tort Claims

#### 1. Disclosure of Private Facts

The Restatement (Second) of Torts § 652D tort provides:

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.

This, however, generally refers to disclosures of information that (1) is viewed as “private or embarrassing or intimate,” and (2) is “actually secret or concealed.”<sup>6</sup> Thus, for instance, publishing a person’s home address and similar information wouldn’t be actionable, because the information is not generally seen as intimate, and because it’s often a matter of public record (for instance, in property tax records).<sup>7</sup>

#### 2. Intentional Infliction of Emotional Distress

The Restatement (Second) of Torts § 46(1) provides:

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<sup>4</sup> Cal. Code Civ. Proc. § 527.6.

<sup>5</sup> See, e.g., *Bey v. Rasawehr*, 161 N.E.3d 529 (Ohio 2020); *Catlett v. Teel*, 477 P.3d 50 (Wash. Ct. App. 2020); *Mashaud v. Boone*, 295 A.3d 1139 (D.C. 2023); *Evans v. Evans*, 6 Cal. Rptr. 3d 859 (Ct. App. 2008); *David v. Textor*, 89 So. 3d 871 (Fla. Ct. App. 2016); *Flood v. Wilk*, 125 N.E.3d 1114 (Ill. App. Ct. 2019); *TM v. MZ*, 926 N.W.2d 900 (Mich. Ct. App. 2018); *In re Marriage of Suggs*, 93 P.3d 161 (Wash. 2004).

<sup>6</sup> *Johnson v. Sawyer*, 47 F.3d 716, 733 (5th Cir. 1995).

<sup>7</sup> See, e.g., *id.* at 732–34. Three 1980s cases concluded that publishing the name of a crime witness might be tortious on this theory, if the criminals didn’t know the name before, and could thus use the name to intimidate or silence the witness. See, e.g., *Capra v. Thoroughbred Racing Ass’n*, 787 F.2d 463, 464 (9th Cir. 1986); *Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556, 560 (Ct. App. 1988); *Hyde v. City of Columbia*, 637 S.W.2d 251, 254 (Mo. Ct. App. 1982). I’m skeptical that these decisions were right, given that the names of witnesses may often be relevant to stories about crime, which are on a matter of public concern; and the decisions are undermined by the Supreme Court’s 1989 decision in *Florida Star v. B.J.F.*, which held that the name of a rape victim in a story about the crime would be seen as speech on “a matter of public significance.” 491 U.S. 524, 536–37 (1989). But in any event, as *Johnson* and other cases note, many states limit the tort to “private or embarrassing or intimate” information and don’t include information such as a name, photograph, or address.

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

The “extreme and outrageous” bar, though, is generally set quite high. Publishing accurate information about people is unlikely to qualify, even when the information is meant to shame people, and runs the risk of provoking violence by some people. Moreover, the tort generally can’t be applied even to outrageous speech, when it is on a matter of public concern.<sup>8</sup> And even if a narrow range of publication of information about people can be made actionable, that likely cannot be done through a tort that is as vaguely defined and potentially subjectively applied as this one:

“Outrageousness” is a highly malleable standard with an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression. In a case such as this, a jury is unlikely to be neutral with respect to the content of the speech, posing a real danger of becoming an instrument for the suppression of vehement, caustic, and sometimes unpleasant expression. Such a risk is unacceptable; in public debate we must tolerate insulting, and even outrageous, speech in order to provide adequate “breathing space” to the freedoms protected by the First Amendment.<sup>9</sup>

### 3. Deliberately Inducing Attacks, Vandalism, Threats, or Intrusive Approaches

Restatement (Second) of Torts § 877(a) provides,

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own.

This suggests that if someone publishes information about a person *deliberately* aiming to get third parties to

- physically attack the person (assault or battery),
- vandalize their property (trespass or trespass to chattels),
- threaten them with violence (such threats likely constitute intentional infliction of emotional distress<sup>10</sup>), or
- cause third parties to approach them in intrusive ways, for instance, by unwanted phone calls (intrusion upon seclusion),

that might be tortious. But this generally requires a *purpose* to induce the torts, and not just a knowledge that some listeners may well engage in such torts.<sup>11</sup> And it also requires some tortious action by a third

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<sup>8</sup> See *Snyder v. Phelps*, 562 U.S. 443 (2011).

<sup>9</sup> *Id.* at 458 (cleaned up).

<sup>10</sup> *State Rubbish Collectors Ass’n v. Siliznoff*, 240 P.2d 282 (Cal. 1952).

<sup>11</sup> See, e.g., *MGM Studios Inc. v. Grokster*, 545 U.S. 913, 930, 935 (2005) (applying common-law tort complicity principles to copyright, and concluding that “where evidence goes beyond . . . knowledge that [a product] may be put to

party, provably induced by the defendant: Merely publishing information wouldn't qualify, unless there is evidence that someone has acted badly based on that information.

#### 4. Negligently Facilitating Attacks or Vandalism

Negligently publishing (or otherwise distributing) information about a person, when that foreseeably causes physical harm (battery, vandalism, etc.) to another person or property, might also be actionable under the normal negligence tort. The analogy might be to negligently providing someone with a tool that can be used to harm someone (e.g., a gun or a car); here, that tool is just information.

