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COMPLETING EXPUNGEMENT

Brian M. Murray *

INTRODUCTION

The limits of expungement are where the hope for real reentry meet the desire for criminal justice transparency. That a criminal record, ordered expunged by a judge after a long and arduous process, continues to exist in the world of private actors is a cold, harsh reality for those attempting to reenter civil society. It is also reassurance for parents hiring a babysitter, school districts seeking new employees, and employers concerned about workplace liability. Not to mention, the thought that all records of criminal justice adjudication could be purged forever intuitively sounds Orwellian,¹ even in an age where surveillance, whether governmental or corporatized,² is the norm. Expungement—the process by which the official, public data of a criminal record is erased, sealed, or made private³—remains an important tool in the battle against stigma and over-punishment after one formally leaves the criminal justice system. But technological and big data realities, coupled with transparency norms, will forever affect its efficacy. The internet is not going away, and private actors will always feel entitled to hold

* Associate Professor of Law, Seton Hall University School of Law. I would like to thank The Hon. Stephanos Bibas for encouraging me to study expungement from various angles; my former colleagues at Community Legal Services of Philadelphia for introducing me to expungement law; and participants at CrimFest 2020, the Rutgers-Seton Hall Colloquium Series, Michigan Law School Junior Scholars Forum 2021, and others for providing feedback on the ideas that generated this Article. I would also like to thank my wife, Katherine, for her continuous support, and my children, Elizabeth, Eleanor, George, John, and Lucy, for their inspiring curiosity, endless questions, sense of wonder, and zealous love for life.

1. *See generally* GEORGE ORWELL, 1984 (1949) (repeating how the State always was at peace with Eurasia and then always at war with Eurasia).

2. *See generally* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019) (arguing that the current time is one characterized by surveillance, whether conducted by corporations for profit-making purposes or government for law enforcement).

3. I use these terms interchangeably throughout this Article, recognizing that the terminology means different things in different jurisdictions. All of these terms are linked to the term “expungement.”

a default position that allows for the dissemination of public information about the criminal justice system, as that sentiment finds support in the history and expectations underlying the transparent administration of the legal system.⁴ For the successful expungement petitioner, a game of whack-a-mole is and will remain the norm. A sense of powerlessness to move on from one's past, like the criminal record, persists.

The inability of expungement law to fully eradicate criminal records that have been ordered expunged is the fruit of a confluence of factors, has been studied by scholars before, and experienced by the legal practitioners who must stare into the face of a client who has done everything right (when pursuing lawful expungement) only to see things continue to go wrong. For starters, the sharing of such data—especially intuitively interesting criminal record history information—only continues to increase, and at warp speed.⁵ The synchronizing of records within and across criminal justice systems has a long history.⁶ This renders any attempt to combat their transmission and spread an effort characterized by mitigation instead of eradication. Efforts at mitigation also jive with the view—held by many and enshrined in legal norms—that the private dissemination of public data is necessary to a healthy polity in order to hold public officials and public policies accountable.⁷ And private actors—at least in the United States—automatically default to a posture that prefers transparency over privacy in criminal justice and the actions of government overall.⁸ These realities will forever shape the reach of a remedy like expungement and are unlikely to change. They also communicate to petitioners who have had a judge order the expungement of their official criminal record that the worst moment of their lives will remain in the hands of

4. Sarah Esther Lageson, *There's No Such Thing as Expunging a Criminal Record Anymore*, SLATE (Jan. 7, 2019, 2:44 PM), <https://www.slate.com/technology/2019/01/criminal-record-expungement-internet-due-process.html> [<https://perma.cc/X6TQ-VLXU>].

5. See ZUBOFF, *supra* note 2, at 53 (describing the pace at which surveillance business models have increased over the past ten to fifteen years).

6. See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 13–31 (2015); Susan E. Gindin, *Lost and Found in Cyberspace: Informational Privacy in the Age of the Internet*, 34 SAN DIEGO L. REV. 1153, 1156 (1997) (describing places where private information appears online and in government databases).

7. For example, the Freedom of Information Act is built on this premise. 5 U.S.C. § 552. Supreme Court Justice Oliver Wendell Holmes once said that “every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.” *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

8. The importance of transparency within the criminal justice system has a long history, enshrined in decisions of the Supreme Court of the United States. See *infra* section II.B.1.

private actors willing to share it with whomever will pay the right price.⁹

In truth, expungement was always somewhat of a paradox: a remedy conceived in hope but forged through an accompanying set of procedures that diminished that promise, limiting its relief to the fortunate few rather than the necessary many.¹⁰ The procedural limits of expungement law have always stunted the potential of the remedy, and there is no sign that that will change anytime soon, although the move by a few states towards automated expungement again provides a glimmer of hope.¹¹ But even then, automated expungement of *public data* will not touch the *private* digital spaces that retain information that has been ordered expunged. This, after all, is what Eldar Haber and Sarah Lageson have labeled digital punishment, leading to calls for “digital expungement,”¹² and for state governments to refrain from publicly conveying criminal records as a matter of policy.¹³ And as Shoshana Zuboff has argued, this age is one where the accumulation of information from the past and present is the very lifeblood of the economy.¹⁴ Scholars across legal fields have recognized this problem and called for a mix of public policy solutions designed to ameliorate its effects, attempting to thread the needle between privacy and transparency.¹⁵

9. Public criminal record history information is routinely sold to private third parties. JACOBS, *supra* note 6, at 70–90.

10. See, e.g., Brian M. Murray, *Retributive Expungement*, 169 U. PA. L. REV. 665 (2021).

11. *After a Haul of Record Relief Reforms in 2020, More States Launch Clean Slate Campaigns*, COLLATERAL CONSEQUENCES RES. CTR. (Feb. 17, 2021), <https://ccresourcecenter.org/2021/02/17/after-a-haul-of-record-relief-reforms-last-year-more-states-launch-clean-slate-campaigns> [https://perma.cc/4WMM-P98R].

12. See generally Eldar Haber, *Digital Expungement*, 77 MD. L. REV. 337 (2018) (describing need for digital remedies in a digital world); SARAH ESTHER LAGESON, *DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE* (2020) (characterizing online criminal records as akin to punishment).

13. Sarah Esther Lageson, Elizabeth Webster & Juan R. Sandoval, *Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet*, 46 L. & SOC. INQUIRY 635 (2021).

14. ZUBOFF, *supra* note 2, at 10.

15. See generally *id.* (discussing potential constitutional and investigative approaches proposed by legal scholars); Lageson, *supra* note 4 (encouraging localities to modify record-keeping policies rather than defaulting to eternal publicity); Haber, *supra* note 12, at 382, 384 (recommending digital remedies in a post-kinetic world that map rehabilitative purposes of expungement); Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 42–49 (2016) (advocating for proportionality constraints on recordkeeping); Frank Pasquale, *Reforming the Law of Reputation*, 47 LOY. U. CHI. L.J. 515, 527–34 (2015) (arguing for statutory rights to be forgotten and reinvigoration of Fair Credit Reporting Act); Daniel J. Solove, *Access and Aggregation: Privacy, Public Records, and the Constitution*, 86 MINN. L. REV. 1137 (2002) (proposing a way to balance

One response to this issue has arisen in European law: the so-called right to be forgotten (“RTBF”). This right of individuals to seek expungement of information held by third-party vendors, online platforms, and other entities operating on the internet, is controversial. Google, for example, has fought it tooth and nail, and until recently, mostly won.¹⁶ Even when it has lost, the margin of victory for the public is debatable as firms like it continue to traffic in the “breadcrumbs” of information available on the web. Conceived in a robust understanding of privacy and reputation that has more solid footing in European law than American law to date, the RTBF has gained some traction and led to relief for parties unable to move on after encountering the criminal justice system.¹⁷

But generally speaking, the right to be forgotten has not gained traction in the United States. Skepticism persists,¹⁸ founded on existing legal doctrines relating to privacy, reputation, the protections of the First Amendment (especially for media organizations), and the general desire to make the activities of the government (especially in the criminal justice system) as public as possible. The latter point is especially important, as the spotlight on the decision-making and discretion of public officials in the criminal justice system has only increased in recent years.¹⁹ Plenty of members of the public are skeptical of informational control by the press, yet oddly mostly unconcerned with the capitalization of human behavior.²⁰ As such, the right to be forgotten—as initially conceived—is unlikely to be recognized on a widespread basis anytime soon in American law or public policy and will be fiercely resisted by corporations. Another solution is necessary for addressing the plight of the successful expungement petitioner who has encountered the limits of expungement law.

This Article addresses this problem which, at its core, is a problem that persists in any field of public law: the inability of public remedies to fully anticipate the myriad ways in which private actors and incentives can undercut the intended efficacy of a legal

transparency and privacy when allowing access to public records of all types).

16. *Google Fights Plan to Extend ‘Right to be Forgotten’*, BBC NEWS (Sept. 11, 2018), <https://www.bbc.com/news/technology-45484300> [<https://perma.cc/QG6M-KFZH>].

17. *See, e.g.*, Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 88–89 (2012).

18. *See, e.g., id.* at 88, 90–91.

19. *See, e.g.*, *The Manuals Initiative: How Transparent Are Policing Manuals?*, POLICING PROJECT: N.Y.U. (2020), <https://www.policingproject.org/manuals-overview-findings> [<https://perma.cc/F3WU-J2YA>] (attempting to publicize police manuals nationwide).

20. *See* ZUBOFF, *supra* note 2, at 5, 10.

regime. The successful expungement petitioner essentially faces a “follow-through” problem that the state, by virtue of the nature of the remedy itself, other legal norms, and technological and market realities beyond its control, is incapable of fully resolving. At most, expungement regimes offer a blunt instrument to mitigate the harmful effects of a public criminal record. They permit the removal of *official* data, but complete erasure is a legal myth, and for some people whose records are more notorious or simply in the hands of a private actor falling into one of the camps above, that myth comes with the terror of a never-ending nightmare.

What can be done? This Article suggests that given the current legal landscape, the solution to the persistent existence and usage of public criminal records after expungement remedies have been exhausted does not rest in the creation of a *formal* right to be forgotten or something similar. In fact, forging that right would be to attempt a degree of conscription of privately held data that is unlikely to be welcomed nor easily legislated. It also mistakenly assumes a determinate nature to the law, as if the whack-a-mole problem can be truly eradicated.²¹ And it runs counter to present day norms relating to accessing public information, even if consonant with earlier views of access.²² That right uncomfortably pits the interests of the formerly arrested and convicted against the broader, and generally held belief that private actors can express themselves, for the most part, as they please, and run their businesses on an “at-will”²³ basis. There are, after all, reasonable uses of criminal record history information; the issue is where to draw

21. While beyond the scope of this Article, the underlying jurisprudential contention is that the positive law cannot possibly account for all the variations of human experience, nor anticipate all future legal problems.

22. Solove, *supra* note 15, at 1155 (noting how early U.S. courts permitted limited access to public documents). Solove details how common law permitted access to public records based on the person’s reason for seeking the information. *Id.* at 1156 (citing *Mans v. Lebanon Sch. Bd.*, 290 A.2d 866, 867 (N.H. 1972)); Matthew D. Bunker, Sigman L. Splichal, Bill F. Chamberlin & Linda M. Perry, *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 556 (1993) (“Most states depended on the discretion of agencies, or on the common law, to provide public access to government records until they were inspired by the federal FOIA to codify the concept of open government.”).

23. The rule of at-will employment is well-entrenched, although limited by certain civil rights laws. Aside from a few judicial rulings relating to the enforcement of Title VII, and the since retracted Equal Employment Opportunity Commission (“EEOC”) Guidance on the Usage of Criminal Records, the ability of civil rights laws to counteract the stigma associated with a public criminal record is minimal. *See, e.g., Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019).

the line and identifying where private action based on such information goes too far.

This Article contends that limitations on the use of information that has been ordered expunged must come from a deeper, *ethical* place that underlies the entire project of the criminal law within a liberal, democratic society and that traffics in the field of *responsibility* rather than *coercive power*.²⁴ In particular, it must come from the roots of the average actor's relationship to the criminal justice system itself: the desire for that system and the processes associated with it do justice, and *nothing more, or nothing less*.²⁵ In short, the theoretical rationales underlying the punishment practices of the criminal system itself must drive how actors conceive of the usage of such information *after* it has been lawfully expunged.²⁶ Legislative expungement remedies can only reach so far; expungement law, just like the criminal law itself,²⁷ will always have a limited ability to redress social ills. The rest is the work of how private actors conceive of the system, its limits, and their duties²⁸ after the system has operated. The right not to be over-punished—instead of the right to be forgotten—requires as much work on the part of

24. This forecast exists against a legal and normative backdrop that is deferential to the autonomy of private actors that drives questions like, "why can't the business owner use the prior conviction when making hiring decisions?" or "why isn't prior flouting of the law relevant to whether someone can be trusted?" This Article argues that while those questions are understandable and reasonable, an answer requires a conception of responsibilities based on the ethical norms underlying the criminal law and the justification for punishment.

25. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 477–78 (1997) (describing how justice-focused punishment accords with the inclinations of the community and also encourages respect for the legitimacy of the criminal law).

26. Alessandro Corda has advanced a similar argument in *More Justice: Less Harm*, which analyzes the punishment theory roots of public criminal recordkeeping *by the state*. Corda, *supra* note 15, at 8–18. Corda makes the astute argument that public safety rationales led to the rise of the current criminal records regime, and that neither retributivist nor utilitarian thinking fully supports the official recordkeeping regime that exists today. *Id.* at 42–44. This Article focuses on a different phenomenon: addressing the *limits of expungement law*, and the ability of the law, if at all, to address the actions of *private actors given those limits*, rather than the rationales underlying *public criminal recordkeeping* by the state.

27. *See generally* HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968) ("The rhetorical question that this book poses is: how can we tell what the criminal sanction is good for?").

28. I am indebted to the work of several scholars who have discussed the responsibilities and duties of private actors with respect to reentry. In particular, this Article draws on the work of Christopher Bennett, *see infra* note 358; Dan Markel, *see infra* note 357; Mary Sigler, *see infra* note 362; Jeffrie Murphy, *see* Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, 4 CRIM. JUST. ETHICS 3 (1985); Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO STATE J. CRIM. L. 423 (2007); Judge Stephanos Bibas, *see* Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO STATE J. CRIM. L. 329 (2007); and several others in advancing this argument in Part III, *see, e.g., infra* section I.A.

private actors as it does on behalf of the state.²⁹ Human actors must prevent over-punishment because expungement law likely cannot. But a theory connected to criminal justice, within a democratic polity, rather than privacy and reputation, provides stronger legal justification for that move and can form structures to incentivize private action that helps ameliorate the problem.

In short, completing the project of expungement requires cognizance of the relational underpinnings of the criminal law and punishment within a democratic society rather than the creation of a formal right to be forgotten. The law can support this goal mindful of other legal commitments that carry serious weight. In making this argument, this Article proceeds in three parts. Part I details the problem the Article addresses: the simultaneous promise and limit of criminal record relief. Building on prior work and that of other scholars, it surveys how criminal records relief has developed, as well as the limits of those remedies in light of existing technological realities. Part II begins by describing one reaction to those limits: the generation of the right to be forgotten in Continental Europe. European legal regimes have grounded the right in robust definitions of privacy and reputation, tethered to alternative understandings of the purpose of the criminal justice system for defendants and communities at large. These differences are significant when juxtaposed with the undercurrents driving general American skepticism of such a right. Those undercurrents include the limits of privacy and reputation as legal concepts,³⁰ a general default to transparency in criminal adjudication and procedure, and the public-private norms associated with the First Amendment and the dissemination of information. Part II then spotlights a few private actors, including newspapers and media organizations, that have sought to respond to this skepticism by constructing their own private procedures that resemble public

29. Margaret Love conceived this problem as the forgiving/forgetting distinction. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753 (2011).

30. This, of course, is not my own argument. Scholars like Daniel J. Solove and others have been arguing that privacy and reputation provide little refuge for those seeking to regulate the usage of harmful information. See, e.g., Solove, *supra* note 15, at 1176–95. In the criminal law and civil rights space, the famous Supreme Court case of *Paul v. Davis* essentially ended any hope for a right to reputation in the federal Constitution. 424 U.S. 693 (1976). Some state constitutions, however, have something resembling such a right, although its strength is questionable. See, e.g., PA. CONST., art. I, § 1 (current through 2022 Reg. Session Act 9) (“All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”).

expungement remedies.³¹ These actions are a response to two realities: (1) the limits of expungement law under state statutes; and (2) that the right to be forgotten has not, and likely will not, gain traction in American law.

In light of that conclusion, Part III contains the normative proposal given the above observations. In sum, it suggests that any effort to address the limits of expungement law, and the actions of private actors with respect to the continued existence of such information, must begin with the theory underlying the criminal law and punishment itself, rather than concepts like privacy and reputation. The focus is on a state and private responsibility not to over-punish rather than an individual right to be forgotten, effectively privatizing expungement once formal regimes reach their limits. This idea corresponds with a robust notion of the relationship between private actors and the public criminal justice system, and a conception of the system as one designed to foster reentry rather than incapacitation.³² They also jive with already existing, although imperfectly applied, understandings of punishment as having limits based on what is deserved. Thus, and perhaps paradoxically, the limits of public expungement remedies require a public-private partnership that recognizes the state as the sole punisher and private actors as cognizant of their responsibility to consider refraining from causing additional harm after punishment. The limits of formal expungement must meet the informal duties of private actors for the full promise of expungement to be achieved.

This grounding in punishment theory can fill the gap left by the limits of expungement law, leading to a more charitable relationship between private actors and public criminal record history information, while preserving the potential for transparency should it be necessary. It attempts to thread the needle, recognizing the need to ground the ability to move on from a public criminal record in a theory of criminal *justice* that conceives a role for the community, rather than broad, amorphous legal concepts like privacy or reputation. It does not pit transparency and reentry against one

31. I first discussed expungement by newspapers in Brian M. Murray, *Newspaper Expungement*, 116 NW. U. L. REV. ONLINE 68 (2021). Section II.C builds from that treatment to support the arguments of this Article.

32. Of course, there are many alternative ways of viewing the primary purpose of the criminal justice system and institutions of punishment. In making the normative argument referenced here, I conceive of the purpose as primarily restorative. For additional insight into this theory, which builds from a tradition spanning two millennia, see Brian M. Murray, *Restorative Retributivism*, 75 U. MIA. L. REV. 855 (2021).

another. Instead, it demands that the relationship of private actors to the broader purposes of the criminal justice system be taken seriously, allowing the promise of just punishment, and nothing more or nothing less, to transcend the limits of expungement.

But this argument also comes with a caveat: it is contingent on recognition that private use of already expunged information is, in fact, punitive rather than not.³³ In the event that such activities cannot be labeled punitive, the argument has a tweak—that the relationships that comprise existence within a democratic polity are the source for reconceiving the boundaries for usage of such information. On balance, regardless of the path taken, either normative rationale is more promising than formal creation of a right to be forgotten given other legal commitments and social and economic realities. This approach can transcend the formal limits of expungement law, permit the completion of expungement's aspirations, and avoid disturbing legitimate concerns about transparency in the criminal justice system and the compelled erasure of privately held information.

I. THE PROMISE AND LIMITS OF CRIMINAL RECORD RELIEF

Criminal records relief has been front and center for nearly two decades at this point. Originating with a movement to expand expungement remedies in the early 2000s,³⁴ the latest reforms call for automatic expungement for public arrest and conviction history information.³⁵ Given that nearly a third of the adult population of

33. I am aware that some would not label private activity on the basis of criminal records "punishment." My understanding is that this is because such activity is based on the conduct underlying the criminal records, and is private, not state action. I am not convinced that argument holds for automatic collateral consequences imposed by the state. For private, discretionary consequences permitted by the state, my position is a bit different. The basis for such activity in many instances is almost always the formal recognition—either by arrest or conviction—of the conduct as sanctionable (e.g., the conviction or arrest operates to justify the private activity). While I concede that such private activity is not *formal* punishment under current doctrine, because it is not inflicted by the state, this does not mean it cannot have punitive attributes. And punitive activity on the part of one party against another party with usage of official information as a proxy for such activity requires justification in civil society.

34. Ram Subramanian, Rebecka Moreno & Sophia Gebreselassie, *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009–2014*, VERA INST. FOR JUST. (2014), https://www.vera.org/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy_downloads/states-rethink-collateral-consequences-summary-v4.pdf [<https://perma.cc/C8YT-VJ8G>].

35. See *Dozens of New Expungement Laws Already Enacted in 2021*, COLLATERAL CONSEQUENCES RES. CTR. (July 7, 2021), <https://ccresourcecenter.org/2021/07/07/dozens-of-new-expungement-laws-already-enacted-in-2021> [<https://perma.cc/8CEG-Q9QB>].

the United States has had some contact with the system,³⁶ and private companies profit in the criminal records business,³⁷ the issue of their public existence remains salient. One tool to combat their effect is expungement.

But expungement law has not lived up to its full promise despite reforms. Every state has its own regime, there is no federal standard, and private companies retain information despite the expungement of official, governmental data, and with few repercussions.³⁸ In the digital information age, data is everywhere for the taking, and online platforms, corporations, indexes, search engines, and other private companies desire to acquire it at an incredible rate. There is a market for airing the dirty laundry of others, even if done so inaccurately.

This Part traces the story of expungement. It begins with the promise of a clean slate, only to see petitioners run into obstacle after obstacle due to the substantive and procedural limits of the remedy, as well as the limits of the law to keep pace with the digital accumulation and dissemination of criminal history information.

A. *The Promise*

For the job applicant, prospective tenant, or professional student training to obtain a license in a particular field, expungement regimes advertise the opportunity to put the past in the rear-view mirror for good. And in fairness, expungement helps a lot of people;

36. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT'L EMP. L. PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 (2011), https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf [<https://perma.cc/Y5TG-23RJ>] (noting that over 25% of the adult population has a criminal record); Jo Craven McGinty, *How Many Americans Have a Police Record? Probably More than You Think*, WALL ST. J., <http://www.wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802> [<https://perma.cc/6NKZ-KW57>] (Aug. 7, 2015, 11:59 AM) ("It's often reported that nearly 1 in 3 American adults, or about 30%, has a police record. . . . [That figure] may be low.").

37. James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 401 (2006) ("Some private information brokers obtain court records *en masse*. Credit bureaus have always obtained information on individual criminal history from court records."); see James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 180–81 (2008) (offering a brief history of federal involvement in state record keeping efforts). Jacobs and Crepet also catalog how commercial vendors purchase this information, in bulk, from state record repositories. *Id.* at 185–86.

38. Jacobs & Crepet, *supra* note 37, at 186 ("An internet search for 'criminal records' yields dozens of companies offering, for a modest fee, to carry out criminal background checks for employment, housing, and other purposes. These companies are somewhat regulated by the federal Fair Credit Reporting Act (FCRA).").

the data suggests that achieving an expungement does improve the chances of positive employment and reentry outcomes, like avoiding recidivism.³⁹ Because collateral consequences can be either state enforced or exacted by private actors, expungement can heighten the chances of reentry.⁴⁰

Expungement remedies originated when rehabilitation theory was popular, driving policy determinations by legislatures and reentry policymakers.⁴¹ Juvenile offenders were the first to gain the possibility of the remedy.⁴² As James Jacobs wrote, “[t]he purpose of this policy . . . is to encourage rehabilitation and to recognize that a previously convicted offender has succeeded in turning his life around.”⁴³ Expungement’s promise was twofold: to reward the rehabilitated and hasten it for those who were considered to be very close,⁴⁴ with the added benefit of fueling positive reentry by removing the obstacles that emerged in the wake of a public criminal record.⁴⁵

39. See generally Peter Leasure & Tia Stevens Andersen, *Recognizing Redemption: Old Criminal Records and Employment Outcomes*, 41 N.Y.U. REV. L. & SOC. CHANGE 271 (2017) (“[T]hose possessing older criminal records still face barriers when seeking employment.”); Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL’Y REV. 11 (2016) (“One of the most punitive collateral consequences of conviction is the impact of a criminal record on the likelihood of securing employment. Research . . . consistently demonstrates that employment is correlated with lower rates of reoffending and therefore with successful reentry.”).

40. Haber, *supra* note 12, at 344 (describing how collateral consequences can be sponsored by the state or the result of social decisions by private actors).

41. Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1326 (2017) (“During the 1960s and 1970s, states endorsed a rehabilitative ideal as an integral part of the criminal justice system.”).

42. Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 482–84 (discussing juvenile expungement as a response to the desire to rehabilitate youth offenders).

43. JACOBS, *supra* note 6, at 113–14.

44. Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 162 (noting how expungement provides juvenile offenders “an incentive to reform” by “removing the infamy of [their] social standing”); Love, *supra* note 29, at 1710 (“The purpose of judicial expungement or set-aside was to both encourage and reward rehabilitation, by restoring social status as well as legal rights.”); Michael D. Mayfield, Comment, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1057 (1997) (“In an attempt to alleviate the effects of such ostracism, and to help offenders reenter society, federal and state governments created expungement laws designed to conceal criminal records from the public.”).