But courts have generally been reluctant to allow negligence liability based on speech.<sup>12</sup> And this is especially so given how broad liability for “negligent speech” might be: If that theory were generally accepted, then producers of film, music, and books might be held liable for (for instance) copycat crimes, suicides, and other harmful actions inspired by the works, something that courts have been reluctant to accept. A narrower cause of action, expressly bounded to disclosure of certain personally identifiable information, is more likely to survive First Amendment scrutiny than a negligence theory that wouldn't be limited to such personal information, and that thus appears to be unconstitutionally overbroad.

Moreover, this tort is likewise limited to situations where the publication has caused physical harm, provably induced by the defendant: Merely publishing information wouldn't qualify, unless there is evidence that someone has injured a person or property based on that information.

#### 5. Tortious Interference with Contract or Business Relations

In some situations, doxing campaigns aimed at getting someone fired—or getting a specific nonemployment contract cancelled—might constitute actionable tortious interference with contract or business relations. (The doxing here might consist simply of publicizing a person's name, the person's unpopular conduct, and the name and contact information for the person's employer; at least some definitions would indeed treat disclosing such information as “doxing.”)

For instance, if the target of the campaign is not just an at-will employee, but has a binding contract—such as a university tenure contract or a union contract—and the doxer knows this, then the doxer may well be liable for tortious inducement of breach of contract. Restatement (Third) of Torts: Liability for Economic Harm § 17(c) provides for liability in such situations, if “the defendant engaged in the conduct for the sole purpose of causing harm to the plaintiff.” A purpose to retaliate against a person for his

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infringing uses, and shows statements or actions directed to promoting infringement,” inducement liability may be imposed).

<sup>12</sup> See, e.g., *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1021 (5th Cir. 1987); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989); *Bill v. Superior Ct.*, 137 Cal. App. 3d 1002 (1982); *DeFilippo v. NBC, Inc.*, 446 A.2d 1036 (R.I. 1982); *McCollum v. CBS*, 202 Cal. App. 3d 989 (1988).

unpopular speech or activity, absent any “legitimate corporate interest” on the part of the interferer, likely qualifies as a culpable purpose.<sup>13</sup>

Even if the target is employed at will, states that follow the Second Restatement of Torts may allow liability for a deliberate attempt to get such an employee fired.<sup>14</sup> Some recent cases have allowed tortious interference cases to go forward when defendants had engaged in a public campaign of that sort.<sup>15</sup>

Finally, some state statutes forbids firing people based on their political activity, or other lawful off-duty activity.<sup>16</sup> In those states, trying to get an employer to fire a person on such a basis might constitute tortious solicitation of civilly actionable conduct.

But such claims will often be unavailable. First, some doxing isn’t aimed at getting someone fired.

Second, most employees are at-will employees, and many states follow the Third Restatement of Torts, under which trying to get someone to terminate a terminable-at-will contract is generally *not* actionable.

Third, in most states firing someone based on most kinds of political activity, or lawful off-duty activity more generally, is not forbidden by state statute.

Fourth, even where a tortious interference claim would otherwise be plausible, both the Second and Third Restatements take the view that merely “conveying truthful information is not ‘improper’ interference ‘even though the facts are marshaled in such a way that . . . the person to whom the information is given immediately recognizes them as a reason for breaking his contract.’”<sup>17</sup> A good deal of doxing will indeed consist of merely conveying truthful information, even without any explicit demands that the person be fired.

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<sup>13</sup> This is evident from *Howcroft v. City of Peabody*, 51 Mass. App. Ct. 573 (2001), one of the cases on which the Restatement section relies (see Reporter’s Note as to ill. 7): There, the court held that an employee who was fired (in violation of the First Amendment) for his speech stated a claim against people who induced his firing, because “A jury reasonably could find . . . that the defendants . . . acted out of an improper motive—i.e., for a ‘spiteful, malignant purpose, unrelated to the legitimate corporate interest.’” *Id.* at 597.

<sup>14</sup> See, e.g., *Drake v. Dickey*, 2 N.E.3d 30 (Ind. Ct. App. 2013); *Grako v. Bill Walsh Chevrolet-Cadillac, Inc.*, 2023 IL App (3d) 220324; *Thomas v. Williams*, 21 So. 3d 1234 (Ala. Civ. App. 2008); *Newmyer v. Sidwell Friends Sch.*, 128 A.3d 1023 (D.C. 2015); *McCurdy v. Collis*, 508 So. 2d 380 (Fla. App. 1987); see generally *Haddle v. Garrison*, 525 U.S. 121, 126-27 (1998).

<sup>15</sup> *Flickinger v. King*, 385 So.3d 504 (Ala. Apr. 21, 2023); *Manco v. St. Joseph’s Univ.*, No. CV 22-285, 2024 WL 299265 (E.D. Pa. Jan. 25, 2024).

<sup>16</sup> See Eugene Volokh, *Private Employees’ Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012).

<sup>17</sup> *Moore v. Hoff*, 821 N.W.2d 591 (Minn. Ct. App. 2012) (quoting Restatement (Second) of Torts § 772 cmt. b); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 20.