45. While I have canvassed the numerous collateral consequences facing those with a criminal record in prior work, other scholars have done so comprehensively. See, e.g., MARGARET COLGATE LOVE, JENNY ROBERTS & CECILIA M. KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013).

B. *The Substantive Limits of the Remedies*

Expungement regimes vary in their breadth and depth, meaning that the promise is narrower for some and wider for others. The substance of expungement law—meaning who is eligible and which types of information may be expunged—vary from state to state.⁴⁶ There is no uniform standard for expungement remedies, although scholars have proposed certain best practices throughout the years.

Expungement regimes thus represent a patchwork of approaches, partly due to the historical fact that expungement began in some places as a judicially-created remedy, where courts interpreted state constitutions to permit the remedy in limited circumstances.⁴⁷ Additionally, early courts crafted the remedy from different, yet sometimes blended premises, like concerns about privacy or rehabilitation.⁴⁸ These early courts essentially created a double inquiry: an assessment of the petitioner's riskiness and whether the continued maintenance of the public criminal record would inflict more harm than good.⁴⁹

This led to a restriction of the remedy to very few people. A minority of prior offenders—and usually only arrestees rather than those who had been convicted—could pursue expungement. For the lucky few who remained eligible despite having been convicted, proof of some sort of rehabilitation was usually a requirement.⁵⁰

46. MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., REDUCING BARRIERS TO REINTEGRATION: FAIR CHANCE AND EXPUNGEMENT REFORMS IN 2018 9–13 (2019), <https://ccresourcecenter.org/wp-content/uploads/2019/01/Fair-chance-and-expungement-reforms-in-2018-CCRC-Jan-2019.pdf> [<https://perma.cc/6BVG-5PTZ>].

47. See Murray, *supra* note 10, at 683–85.

48. *Id.*

49. See, e.g., Meinken v. Burgess, 426 S.E.2d 876, 879 (Ga. 1993); Commonwealth v. Wexler, 431 A.2d 877, 879 (Pa. 1981); Brian M. Murray, *Retributivist Reform of Collateral Consequences*, 52 CONN. L. REV. 863, 913 (2020) (“In effect, courts were tasked with engaging in cost-benefit calculations about offender riskiness rather than contemplating whether the individual actually deserved to have a public criminal record after serving the initial sentence.”); Walter W. Steele, Jr., *A Suggested Legislative Device for Dealing with Abuses of Criminal Records*, 6 U. MICH. J.L. REFORM 32, 54 (1972) (referencing, in model statute, how waiting period conveyed rehabilitation).

50. See, e.g., ALASKA STAT. § 12:55:080 (1962); REV. CODES OF MONT. § 94-7821 (1965 Supp.); ORE. COMP. LAWS § 26-1234 (1940); UTAH CODE ANN. § 77-35-17 (1953); CAL. PENAL CODE §§ 1203.4, 1203.4a (West Supp. 1966); IDAHO CODE § 19-2604 (1965 Supp.); NEV. REV. STAT. § 176.340 (1963); WASH. REV. CODE § 9.95.240 (1957); Commonwealth v. D.M., 695 A.2d 770, 773 (Pa. 1997) (granting automatic expungement of charges resulting in acquittal).

Early statutory expungement regimes followed suit, tethering relief to assessments of moral character.

Between 1980 and 2010, legislatures expanded expungement relief. More types of arrest and court information were eligible for expungement and the types of offenses that were eligible for expungement also increased. The expungement of arrest information remained the norm, although many states allowed for the expungement of at least some convictions.

Beginning in the last decade, the pace of expungement reform increased rapidly. The Collateral Consequences Resource Center (“CCRC”) has tracked such progress. As the CCRC stated in January 2019, states have “pursued a dizzying variety of approaches, reducing waiting periods and expanding eligibility, including for misdemeanors and some low-level felonies, and expediting relief for non-conviction and juvenile records. . . .”⁵¹

More than two-thirds of states now permit expungement of convictions, including felonies.⁵² The progression is somewhat predictable. States begin by permitting the expungement of low-level misdemeanor convictions before transitioning to allowing some felony offenses.⁵³ Maryland is a good example of this process.⁵⁴

Although the breadth has increased, variation remains for *which* offenses are eligible. For example, Illinois permits the

51. LOVE & SCHLUSSEL, *supra* note 46, at 9.

52. MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., FROM REENTRY TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2021 2 (2022), https://ccresourcecenter.org/wp-content/uploads/2022/01/2022_CCRC_Annual-Report.pdf [https://perma.cc/Z57H-WHX4].

53. *See, e.g.*, ARK CODE ANN. §§ 16-90-1406 to -1408 (2021); COLO. REV. STAT. § 24-72-706 (2022); DEL. CODE ANN. tit. 11, § 4374 (2021); 20 ILL. COMP. STAT. 2630/5.2 (2021); IND. CODE §§ 35-38-9-1 to -6 (2021); KAN. STAT. ANN. § 21-6614 (2021); KY. REV. STAT. ANN. § 431.073 (LexisNexis 2021); LA. CODE CRIM. PROC. ANN. art. 978 (2021); MD. CODE ANN., CRIM. PROC. § 10-110 (LexisNexis 2021); MASS. GEN. LAWS ch. 276, § 100A (2022); MICH. COMP. LAWS § 780.621 (2022); MINN. STAT. § 609A.02 (2021); MISS. CODE ANN. § 99-19-71 (2021); MO. REV. STAT. § 610.140 (2021); NEV. REV. STAT. § 179.245 (2020); N.J. STAT. ANN. § 2C:52-2 (West 2021); N.Y. CRIM. PROC. LAW § 160.59 (LexisNexis 2022); N.C. GEN. STAT. § 15A-145.5 (2021); N.D. CENT. CODE § 12.1-32-02(9) (2021); OHIO REV. CODE ANN. § 2953.32 (LexisNexis 2021); OKLA. STAT. tit. 22, § 18(a) (2019); OR. REV. STAT. § 137.225 (2021); 12 R.I. GEN. LAWS § 12-1.3-2 (2018); S.C. CODE ANN. § 22-5-920 (2018); TENN. CODE ANN. § 40-32-101(g), (k) (2021); UTAH CODE ANN. § 77-40-105 (LexisNexis 2021); VT. STAT. ANN. tit. 13, § 7602 (2021); WASH. REV. CODE § 9.94A.640 (2021); W. VA CODE § 61-11-26 (2022); WIS. STAT. § 973.015 (2021); WYO. STAT. ANN. §§ 7-13-1501 to -1502 (2021).

54. MD. CODE ANN., CRIM. PROC. § 10-301(f)(1)–(12) (LexisNexis 2021) (listing “shieldable conviction[s],” including but not limited to disorderly conduct, possession of a controlled substance or drug paraphernalia, and driving without a license).

expungement of almost all convictions.⁵⁵ New York's law is similar, but makes relief contingent on whether the individual has other serious offenses.⁵⁶ A state like California, for instance, began with drug-related convictions.⁵⁷ Indiana allows for a broad range of offenses to be expunged, but the promise of full erasure really only extends to the lower-level convictions.⁵⁸ The norm seems to be gradation amongst offenses: states like North Carolina,⁵⁹ Kentucky,⁶⁰ Ohio,⁶¹ Michigan,⁶² Rhode Island,⁶³ and Tennessee⁶⁴ allow the expungement of convictions, as long as certain preconditions are met, such as a short criminal history or an extended period without recidivating.

These substantive changes certainly represent a “new normal” when it comes to expungement law, where “relief is not reserved just for nonconviction and acquittal charges.”⁶⁵ These trends highlight the ever-growing promise of expungement. But while legislatures have broadened remedies, they have done little to ease their operationalization. Procedural hurdles to expungement are common, and when coupled with socio-economic and other realities for prospective petitioners, the consequences can be fatal for one's pursuit of records relief.

C. *The Procedural Limits of the Remedies*

Expungement procedure undercuts the promise of substantive reform by erecting hurdles for petitioners that exacerbate already existing social conditions.⁶⁶ These obstacles come in many forms—tedious filing requirements, monetary barriers, waiting periods, prosecutorial intervention, and hearing standards that are not favorable to petitioners.

55. 20 ILL. COMP. STAT. 2630/5.2 (2021).

56. N.Y. CRIM. PROC. LAW § 160.59 (LexisNexis 2022).

57. CAL. PENAL CODE § 1210.1(e)(1) (Deering 2021).

58. IND. CODE ANN. § 35-38-9-6(a)(1) (2016); *see also* Joseph C. Dugan, Note, *I Did My Time: The Transformation of Indiana's Expungement Law*, 90 IND. L.J. 1321, 1341–42 & nn.129–37 (2015).

59. N.C. GEN. STAT. § 15A-145.5 (2021).

60. KY. REV. STAT. ANN. § 431.078 (LexisNexis 2021).

61. OHIO REV. CODE ANN. §§ 2953.31–32 (2021).

62. MICH. COMP. LAWS § 780.621 (2022).

63. 12 R.I. GEN. LAWS § 12-1.3-3 (2021).

64. TENN. CODE ANN. § 40-32-101(g)(2), (k) (2021).

65. Murray, *supra* note 10, at 690.

66. In this section, I draw on my previous work. *See generally id.*

Formal requirements for filing for expungement are cost prohibitive and so time consuming that they deter the pursuit of relief.⁶⁷ Having to track down paperwork from multiple agencies, verify its accuracy as it relates to one's personal information, obtain fingerprints, and synchronize petitions and filings requires a level of legal sophistication beyond the average lay petitioner. There also is a high opportunity cost given other obligations in one's daily life. Expungement's early procedure thus creates access to justice problems.⁶⁸ And even in states where automated relief has been approved by the legislature, other procedural mechanisms—such as waiting periods and implementation requirements—suggest hurdles will remain.

Monetary barriers to expungement persist despite the broadening of remedies. Most petitioners have low incomes.⁶⁹ Because expungement varies state by state, different places have different costs for expungement. Within some states, counties have different fees.⁷⁰ And that is not counting the lost income from trekking all over the place to put together a petition, with the time required for such trips a luxury of those with flexible economic and social situations.⁷¹ While some places have moved to eliminate fees, the price of expungement is generally high.⁷²

67. See J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2466 n.24 (2020) (noting how Michigan State police suggested low expungement rates existed due to failures to apply). For a greater discussion of how onerous procedures limit access to justice, see *id.* at 2521–22; see also Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 554 (2020).

68. Prescott & Starr, *supra* note 67, at 2478 (“[W]hen criminal justice relief mechanisms require individuals to go through application procedures, many people who might benefit from them will not do so.”); Murray, *supra* note 10, at 690–92 (describing state processes).

69. See Theresa Zhen, *How Court Debt Erects Permanent Barriers to Reentry*, TALKPOVERTY (Apr. 28, 2016), <https://talkpoverty.org/2016/04/28/how-court-debt-erects-permanent-barriers-to-reentry> [https://perma.cc/M3AM-79GK] (“One of the most significant barriers to reentry is the imposition of fines, fees, surcharges, costs, and other monetary penalties.”).

70. AD HOC COMM. ON BONDING PRACS., FINES & FEES IN MUN. CTS., AD HOC COMMITTEE REPORT ON BONDING PRACTICES, FINES AND FEES IN MUNICIPAL COURTS 39 (Sept. 6, 2018), <https://www.kscourts.org/KSCourts/media/KsCourts/court%20administration/AdHocCommitteeMunicipalCourtsReport.pdf> [https://perma.cc/PS2L-GVC8].

71. See Prescott & Starr, *supra* note 67, at 2503–04 (“[T]hose without cash on hand may not have the liquidity or ability to make such an investment or may be reluctant to do so when the long-term benefits are speculative.”).

72. See, e.g., ARK. CODE ANN. § 16-90-1419 (2021) (filing fee waived for filing of uniform petition in Arkansas); ARIZ. REV. STAT. § 13-905 (LexisNexis 2021) (eliminating application fees for expungement in Arizona); 20 ILL. COMP. STAT. ANN. 2630/5.2(d)(1.5), (6)(C) (2021) (eliminating fees to expunge charges resulting in acquittal, dismissal, or a conviction later reversed or vacated in counties with more than 3,000,000 people, and providing that a court cannot deny an expungement petition because of an unpaid court debt); see also *Arizona HB*

In jurisdictions where convictions are now eligible for expungement, full payment of fines is required before *any* type of expungement is possible. While completion of one's sentence seems like a reasonable condition for expungement, this hurdle can result in the inability to ever obtain relief, especially if one's criminal record is the reason one cannot obtain employment.⁷³ Furthermore, it is not the case that all financial liabilities after a criminal case are *part* of the sentence; rather, sometimes such debt is the result of processing and other administrative fees.⁷⁴

The most onerous procedural requirement faced by petitioners relates to waiting periods. Waiting periods are often justified as necessary to ensure that an individual petitioner is in fact rehabilitated and worthy of an expungement.⁷⁵ Some states have blanket waiting periods for classes of offenses, whereas others opt for graduated schemes based on the seriousness of the offense.⁷⁶

As documented elsewhere, prosecutors wield statutory-based powers to intervene in the expungement process.⁷⁷ While it has become more popular for prosecutors to assist with expungement,⁷⁸

2312: *Relating to Setting Aside a Conviction*, FINES & FEES JUST. CTR. (Mar. 15, 2018), <https://finesandfeesjusticecenter.org/articles/arizona-hb-2312-setting-aside-fee> [https://perma.cc/WFM6-368T] (expressing support for the Arizona law); *Illinois HB 5341: Amendment, Criminal Identification Act Section 5.2*, FINES & FEES JUST. CTR. (Feb. 1, 2018), <https://finesandfeesjusticecenter.org/articles/illinois-hb-5341-amendment-criminal-identification-act-section-5-2> [https://perma.cc/94YP-QMSE] (expressing support for the Illinois law).

73. See, e.g., MO. REV. STAT. § 610.140(5)(3) (2021) (requiring petitioners to pay fines and restitutions before expungement); N.M. STAT. ANN. § 29-3A-5 (2020) (same); COLO. REV. STAT. § 24-72-706(1)(c) (2022) (same); *Frequently Asked Questions About Clean Slate*, CMTY. LEGAL SERV. OF PHILA. (June 26, 2018), <https://clsphila.org/employment/frequently-asked-questions-about-clean-slate> [https://perma.cc/WYQ5-PYCY] (advising payment of fines and fees before applying for expungement); Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, AM. BAR ASS'N (Oct. 3, 2016), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs> [https://perma.cc/WWN6-YTM7] (finding that people cannot vacate their records to regain their rights until they pay their financial obligations to the court).

74. MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN, & NOAH ATCHISON, BRENNAN CTR. FOR JUST., *THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 6* (2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> [https://perma.cc/3K86-T578].

75. Murray, *supra* note 10, at 695 (“[T]he theory behind waiting periods is the same that supported expungement half a century ago: those who have not recidivated and shown good behavior are now worth the risk.”).

76. See, e.g., 20 ILL. COMP. STAT. ANN. 2630/5.2(c) (2021); MD. CODE ANN., CRIM. PROC. § 10-303(a) (LexisNexis 2021); LA. CODE CRIM. PROC. ANN. art. 977(2) (2021); Murray, *supra* note 10, at 695.

77. See Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2847–48 (2018).

78. *Sealing a Criminal Conviction*, MANHATTAN DIST. ATT'Y'S OFF., <https://www.manh>

prosecutors retain the ability to make life difficult for petitioners through the usage of technical objections.⁷⁹ Prosecutors can prevent expungement themselves in some states,⁸⁰ and at the very least stall the process, causing petitioners to lose valuable time.⁸¹ In some states, prosecutors are given quasi-judicial, prescreening authority for petitions.⁸² And these powers persist even in places where automatic expungement has been pursued.⁸³

Finally, the hearing standards for expungement petitions are mixed, with some placing the burden on petitioners to justify expungement, rather than questioning why the state should be able to publicize the information forever.⁸⁴ For example, Delaware's

attanda.org/sealing [https://perma.cc/F6MV-3HKG]; *Through Groundbreaking Class Action, Hundreds of New Yorkers Have Old Marijuana Convictions Sealed*, MANHATTAN DIST. ATT'Y'S OFF. (Aug. 12, 2019), https://www.lac.org/news/through-groundbreaking-class-action-hundreds-of-new-yorkers-have-old-marijuana-convictions-sealed [https://perma.cc/9B38-F7Q2].

79. See Murray, *supra* note 77.

80. Michigan allows prosecutors to prevent expungement. MICH. COMP. LAWS §§ 28.243(8)–(10) (2022). Georgia gives prosecutors a fixed period of time to object on technical grounds. GA. CODE ANN. § 35-3-37(n)(2) (2021). Prosecutorial objection also can heighten the degree of scrutiny given to a petition. *Id.* § 35-3-37(n)(3).

81. The District of Columbia Code is a good example of how prosecutorial review and potential objection adds delay to the process. See, e.g., D.C. CODE § 16-805(b)–(e) (2022). Prosecutors also can object to force hearings in front of judges who are skeptical of expungement. See, e.g., GA. CODE ANN. § 35-3-37(n)(3) (2021) (allowing prosecutors to decline an individual's request to their criminal history record information, which leads to a civil action to remedy the prosecutorial discretion). *But see* COLO. REV. STAT. § 24-72-704(1)(c) (2021) (allowing judges to determine whether grounds for a hearing exist).

82. See, e.g., COLO. REV. STAT. § 24-72-704(1)(c)(II) (2022); VT. STAT. ANN. tit. 13, § 7602(a)(3) (2021); ARIZ. REV. STAT. ANN. § 13-909(B) (LexisNexis 2021) (“If the prosecutor does not oppose the application, the court may grant the application and vacate the conviction without a hearing.”); ARK. CODE ANN. § 16-90-1413(b)(2)(B)(i) (2021) (“If notice of opposition is not filed, the court may grant the uniform petition.”); CAL. PENAL CODE § 851.8(d) (Deering 2022) (“In any case where a person has been arrested and an accusatory pleading has been filed, but where no conviction has occurred, the court may, with the concurrence of the prosecuting attorney, grant the relief provided in subdivision (b) at the time of the dismissal of the accusatory pleading.”); see also 20 ILL. COMP. STAT. 2630/5.2(d)(6)(B) (2021) (requiring the court to grant or deny a petition if no objection is filed); IND. CODE § 35-38-9-9(a) (2019) (allowing a court to grant a petition for expungement without a hearing if the prosecutor does not object); MD. CODE ANN., CRIM. PROC. § 10-303(d)(2) (LexisNexis 2021) (allowing a court to grant a petition for shielding criminal records if the State's Attorney does not file an objection); N.J. STAT. ANN. § 2C:52-11 (West 2021); UTAH CODE ANN. § 77-40-103(9) (LexisNexis 2021) (allowing a court to grant a petition for expungement without a hearing if no objection is received); VA. CODE ANN. § 19.2-392.2(F) (Cum. Supp. 2021) (allowing a court to enter an order of expungement without conducting a hearing if the prosecutor gives written notice that they (1) do not object to the order and (2) the continued existence of the record would be unjust to the petitioner).

83. For example, in California, local prosecutors can object to the expungement of information otherwise eligible for automatic expungement. Prosecutors, thus, can subvert legislative will. LOVE & SCHLUSSEL, *supra* note 46, at 11.

84. See, e.g., D.C. CODE § 16-803(i)(2)–(3) (2022) (placing the burden on the movant for petitions relating to convictions); ARK. CODE ANN. § 16-90-1415(a)–(e) (2021) (placing

new law places the burden on the “petitioner to allege specific facts in support of that petitioner’s allegation of manifest injustice[.]”⁸⁵ Balancing tests, however, provide judges ample discretion to determine whether expungement is appropriate, and the ability to scrutinize the prospects of the petitioner.⁸⁶ In sum, petitioners, once they arrive at a hearing, are by no means guaranteed a positive result.⁸⁷

D. *The Technological Limits of the Remedies*

Although the reforms mentioned above have limits, they have expanded the ability of petitioners to eliminate public, *official* criminal history information. But even if someone manages to get past the procedural hurdles, such reforms are rarely coupled with provisions that permit the regulation of the dissemination of such information once it is held by *private* parties. Furthermore, existing expungement law does little to respond to the exceptional pace at which such information travels across the internet and from one actor to another. In other words, the promise of substantive expungement reform does little to regulate the secondary market in such information, which is fortified by a data driven economy.

This means expungement can only accomplish so much in reality. In the past, the limits of expungement were mostly about the lack of breadth within the laws: who could apply and which types of information was eligible. Now, sealing *official* data, and lots of it, is possible, should the stars align. As others have noted, the present problem is different: at stake is expungement’s *efficacy* as a remedy within a larger, digitized, surveillance-based economy.⁸⁸ The limits of expungement are thus related to lackluster enforcement regimes with little capacity for dealing with the trafficking of data held by private actors after it has been formally ordered expunged in the official system. Technological realities exacerbate

burden on petitioners for felony convictions); KY. REV. STAT. ANN. § 431.073(4)(a) (LexisNexis 2021).

85. DEL. CODE ANN. tit. 11, § 4374(f) (2021).

86. D.C. CODE § 16-803(h)(2)(A)–(C) (2022); *see also* N.M. STAT. ANN. §§ 29-3A-5(C) (2020); ARK. CODE ANN. § 16-90-1415(b) (2021); MINN. STAT. § 609A.03, subdiv. 5(c) (2021); COLO. REV. STAT. § 24-72-706(1)(g) (2022); 20 ILL. COMP. STAT. 2630/5.2(d)(7) (2021). *But see* NEV. REV. STAT. § 179.2445(1) (2017) (establishing a “rebuttable presumption that . . . records should be sealed if the applicant satisfies all statutory requirements for the sealing of the records”).

87. While J.J. Prescott & Sonja Starr have shown that plenty of expungement petitions are granted, judicial discretion remains. *See* Prescott & Starr, *supra* note 67, at 2493–501.

88. *See* Lageson, *supra* note 4; Haber, *supra* note 12, at 348–49.

this problem, resulting in a real-life game of whack-a-mole for the petitioner hoping to realize the promise of an achieved expungement. Drawing on the work of other scholars, this section highlights these challenges, before transitioning to potential solutions offered by other legal regimes in the form of the right to be forgotten.

The reluctance of legislatures to regulate the continued publication and usage of information otherwise ordered expunged undermines the long-term efficacy of the remedy. The federal Fair Credit Reporting Act (“FCRA”)⁸⁹ is grossly insufficient to combat this problem. Private data brokers can dispute whether they are consumer reporting agencies under the law, the accuracy requirements are vague, and the statute does not specifically proscribe the disclosure and sharing of already expunged records.⁹⁰

State regulation in the same vein is piecemeal. Some states—like Connecticut—have laws that require constant updating of records by data brokers.⁹¹ California law requires consumer reporting agencies not to report certain types of charges,⁹² and Indiana requires redactions in other official documents that have the person’s name.⁹³ But overall, the FCRA and state laws do not provide much protection. Private litigation does not have a track record of success under the statutes and defamation actions are also viewed skeptically by courts.⁹⁴

The technological realities of the real world also undermine official expungement: information-sharing is the fuel on which most of the world runs, and, as Eldar Haber has forcefully argued, the world is no longer kinetic.⁹⁵ To make that more concrete, whereas the same problem existed before the internet—the dissemination of information otherwise expunged by private actors after the expungement—it was a lot more difficult given that the erasure of

89. 15 U.S.C. § 1681.

90. Haber, *supra* note 12, at 357 (citing Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-offender Status and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 918 (2014)).

91. CONN. GEN. STAT. § 54-142e (2022).

92. CAL. CIV. CODE § 1786.18(a) (Deering 2022).

93. Doris Del Tosto Brogan, *Expungement, Defamation, and False Light: Is What Happened Before What Really Happened or Is There a Chance for a Second Act in America?*, 49 LOY. U. CHI. L.J. 1, 20 (2017).

94. *See, e.g.*, *G.D. v. Kenny*, 15 A.3d 300, 314–16 (N.J. 2011); *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995).

95. Haber, *supra* note 12, at 348 (noting how the biggest threat to expungement is that rehabilitation “worked well in the kinetic world”).

the *official* data marked a clear line in time that prevented continued, mass *accumulation* of the data.⁹⁶ The speed of communication was also slower. Verbal gossip traveled, but not at the same pace, and such gossip did not automatically equal *publication*, forever. In other words, once the governmental institution erased or sealed the data, permanently obtaining it was nearly impossible, not to mention accessing it in the first place. Even if media organizations retained it in their archives, those archives were not digitized and easily searchable. As Haber puts it, “[t]he digital era changed this form of practical obscurity.”⁹⁷ In today’s world, availability anywhere enables access almost anytime, and also amounts to some form of perpetual publication.

How so? First, information storage and sharing is much easier, and at this point an industry norm.⁹⁸ This is reflected in governmental sharing of criminal record history information, which has become almost entirely digitized and available on the internet.⁹⁹ States have central repositories of information that are largely available to the public and Congress mandated the same for federal entities.¹⁰⁰ A private market later followed, serving the landlords, employers, and other institutions looking for background information.¹⁰¹ Thus, official data shared by governments became *eternally held private data* beyond the reach of regulators.¹⁰²

This new form of private business is emblematic of a broader economic movement that prioritizes accumulating information about human experience in order to ultimately monetize it. Government sharing of docket sheets with charges, demographic information, and other details is highly valuable information. Information accumulation *is* capital acquisition and criminal records history information is a particularly exciting type of information that many deem reasonable to their everyday associational

96. As Haber writes, “it was practically impossible” to obtain the data because the governmental entities “no longer maintained them.” *Id.* at 348–49.

97. *Id.* at 349.

98. *Id.*

99. Lageson, *supra* note 4.

100. Jacobs & Crepet, *supra* note 37, at 185.

101. Haber, *supra* note 12, at 351–52 (“More generally, there was a great demand for companies that could provide a service for end-users to obtain criminal history records that could potentially be more accurate and nationwide in scope.”); see also JACOBS, *supra* note 6, at 70–73 (discussing the rise of private data brokers trafficking in background information).

102. Haber, *supra* note 12, at 352.

decisions.¹⁰³ The internet is the vehicle by which this economic activity moves, chases *all* material, and ultimately thrives.¹⁰⁴ Thus, the problems identified in Haber's excellent Article combine with a larger economic culture that has embraced the commodification of human experience and packaged it to consumers as the right to know and share information.¹⁰⁵

This broader cultural and economic reality is hard to dispute. Shoshana Zuboff, in *The Age of Surveillance Capitalism*, has exposed this forcefully, demonstrating how the largest tech and data-based corporations aim to acquire *all* data about human experience.¹⁰⁶ These activities invade spaces and the decisional capabilities once thought to be immune from private actors, resulting in a new normal that undermines rigid legal concepts like privacy and consent.¹⁰⁷ After all, Google's stated mission—"to organize the world's information and make it universally accessible and useful"¹⁰⁸—runs directly counter to the promise of expungement and fortifies its limits. As Zuboff notes, this means that information that would "normally age and be forgotten now remains forever young, highlighted in the foreground of each person's digital identity."¹⁰⁹ When memories dictate the present, it is nearly impossible to move on from one's past. Attempting to escape from this labyrinth of informational connections and expectations is nearly impossible on an individual level, and expungement law is just one legal regime struggling to keep pace.

As will be discussed below, these limits are likely to remain the status quo given several norms in American law. Ultimately, they doom proposals like the right to be forgotten, which can be viewed as subversive to the new norms, like information sharing and data accumulation, and old norms, like transparency in criminal justice.

103. *Id.* at 362 (noting the demand for criminal histories, resulting in explosive growth in the market).

104. ZUBOFF, *supra* note 2, at 21 (describing the totalizing, accumulative logic of surveillance capitalism).

105. *Id.* at 19.

106. *Id.* at 21.

107. *Id.* at 14.

108. *Our Approach to Search*, GOOGLE, <https://www.google.com/search/howsearchworks/mission/#:~:text=Maximize%20access%20to%20information,a%20wide%20variety%20of%20sources> [<https://perma.cc/AD5Y-M6KB>].

109. ZUBOFF, *supra* note 2, at 59.

II. THE PROMISE AND LIMITS OF THE RIGHT TO BE FORGOTTEN

Given the problem mentioned in section I.C., some have conceived a right to be forgotten to ensure the actual efficacy of expungement or remedies like it. This Part details this concept by first discussing its origin in Continental Europe. It then analyzes its viability in the United States to date given existing theories of privacy and reputation, as well as existing case law relating to the accessibility of public information and private tort actions involving harms to privacy and reputation. It concludes by discussing a recent phenomenon: the efforts of private actors, like newspapers, to step into the breach when it comes to the persistence of such harmful information. In the end, the norms and existing doctrines in American law relating to privacy, reputation, and transparency limit the viability of the RTBF as a solution to the problem of private dissemination and use of already expunged information.

A. *Continental Origin: Privacy and Reputation*

The development of the RTBF in European countries can be traced to the European Convention of Human Rights (“ECHR”) and its statement in article 8 that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”¹¹⁰ This overarching statement is qualified by the following:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹¹¹

In 1995, the European Data Protection Directive (“DPD”) laid out principles for how information relating to data subjects can be processed legally.¹¹² The DPD formed the “core of the European data-protection framework,” directing European countries to design ways to protect data rights of their citizens.¹¹³ Notably, article 12 of the DPD gives individuals the right to ask to have personal data

110. European Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222.

111. *Id.*

112. Andrés Guadamuz, *Developing a Right to be Forgotten*, in EU INTERNET LAW: REGULATION AND ENFORCEMENT 61 (Eleni Synodinou et al. eds., 2017).

113. MEG LETA JONES, CTRL + Z: THE RIGHT TO BE FORGOTTEN 28 (2016).

deleted once the data is “no longer necessary.”¹¹⁴ The DPD also gave individuals the right to notice, access, correction, and deletion of their personal information.¹¹⁵ In 2016, the General Data Protection Regulation (“GDPR”) updated the DPD, outlining the “right to be forgotten,” leading to different enforcement actions in different countries.

In Germany, the RTBF grew from the concept of informational self-determination. As Gerrit Hornung and Christoph Schnabel argued, this means “[t]he individual is shielded from interferences in personal matters, thus creating a sphere in which he or she can feel safe from any interference.”¹¹⁶ As will be discussed below, Daniel Solove has shown how this concept differs radically from common notions of privacy in United States law.¹¹⁷ Most pointedly, informational self-determination enables individuals to control and decide how they want to be presented to third parties and the public, including which personal information is made available, and to whom.¹¹⁸ Germany has coupled this concept with a robust notion of data protection designed to foster democratic participation. Thus, the public interest in privacy and reputational protection is twofold, premised on self-determination and the ability to participate civically.

While this default posture is a strong counterweight to notions of free expression, German courts, prior to the GDPR, struggled with how to apply it to concrete cases. For example, in the case of *Princess Caroline of Monaco v. The Judgments of the Lower Courts*, the court held that photographs obtained while the Princess was in a public place could not be controlled by the Princess, but that images obtained while she was in private could be controlled if the individual could reasonably believe he or she had not been exposed to the public when the images were taken.¹¹⁹ Princess Caroline

114. Nicolae Dragoş Costescu, *Google Spain Decision—An Analysis of the Right to be Forgotten—A Regression from Past Interpretations of ECJ*, in ANALELE UNIVERSITĂȚII DIN BUCUREȘTI: SERIA DREPT [ANNALS OF THE UNIVERSITY OF BUCHAREST: THE LAW SERIES] 654 (C.H. Beck ed., 2016).

115. McKay Cunningham, *Free Expression, Privacy, and Diminishing Sovereignty in the Information Age: The Internationalization of Censorship*, 69 ARK. L. REV. 71, 80–81 (2016).

116. Gerrit Hornung & Christoph Schnabel, *Data Protection in Germany I: The Population Census Decision and the Right to Informational Self-Determination*, 25 COMPUT. L. & SEC. REV. 84, 86 (2009).

117. See *infra* notes 162, 208–12, 310 and accompanying text.

118. JONES, *supra* note 113, at 32.

119. BVerfGE [The Federal Constitutional Court of Germany], 1 BvR 653/96, ¶ 80, Dec. 15, 1999, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1999/12/rs19991215_1bvr065396en.html [<https://perma.cc/5DLS-GJZT>].

appealed to the European Court of Human Rights, which overturned the Germany court, citing article 8 of the DPD. The ECHR held that privacy guarantees undergird the ability of individuals to develop their own personalities and that sometimes even public interactions are considered “private” by the law.¹²⁰ While the private lives of politicians might be construed as matters of public interest, the private lives of private figures, even if those activities are visible in a technical sense to the public, are protected by article 8.¹²¹

The ECHR decided a case involving public criminal record history information in 2012. In *M.M. v. United Kingdom*,¹²² the petitioner was arrested in Northern Ireland in 2000 after kidnapping her baby grandson for a day in an attempt to prevent the child’s mother from going to Australia after the mother and father’s relationship had ended.¹²³ The child was never hurt; at the time, the grandmother was given what is called a “caution for child abduction” and told it would expire in five years.¹²⁴ Later, she learned a policy change had led to its extension for her life.¹²⁵ After being offered a job in the mid-2000s, a background check revealed the caution.¹²⁶ She brought suit in the ECHR, claiming that the extension of the caution for life, and recordkeeping that permitted its discovery, violated article 8.¹²⁷ The ECHR agreed, holding that the storing of the information relating to her “private” life and the release of such information fell under article 8.¹²⁸ Absent a clear and detailed statutory regulation governing the length of time the information would be stored, and how it would be stored, article 8 was violated. Notably, the ECHR considered the criminal record part of the petitioner’s *private* life even though it involved a criminal case.¹²⁹

120. Von Hannover v. Germany (No. 1), App. No. 59320/00, Eur. Ct. H.R. 41, ¶ 50 (Sept. 9, 2004), <https://hudoc.echr.coe.int/tur#%7B%22itemid%22:%5B%22001-61853%22%5D%7D> [<https://perma.cc/GB22-56VY>].

121. *Id.* at ¶ 64.

122. *M.M. v. United Kingdom*, App. No. 24029/07, ¶ 6 (Apr. 29, 2013), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-114517%22%5D%7D> [<https://perma.cc/X2LZ-X62H>].

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

France has a long history of data protection laws, updating them in 2004 to meet then-existing EU standards.¹³⁰ In 2010, several online platforms, but not including Google and Facebook, signed a charter with the French government creating a “right of oblivion.”¹³¹ The charter enabled internet users to complain about indexing in search engines.¹³² Google became implicated in 2012 in a case involving a woman who had been employed in the pornography industry.¹³³ The court ordered Google.com and Google.fr to delete all links to the woman’s past because it harmed her right to be forgotten.¹³⁴ The woman had contacted a specific website to no avail, and her requests to Google to prevent access to the website were met with a response that she should contact the website.¹³⁵ The French tribunal relied on a French data protection law to hold that Google was interfering with the woman’s right to be forgotten.¹³⁶

Spain is a particularly noteworthy case study when it comes to the public’s ability to access criminal case information. While the Spanish Constitution guarantees public *access* to criminal *trials*, verdicts are usually sent only to the defendant in writing.¹³⁷ If the opinion is published, the government redacts the name of the defendants and case files are not freely available to the public.¹³⁸ This default legal position has extensive history, finding support in Spanish Supreme Court cases that have held that while courts are open to the public, the *judgments* from those courts are not part of public record, and access is limited to parties with concrete

130. JONES, *supra* note 113, at 28, 37.

131. BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS [EUROPEAN CONSUMERS’ ORGANIZATION], A COMPREHENSIVE APPROACH ON PERSONAL DATA PROTECTION IN THE EUROPEAN UNION: EUROPEAN COMMISSION’S COMMUNICATION 9 (2011), <https://www.beuc.eu/publications/2011-00062-01-e.pdf> [<https://perma.cc/DRK9-QCAL>].

132. Laurent Checola, “*Right to be Forgotten*” on the Internet: A Charter Signed Without Google or Facebook, LE MONDE (Oct. 13, 2010, 3:42 PM), https://www.lemonde.fr/technologies/article/2010/10/13/droit-a-l-oubli-sur-internet-une-charte-signe-sans-google-ni-facebook_1425667_651865.html [<https://perma.cc/DRK9-QCAL>].

133. Laura Ligouri & Frederica De Santis, *Could ISPs be Forced to Take Action to Guarantee Individual’s “Right to be Forgotten”? From the “Right to be Let Alone” to Control Over Personal Data*, LEXOLOGY (Aug. 3, 2012), <https://www.lexology.com/library/detail.aspx?g=2b89a15f-4606-4aff-ac63-4506d989d3fb> [<https://perma.cc/F8LK-CY2G>].

134. *Id.*

135. *Id.*

136. *Id.*

137. James B. Jacobs & Elena Larrauri, *American Criminal Record Exceptionalism (I): A Spanish Comparison*, COLLATERAL CONSEQUENCE RES. CTR. (Dec. 30, 2014), <https://ccresourcencenter.org/2014/12/30/american-criminal-record-exceptionalism-spanish-comparison> [<https://perma.cc/M6WW-H37M>].

138. JACOBS, *supra* note 6, at 164.

connections to the case.¹³⁹ This position is truly foreign to the American conception of criminal records data.

Three cases between 1999 and 2010 involving the publicizing of past criminal activity illustrate the point. In 1999, the Sentencia Tribunal Constitucional (the Constitutional Court) held that criminal convictions are “personal information” and cannot be disclosed to anyone, even another governmental agency, because “the constitutional right to privacy guarantees anonymity, a right not to be known, so that the community is not aware of who we are or what we do.”¹⁴⁰ In 2008, the Tribunal Supremo held that information about accusations and convictions of named individuals is personal data.¹⁴¹ Additionally, the Personal Data Protection Law (“PDPL”) made it illegal to post such information on a website, and for court judgments to be publicly accessible, and held that only governmental agencies can maintain databases of criminal convictions.¹⁴² Finally, in 2010, the Sentencia de la Audencia Nacional held that a city’s decision to post information about a fired police officer’s sexual assault conviction on the city’s website violated the officer’s privacy rights.¹⁴³

These developments contributed to the European Union’s ultimate creation of the General Data Protection Regulation (“GDPR”), which came into effect in 2018 and governs “how personal data must be collected, processed, and erased.”¹⁴⁴ The RTBF originated in the early 2010s under the umbrella of the right to access one’s personal data.¹⁴⁵ It now explicitly exists within the GDPR, specifically in article 17, which reads: “The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without

139. *See id.* at 163–68.

140. S.T.C., July 22, 1999 (B.O.E., No. 204) (Spain), <https://www.poderjudicial.es/search/TS/openDocument/c47a6504f7cbe15f/19960102> [<https://perma.cc/JS3N-66G3>]; JACOBS, *supra* note 6, at 165.

141. JACOBS, *supra* note 6, at 166.

142. *Id.*

143. *Id.*

144. *Everything You Need to Know About the “Right to be Forgotten,”* GDPR.EU, <https://gdpr.eu/right-to-be-forgotten> [<https://perma.cc/UWQ6-R4S4>].

145. Council Directive 95/46/EC, art. 10, On the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281/31).

undue delay.”¹⁴⁶ This right of data subjects follows the right to access one’s personal information now located in article 15.¹⁴⁷

By its terms, the RTBF is *not* absolute and only applies in specific circumstances. The right to erasure includes when the data is no longer necessary for the purpose an organization originally collected it for, the subject has withdrawn consent to usage of the data, the subject objects to its usage for marketing purposes, there is no “legitimate interest” that overrides the subject’s objection to the usage of the data, an organization has processed the information unlawfully, and an organization must erase the data due to a legal ruling or obligation.¹⁴⁸ But organizational rights to keep the data or use it trump individual rights when “[t]he data is being used to exercise the right of freedom of expression and information,” is “being used to comply with a legal ruling or obligation,” relates to a task in the public interest or the organization’s official authority, relates to public health purposes, or relates to a host of scientific or medical purposes.¹⁴⁹ These conflicting interests necessarily lead to confusion about the strength of the RTBF, not to mention the ability to enforce it.

Scholarly work to date suggests that although the RTBF and the broader GDPR have become normalized in European law, their implementation remains a matter of great dispute.¹⁵⁰ The primary difficulty stems from the right’s own framework, which encourages notice by the individual and a response by the entity to delist or not, which provides ample discretion for online platforms to make determinations contrary to the interests of the individual subject.¹⁵¹ Google itself has found “two dominant intents” for delisting requests: half of all requests involved removal of personal history and legal history.¹⁵²

146. Council Regulation, 2016/679, art. 17, 2016 O.J. (L 119/1).

147. *Id.* at art. 15.

148. *Id.*

149. *Id.*

150. See generally Bruno Zeller, Leon Trakman, Robert Walters & Sinta Dewi Rosadi, *The Right to be Forgotten—the EU and Asia Pacific Experience (Australia, Indonesia, Japan and Singapore)*, 1 EUR. HUM. RTS. L. REV. 23 (2019) (“The right to be forgotten has quickly become an important concept of data protection law. . . . However, the acceptance and implementation of this right . . . varies.”).

151. Theo Bertram et. al, *Five Years of the Right to be Forgotten*, CCS ’19: PROC. 2019 ACM SIGSAC CONF. ON COMPUT. & COMM’NS SEC. 959, 959–60 (2019), <https://doi.org/10.1145/3319535.3354208> [<https://perma.cc/R92P-Z73H>].

152. *Id.* at 959.

In the wake of the GDPR, Google set up an elaborate process to handle these requests, both procedurally and substantively. Requests are reviewed manually, and according to Google, the “reviewers consider four criteria that weigh public interest versus the requester’s personal privacy”:

1. The validity of the request;
2. The identity of the requester, including whether the person is a public figure;
3. The content referenced in the specific URL; and
4. The source of the information (e.g., government or private).¹⁵³

Most recently, implementation came to a head in a case involving Google and France’s data authority, the Commission Nationale de l’Informatique et des Libertés (“CNIL”).¹⁵⁴ Google had objected to the French authority’s interpretation of the scope of the GDPR, arguing CNIL could not enjoin Google to delist information globally.¹⁵⁵ Since 2014, Google has received over a million requests under the GDPR.¹⁵⁶ In the case, the European Court of Justice held that Google did not have to apply the right globally, effectively meaning that removal of information only needed to occur for search results happening within Europe, and only after an appropriate request.¹⁵⁷ This means that Google did not have to de-reference a subject “on all [of] the versions of its search engine.”¹⁵⁸ Essentially, CNIL lacked authority to enforce the GDPR beyond the EU.

In a second, less well-known case, the EU high court essentially mandated a “notice-and-delist regime” for certain kinds of “sensitive” information, such as criminal justice records.¹⁵⁹ But the court

153. Theo Bertram et al., *Three Years of the Right to be Forgotten* 2–3 (unpublished manuscript), <https://d110erj175o600.cloudfront.net/wp-content/uploads/2018/02/google.pdf> [https://perma.cc/HLS5-8K6Q].

154. Leo Kelion, *Google Wins Landmark Right to be Forgotten Case*, BBC (Sept. 24, 2019), <https://www.bbc.com/news/technology-49808208> [https://perma.cc/DZ6F-ASS4].

155. *Id.*

156. *Requests to Delist Content Under European Privacy Law*, GOOGLE TRANSPARENCY REP., https://transparencyreport.google.com/eu-privacy/overview?hl=en_GB [https://perma.cc/U2GJ-DEDB].

157. Kelion, *supra* note 154.

158. *Id.*

159. Andrew Keane Woods, *Three Things to Remember from Europe’s ‘Right to be Forgotten’ Decisions*, LAWFARE (Oct. 1, 2019, 10:11 AM), <https://www.lawfareblog.com/three->

also acknowledged the difficulty in operationalizing such a regime, and effectively punted to national bodies to regulate a platform like Google as it attempts to do so.¹⁶⁰ In other words, the court noted the difficulties with content moderation and did not appear overly optimistic that this problem has a one-size-fits all approach.

Despite the difficulties in implementation, the RTBF remains part of European law. It is explicitly written into the GDPR and recognizes individual privacy rights to control data that appears online. Some credit this normalization with the civil law tradition in European countries,¹⁶¹ although there has been movement in the United Kingdom, despite its common-law history, in favor of the RTBF.¹⁶² The current legal reality is a set of standards and interests for consideration by courts, with diverse results, but consistent recognition of the right as legitimate and worthy of balancing. Whether the right is to be forgotten or to simply *request* as much is being worked out in real time. As one set of scholars puts it, the right is an “evolving concept . . . [but w]hat is certain is the fact that EU citizens are afforded a level of right to request from an entity that their personal data be deleted or removed from the internet.”¹⁶³ That is a degree of autonomy unlikely to materialize in American law anytime soon given confusion about what privacy *is* and the entrenchment of transparency as a legal norm when it comes to the criminal justice system.

B. *The Limits of American Law*

American law has not developed in the same direction. Skepticism of the RTBF stems from the bundling of several entrenched legal concepts and their relation to one another. A general commitment to transparency and free speech rivals the tenuous concepts of privacy and reputation that solidified the right in Europe, with a heavy presumption for the former basically treasured in American law. Although the common law restricted access to public records for limited purposes, courts have generally permitted access to *judicial* records, and open records statutes have proliferated

things-remember-europes-right-be-forgotten-decisions [https://perma.cc/9Z8S-4JL3].

160. *Id.*

161. Zeller et al., *supra* note 150, at 30.

162. See *NT1 & NT2 v. Google, LLC* [2018] EWHC 799 (QB), <https://www.judiciary.uk/wp-content/uploads/2018/04/nt1-Nnt2-v-google-2018-Eewhc-799-QB.pdf> [https://perma.cc/KGZ9-6D3M]; Róisín A. Costello, *The Right to be Forgotten in Cases Involving Criminal Convictions*, 3 EUR. HUM. RTS. L. REV. 268 (2018) (discussing *NT1 v. Google*).

163. Zeller et al., *supra* note 150, at 32.

over the past century.¹⁶⁴ Thus, transparency is essentially legally enshrined. As the Supreme Court of the United States stated in *Nixon v. Warner Communications, Inc.*, the right to access public records rests on “the citizen’s desire to keep a watchful eye on the workings of public agencies . . . and in a newspaper publisher’s intention to publish information concerning the operation of government.”¹⁶⁵ Thus, access norms and free speech breed skepticism of a right to delete unflattering information.¹⁶⁶ Further, privacy is an ever developing concept in need of a definition, with a tortured history in various parts of American law. And the law of reputation is equally stilted when it comes to private access and use of public records. This section details these limitations against the broader backdrop that prefers transparency in public records.

1. Criminal Justice, Transparency, and First Amendment Norms

Access to public criminal records implicates the First Amendment because an individual’s ability to access government records has been recognized as constitutionally protected.¹⁶⁷ Second, the press’s ability to obtain and publish information relating to the actions of government has been upheld.¹⁶⁸ From there, the ball can pass through an endless chain of private hands. A right of access to public records is essentially the default position recognized in law, especially in the criminal context. Allowing access began with the common law, with deference to the discretion of lower court judges when privacy interests were at stake.¹⁶⁹ Public records outside of litigation were more likely to receive protection than documents recording what was happening in court.¹⁷⁰

164. Solove, *supra* note 15, at 1157 (citing Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 69–70 (1996); and then citing Jason Lawrence Cagle, Note, *Protecting Privacy on the Front Page: Why Restrictions on Commercial Use of Law Enforcement Records Violate the First Amendment*, 52 VAND. L. REV. 1421, 1422 & n.2 (1999)).

165. 435 U.S. 589, 598 (1978).

166. Rosen, *supra* note 17, at 88–92.

167. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *see also* Solove, *supra* note 15, at 1194 (discussing *Richmond Newspapers*).

168. *See* Solove, *supra* note 15, at 1199.

169. *Id.* at 1155.

170. *Id.* at 1155 (“The right of access to court records differs from the right to access other public records.”). Solove notes how the Supreme Court in *Nixon* recognized the common law right of access, subject to a few limitations. *Id.* at 1155.

The concept of open access is enshrined in open records laws. The Freedom of Information Act (“FOIA”)¹⁷¹ is the most well-known statute responding to complaints that agencies were denying access to public records.¹⁷² Interestingly, FOIA only applies to records maintained by executive agencies rather than legislative or judicial records.¹⁷³ Every state also has a mini-FOIA.¹⁷⁴ These laws relaxed the common law requirement that the party requesting information have an interest in the information, instead opting for at-will requests. This essentially allows access to executively-held information for any reason.¹⁷⁵ Getting public information “when I want it” is the norm.

That said, FOIA and laws like it contain exemptions that allow the government to withhold information.¹⁷⁶ Some of these exceptions make particular reference to information many would consider private, like health records.¹⁷⁷ However, FOIA does not require notice to individuals who have records within an otherwise existing FOIA request.¹⁷⁸ State open records laws, as Solove notes, contain a patchwork of privacy protections, although courts have muddled their meaning.¹⁷⁹ While FOIA was enacted prior to the digital revolution, in the mid-1990s Congress passed the Electronic Freedom of Information Amendments (“E-FOIA”),¹⁸⁰ which essentially extended FOIA enabled access to electronic public records.¹⁸¹

Transparency is the norm in the criminal justice system and with respect to court proceedings because the administration of the criminal justice system on a macro and micro level is considered a public matter. This is a crucial distinction that marks a significant difference from law in countries like Spain. As Solove points out:

There are at least four general functions of transparency: (1) to shed sunshine on governmental activities and proceedings; (2) to find out

171. 5 U.S.C. § 552.

172. Solove, *supra* note 15, at 1158 (citing S. REP. NO. 89-813, at 3 (1965)).

173. § 552(f).

174. Nowadzky, *supra* note 164, at 65–66.

175. U.S. Dep’t of Just. v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 771 (1989) (recognizing FOIA as providing access rights to the general public that mirror the rights of those asserting a particular interest in particular documents).

176. § 552(b).

177. *Id.* § 552(b)(6).

178. Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 593–94 (1995).

179. Solove, *supra* note 15, at 1160.

180. Bureau of Indus. & Sec., *Electronic FOIA*, U.S. DEP’T OF COM. (2020), <https://efoia.bis.doc.gov> [<https://perma.cc/Q544-GQBC>].

181. § 552(a)(2) (2000); Solove, *supra* note 15, at 1164.

information about public officials and candidates for public office; (3) to facilitate certain social transactions, such as selling property or initiating lawsuits; and (4) to find out information about other individuals for a variety of purposes.¹⁸²

Public criminal records relate to at least three of these. First, public criminal records shed light on what happened in criminal proceedings: who was arrested and possibly convicted, the disposition of the charges, the actors involved in determinations, and the particular types of hearings that happened within an entire case. In theory, this information could allow for accountability, but mostly in a downstream way. Courts have acknowledged this themselves, noting how public arrest records provide valuable “protection of the public against secret arrests” and improper police tactics,¹⁸³ and help to preserve “the integrity of the law enforcement and judicial processes”¹⁸⁴ Access to court records allows the public to serve as a watchdog to the integrity of the judicial function.¹⁸⁵ And data driven criminal justice research and reform efforts benefit from this norm.

The third function of transparency—the facilitating of social transactions—also relates to public criminal records. These records may affect whether public benefits or private transactions can occur under the law. Finally, public criminal records serve the fourth function of transparency—permitting individuals to simply know information that they might find useful down the road for various purposes. This, in essence, *is the crossroads* when it comes to the limits of expungement law. Expungement is an act *against transparency* for this function; as such, it is, by definition, in tension with transparency and privacy. After all, the thirst for transparency underwrites the desire to access records that might inform whether to hire an employee, babysitter, or bus driver.¹⁸⁶

These values suggest why the Supreme Court has held that the right of access extends to governmental proceedings and why courts have extended these precedents to include access to court records. In *Richmond Newspapers, Inc. v. Virginia*, a Court plurality held that the First Amendment provides the public with a right to access criminal trials, although no single rationale garnered a

182. Solove, *supra* note 15, at 1173.

183. *United States v. Ross*, 259 F. Supp. 388, 390 (D.D.C. 1966).

184. *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985).

185. Solove, *supra* note 15, at 1174.

186. *Id.* at 1176 (acknowledging that while these purposes might be questionable, they are real and valued by many).

majority for the seven justices who agreed with the result.¹⁸⁷ However, a few years later, the Court did articulate a test to determine the right to access a criminal proceeding. In *Globe Newspaper Co. v. Superior Court*, the Court stated the first inquiry is whether the proceeding has “historically . . . been open to the press and general public.”¹⁸⁸ Next, the question is whether access “plays a particularly significant role in the functioning of the judicial process and the government as a whole.”¹⁸⁹ The Court was clear with respect to its baseline position as to accessing criminal trials, stating “public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.”¹⁹⁰ With that said, this right was not absolute.¹⁹¹ These initial Supreme Court cases were extended to other aspects of criminal proceedings: jury selection and certain pretrial contexts.¹⁹² There is disagreement about whether these precedents logically extend to accessing court records. Some courts have extended their logic to allow access to documents and records,¹⁹³ while others draw the line at records.¹⁹⁴

Altogether, American practices with respect to accessing criminal records are, as James Jacobs and others have said, “a powerful example of . . . exceptionalism.”¹⁹⁵ This is a result, to some degree, of liberal democratic premises that conflict.¹⁹⁶ When compared to European countries, who have similar premises supporting their

187. 448 U.S. 555, 575–78 (1980).

188. 457 U.S. 596, 605 (1982).

189. *Id.* at 605–06.

190. *Id.* at 606.

191. *Id.* at 607 (referring to compelling interests as potentially overriding the right).

192. See *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984) (applying *Richmond Newspapers* to jury selection); *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 10 (1986) (same); *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982) (applying *Richmond Newspapers* to pretrial hearings); *United States v. Chagra*, 701 F.2d 354, 363–64 (5th Cir. 1983) (applying *Richmond Newspapers* to bail reduction hearings).

193. Solove, *supra* note 15, at 1203 (citing *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997)); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988) (“Access means more than the ability to attend open court proceedings; it also encompasses the right of the public to inspect and to copy judicial records.”); *Assoc. Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145 (4th Cir. 1984) (“There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them.”).

194. See, e.g., *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512 (10th Cir. 1994) (“[T]here is no general First Amendment right in the public to access criminal justice records.”).

195. JACOBS, *supra* note 6, at 159.

196. Amanda Conley, Anupam Datta, Helen Nissenbaum & Divya Sharma, *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 774 (2012) (referencing “one current” demanding openness, and “the other” demanding privacy).

law, the right of free speech protections in the United States are stronger.¹⁹⁷ The result is a default posture that is stacked against definitions of privacy.

For example, while the federal FOIA and state analogues attempt to balance transparency and privacy, the statute favors the former. The Supreme Court considered whether the privacy exception in FOIA offered protection for criminal information compiled in an investigation and held by prosecutors in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*.¹⁹⁸ At first glance, the Supreme Court's decision that upheld the Department of Justice's ability to cite privacy as a reason not to disclose seems to cut against transparency. But the decision actually created a balancing framework, and mostly for individuals involved in the case who *were not full-fledged suspects*.¹⁹⁹

Furthermore, the reach of that precedent to run-of-the-mill *court* records seems like a stretch. Criminal case records are available in courthouses across the country and downloadable from the internet. The Supreme Court has consistently upheld access rights for the public and the media, holding that "the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one."²⁰⁰ As Jacobs said, this means "[d]isclosing an expunged conviction could not be prohibited or punished as long as the information was lawfully obtained."²⁰¹

This preference for transparency and deference to First Amendment norms also exists in the commercial context, but at least one court was willing to suggest the protections are not as strong.²⁰² FCRA, which prohibits reporting certain types of criminal records after a certain amount of time, was considered constitutional by a federal district court before the case was settled in 2014. That left the constitutional issue for another day, however, and still would not affect the third-party dissemination problem. Once the

197. JACOBS, *supra* note 6, at 171 (referencing how Spanish Constitution's protections for free speech are much weaker than the First Amendment).

198. 489 U.S. 749 (1989).

199. JACOBS, *supra* note 6, at 174.

200. *Globe Newspaper v. Superior Ct.*, 457 U.S. 596, 606 (1982).

201. JACOBS, *supra* note 6, at 177.

202. *King v. Gen. Info. Servs.*, 903 F. Supp. 2d 303, 308 (E.D. Pa. 2012).

information is in the hands of the press or a publisher, the First Amendment's free speech guarantee seems to provide strong protection.²⁰³

That final point also seems to extend to the types of entities that enable most of the access to such information, such as Google. Google and other firms have resisted regulation, citing the First Amendment rights to expression. Google claims possession of the information,²⁰⁴ or the indexing of the information, and then tethers it to First Amendment concepts to fashion its arguments against erasure. Frank Pasquale has coined this "free speech fundamentalism."²⁰⁵ Concepts of ownership, property, speech, and expression are bundled to resist regulation. These arguments exist against a historical backdrop of deference to web-based companies. For example, § 230 of the Communications Decency Act of 1996,²⁰⁶ shields website owners from liability for user-generated content. As Zuboff notes, this enables a site like TripAdvisor to have negative hotel reviews.²⁰⁷ Sharing criminal record history information is just another form of the same activity.

2. The Limits of Privacy Law

Because the First Amendment provides presumptively strong protection to the majority of the keepers of such information, a counterweight is necessary to regulate dissemination of the information. The Supreme Court and lower courts have referenced privacy in decisions.²⁰⁸ But the limits of privacy as a theoretical rationale for the RTBF rest in the reality that no singular theory of privacy seems to exist, and the fact that American law contains competing paradigms without preference for one or the other. Further, existing statutory privacy protections are treated as the exception to the norm of transparency, and legislation based on

203. JACOBS, *supra* note 6, at 187 ("[I]f a media organization or private person gets hold of and publishes personal medical information or grades, that disclosure would be protected by the First Amendment's free speech guarantee.").

204. Zuboff synthesizes these declarative, possessory claims into six overarching principles: (1) human experience is raw material that can be claimed for free; (2) such experience can be translated; (3) such experiential data can be owned; (4) the right to take and own confers the right to know; (5) the right to take, own, and know confers the right to use and decide how to use; and (6) number 5 confers rights to preserve such rights. ZUBOFF, *supra* note 2, at 179.

205. *Id.* at 109.

206. 47 U.S.C. § 230.

207. ZUBOFF, *supra* note 2, at 110.

208. *See supra* Part II.

privacy rights has failed to progress in numerous states. And post-9/11, mass surveillance for security purposes displaced any robust sense of privacy, especially on the web.²⁰⁹

a. Limits in Theories of Privacy

The concept of privacy under American law is unlikely to provide firm footing for something akin to the RTBF. Privacy as a legal concept is simultaneously lauded as legitimate while critiqued as incoherent, vague, and underwhelming.²¹⁰ Daniel Solove has written extensively on the difficulties of understanding privacy and how scholars and judges have struggled to define it, looking unsuccessfully for the “holy grail” that is the “common denominator” of privacy.²¹¹ Possible definitions have included the right to be let alone, limiting access to oneself, secrecy and concealment of personal information, the ability to control personal information, personhood, and intimacy.²¹² Solove contends all of these strive to reduce privacy to a set of necessary and sufficient conditions, and all of them are subject to being labeled overbroad, vague, or too narrow.²¹³ He proposes a different understanding, opting for a patchwork approach that essentially leads to a taxonomy that illustrates privacy, but does not define it with clear-cut boundaries.²¹⁴

Examining each of the proposed definitions indicates how they are imperfect for grounding the erasure of criminal record information held by private parties. The right to be let alone—first developed by Samuel Warren and Louis Brandeis in *The Right to Privacy* in the *Harvard Law Review*²¹⁵—influenced the development of numerous privacy related torts.²¹⁶ But as Solove points out, this conception suffers from a definitional problem by begging the question. After all, in order to know when someone has the right to be let alone, knowledge of which areas of life are private is essential.²¹⁷ But Warren and Brandeis never clarified those parameters.

209. ZUBOFF, *supra* note 2, at 114 (noting how the FTC switched to a concrete harms-based model for enforcement of privacy violations after 9/11).

210. *See, e.g.*, DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 1–8 (2008).

211. *Id.* at 38.

212. *Id.* at 12–13.

213. *Id.* at 1–9, 12–13.

214. *Id.* at 9–11, 43.

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

216. SOLOVE, *supra* note 210, at 16 (citing DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 31 (2d ed. 2006)).

217. *Id.* at 17 (“Understanding privacy as being let alone does not inform us about the

Further, with respect to criminal record history information, the antisocial, *public* conduct that led to the creation of such information in the first place suggests a right to privacy with respect to the nature of that conduct is unlikely. Even conceiving this right as the ability to remain secluded²¹⁸ is problematic, considering the rationale for the right to be forgotten with respect to arrestees and ex-offenders is the need for reentry, which is the opposite of the ability to hide.

Another conception of privacy involves the notion of limited access. Solove traces this idea to E.L. Godkin, who framed it as the “right of every man to keep his affairs to himself, and to decide for himself to what extent they shall be the subject of public observation and discussion.”²¹⁹ Contemporary scholars who share this conception refer to it as the ability to limit access to one’s personal affairs.²²⁰ Basically, it involves the ability to exclude, preserving for oneself a sphere of activity, thoughts, and knowledge for which permission is required to access. But Solove points out how this understanding suffers from the same problem as the right to be let alone—it does not have a uniform understanding of *which* areas of life are worthy of limited access.²²¹ In short, knowing what is private seems to be an antecedent question to knowing when access should be limited.

Solove’s third concept of privacy relates to secrecy and concealment, and as then-Judge Richard Posner put it, involves when information that one desires to be concealed is shared without that person’s consent.²²² This notion of privacy involves the ability to contain the facts that one does not wish to have public. It is mostly about the *power* to only release certain information about oneself.²²³ But this conception implies a corollary. As Solove points out, “the view of privacy as secrecy often leads to the conclusion that once a fact is publicly divulged—no matter how limited or narrow the disclosure—it can no longer remain private.”²²⁴ This comports

matters in which we should be let alone.”)

218. *Id.* at 18–19.

219. *Id.* at 19 (citing E.L. Godkin, *Libel and Its Legal Remedy*, 12 J. SOC. SCI. 69, 80 (1880)).

220. *Id.* (citing Hyman Gross, *The Concept of Privacy*, 43 N.Y.U. L. REV. 34, 35–36 (1967)).

221. *Id.* at 20 (“Without a notion of what matters are private, limited-access conceptions do not tell us the substantive matters for which access would implicate privacy.”).

222. *Id.* at 21 (citing RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 272–73 (1981)).

223. POSNER, *supra* note 222, at 234.

224. SOLOVE, *supra* note 210, at 22.

with Supreme Court doctrine under the 4th Amendment, like the test for the threshold of what constitutes a search: whether the person could reasonably expect privacy in the particular area or thing to be searched.²²⁵ Applied to the criminal records arena, privacy as secrecy seems like a nonstarter given that crime is rarely, if ever, fully secret, and the proceedings themselves (which form the basis of the records) are almost always public.

The fourth understanding of privacy involves the ability to control information about oneself.²²⁶ Solove references theorists like Alan Westin, Arthur Miller, and Charles Fried, who essentially link privacy to one's ability to control information circulation.²²⁷ The Supreme Court has referenced this theory before, stating how privacy involves the individual's "control of information concerning his or her person."²²⁸ Like the limited access understanding above, the focus is on *information*. This leads to charges that this conception is too narrow, forgetting about *activities* many would consider private.²²⁹ More importantly for purposes of the argument presented here, this conception still begs the question: *which* information is worthy of being controlled. Richard Parker references any information that can be sensed by others as private.²³⁰ Of course, that is very broad. A second problem also exists, namely what is meant by "control." Is ownership the linchpin, such that property concepts inform privacy? What about one's labor? Solove aptly points to how linking control to the "fruits of one's labor," in a Lockean sense, necessarily widens the net of control quite far, implicating the realities of human nature when it comes to third party knowledge. Solove writes:

Extending property concepts to personal information, however, has difficulties. Information can be easily transmitted and, once known by others, cannot be eradicated from their minds Personal information is often formed in relationships with others. All parties to that relationship have some claim to the information.²³¹

The problem with applying this understanding to criminal records history information held by third parties should be apparent. Some

225. *Katz v. United States*, 389 U.S. 347, 351 (1967).

226. SOLOVE, *supra* note 210, at 24.

227. *Id.*

228. *U.S. Dep't of Just. v. Repts. Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989).

229. SOLOVE, *supra* note 210, at 25.

230. *Id.* (citing Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 276, 280 (1974)).

231. SOLOVE, *supra* note 210, at 27.

of those parties have significant relational connections to the criminal justice system. Victims are part of cases, as are witnesses, and the media rightfully reports on interactions with the criminal justice system. Put simply, it seems difficult to claim that arrestees and ex-offenders have an ownership interest in information generated by virtue of the criminal justice process. Solove, anticipating this, references the case of *Haynes v. Alfred A. Knopf, Inc.*, where Judge Richard Posner, writing for the 7th Circuit, stated: “[a] person does not have a legally protected right to a reputation based on the concealment of the truth.”²³² In short, shared information rarely belongs to one person, making the link between privacy and control impracticable.

Another possible conception involves the idea of personhood, or the ability to construct one’s unique personality. Solove labels this theory “dignitarian,” rooted in the idea that individuals have the ability to choose the course for their lives.²³³ This theory, of course, is synergistic with pronouncements by the Supreme Court in major cases like *Griswold v. Connecticut*²³⁴ and *Planned Parenthood v. Casey*.²³⁵ In the latter, Justice Anthony Kennedy famously defined liberty as the “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”²³⁶ Privacy is thus necessarily tethered to a sphere of liberty beyond the reach of the state. The problem with this theory and the maintenance and usage of criminal records is that existing criminal law presumes that the subject of the records has chosen²³⁷ to engage in the conduct that is represented in the record, and that choice was in many instances *public*. Thus, the reduction to liberty is not actually helpful for the person with the record. More pointedly, the definitional problem referenced above remains, but in another form. In particular, what constitutes personhood? And what are its necessary conditions such that an imposition implicates privacy? What is constitutive of one’s identity? Can one construct identity by erasing the past? In order to preserve a path for her desired

232. 8 F.3d 1222, 1228 (7th Cir. 1993).

233. SOLOVE, *supra* note 210, at 30 (referencing the work of several scholars who nestle this understanding of privacy in the human dignity, the uniqueness of persons, and their ability to choose the direction for their lives).

234. 381 U.S. 479 (1965).

235. 505 U.S. 833 (1992).

236. *Id.* at 851.

237. Of course, while the law presumes free choice, it is well known that not all instances of involvement with the criminal system are by choice. For example, the initiation of baseless charges and the improper use of discretion by law enforcement (in for example, stopping individuals) enmesh individuals in the system.

future? This theory has varied answers.²³⁸ In fairness, some answers would leave room for a right to be forgotten, arguing that the persistent existence of public criminal records amounts to a sort of totalitarian surveillance that undermines the ability to act freely and autonomously in a fashion that contributes to identity.²³⁹ Zuboff suggests something similar when discussing the “right to a future tense” being obliterated by behavior control through data mining and sharing.²⁴⁰ But that is only one conception of personhood, not to mention there are tons of state activities that do just that, and that we would not consider problematic.²⁴¹ Thus, this theory, overall, would struggle to coherently serve as the basis of a right to be forgotten for the individual who has encountered the criminal justice system.

In sum, existing theories of privacy are unlikely to fortify legal structures designed to limit or incentivize private usage and dissemination of information that has been ordered expunged.

b. Limits of Privacy Protections in Existing Law

Despite the default position of open access to public records mentioned above in section II.A, and the amorphous nature of defining privacy, legislatures have passed laws designed to protect privacy. These laws arose when fears about national computerized databases entered the political arena.²⁴² Congress passed the Privacy Act in 1974 as a response.²⁴³ The Privacy Act gives individuals the right to access and correct information held by federal agencies and restricts the collection abilities of federal agencies, as well as their ability to disclose information.²⁴⁴ Additionally, the maintenance of the information must be “relevant and necessary” to accomplish a

238. SOLOVE, *supra* note 210, at 31–32. Solove references the work of Jed Rubenfeld, who has critiqued this theory at length. *See id.*; Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 773–82 (1989).

239. Rubenfeld, *supra* note 238, at 782–94.

240. ZUBOFF, *supra* note 2, at 20.

241. SOLOVE, *supra* note 210, at 33 (referencing state activities that contribute to the formation of the identity, and that are often mandatory, which are not considered invasions of privacy).

242. Solove, *supra* note 15, at 1164 (citing MYRON BRENTON, *THE PRIVACY INVADERS* 14 (1964); then citing ALAN F. WESTIN, *PRIVACY AND FREEDOM* (1967); and then citing Kenneth L. Karst, “*The Files*”: *Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 L. & CONTEMP. PROBS. 342, 359–63 (1966)).

243. 5 U.S.C. § 552a(b).

244. *Id.*

purpose of the agency.²⁴⁵ Despite these protections, scholars have criticized the effect of the Privacy Act's provisions as relatively minor, failing to inhibit agency use²⁴⁶ of some information, like Social Security Numbers.²⁴⁷ Most importantly for purposes of this Article, the Privacy Act does not apply to state or local agencies, or to court records,²⁴⁸ and leaves little room for remedies in the wake of violations.²⁴⁹

As mentioned above, 9/11 also altered the environment for crafting privacy protections in law, especially as it relates to information, such as criminal history, that might inform security efforts.²⁵⁰ After 9/11, the federal government and corporations like Google began a de facto public and private partnership that operationalizes the desire to speedily obtain information relevant to national security interests.²⁵¹ Prior to 9/11, Congress was beginning to regulate activities on the internet.²⁵² After 9/11, agencies like the National Security Agency were all ears when it came to learning about Google's information apparatus. Intelligence and mass data expenditures spiked after the terrorist attacks.²⁵³ As Zuboff notes, in 2004, the United States General Accounting Office ("GAO") "surveyed 199 data-mining projects across dozens of federal agencies and more than 120 programs developed to collect and analyze personal data to predict individual behavior."²⁵⁴ Google search technology was being used to outfit federal agencies around the same time.²⁵⁵

Finally, private litigation actions have largely been unsuccessful when using privacy law as a sword. Cases involving allegations of privacy violations after otherwise expunged information was shared have been unsuccessful. Court decisions suggest that the

245. *Id.* § 552a(e)(1).

246. The "routine use exemption" in the Privacy Act is largely considered to be a "huge loophole." Schwartz, *supra* note 178, at 585–87 (citing DAVID H. FLAHERTY, *PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES* 323 (1989)).

247. Solove, *supra* note 15, at 1166–67.

248. 5 U.S.C. §§ 551(1)(B), 552(f); *United States v. Frank*, 864 F.2d 992, 1013 (3d. Cir. 1988); *Warth v. Dep't of Just.*, 595 F.2d 521, 522–23 (9th Cir. 1979).

249. Robert Gellman, *Does Privacy Law Work?*, in *TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE* 193, 198–99 (Philip E. Agre & Marc Rotenberg eds., 1997).

250. *See supra* note 209 and accompanying text.

251. ZUBOFF, *supra* note 2, at 116.

252. *Id.* at 113–14.

253. *Id.* at 116–17.

254. *Id.* at 116.

255. *Id.* at 117.

publication of truthful information does not violate privacy.²⁵⁶ The Supreme Court, in *Dickerson v. New Banner Institute, Inc.*, held that under federal law, a state expungement does not erase the fact of the criminal record.²⁵⁷

c. Limits of Privacy Protections in Proposed Legislation

With respect to any formal recognition of the RTBF in the United States, some states have attempted legislation. The Right to be Forgotten Act was introduced in February 2017 in New York and quickly met First Amendment challenges. According to the bill's summary, the law would have required search engines, indexers, publishers, and any other persons or entities, "which make available, on or through the internet or other widely used computer-based network, program or service, information about an individual to remove such information, upon the request of the individual, within thirty days of such request."²⁵⁸ Failing to comply would have resulted in a \$250 per day fine.²⁵⁹ The bill has not moved beyond the governmental operations committee since January 2018.²⁶⁰ Governor Andrew Cuomo, in his 2020 executive budget, also proposed an amendment for New York's Freedom of Information Law that would ban the dissemination of mugshots and "booking information" requested by the public unless the release served a "specific law enforcement purpose."²⁶¹ The proposal was designed to combat websites who forced arrestees to pay to remove their photos even after the arrestees had been exonerated or the charges had been dropped.²⁶² The New York Civil Liberties Union opposed the

256. *Gates v. Discovery Commc'ns, Inc.*, 101 P.3d 552, 562 (Cal. 2004) ("[A]n invasion of privacy claim based on allegations of harm caused by a media defendant's publication of facts obtained from public official records of a criminal proceeding is barred by the First Amendment to the United States Constitution."); *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995) ("[D]isclosed information itself must warrant constitutional protection" and an expunged criminal record "is not protected by the constitutional right to privacy.").

257. 460 U.S. 103, 121–22 (1983).

258. *A05323 Bill Summary*, N.Y. ST. ASSEMBLY (Jan. 3, 2018), https://assembly.state.ny.us/leg/?default_fld=&bn=A05323&term=2017&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y [<https://perma.cc/7EF8-9CEQ>]; *A05323*, 2017–2018 State Assemb., Reg. Sess. (N.Y. 2017).

259. Allison Grande, *NY's 'Right to be Forgotten' Bill Needs Narrower Focus*, LAW360 (Mar. 28, 2017, 6:54 PM), <https://www.law360.com/articles/906491/ny-s-right-to-be-forgotten-bill-needs-narrower-focus> [<https://perma.cc/Q798-W7EK>].

260. *A05323 Bill Summary*, *supra* note 258.

261. *Legislative Memo: "Mugshot" and Booking Information Ban*, NYCLU, <https://www.nyclu.org/en/legislation/legislative-memo-mugshot-and-booking-information-ban> [<https://perma.cc/JFX4-ZUBE>]; A02005C, 2019–2020 State Assemb., Reg. Sess. (N.Y. 2019).

262. *Legislative Memo: "Mugshot" and Booking Information Ban*, *supra* note 261.

proposal, arguing that it was overbroad, failed to define “booking information,” and would allow for police to control too much of the information disseminated to the public.²⁶³ The NYCLU was concerned that the measure restricted public access to information while allowing the government to disseminate the information as it saw fit. Nevertheless, Governor Cuomo signed this amendment on April 12, 2019.²⁶⁴

California is perhaps the leader when it comes to initiatives that share the premises of the RTBF. California’s “Online Erasure” Law went into effect on January 1, 2015.²⁶⁵ The law permits minors to “request and obtain the removal of content or information posted on the operator’s Internet Web site [or] service.”²⁶⁶ Notably, information posted by a third party is beyond the reach of the law.

Five years later, California’s Consumer Privacy Act (“CCPA”) went into effect. This law purports to give residents several rights:

- (1) the right to know what a company’s data practices are, including what information they collect about consumers;
- (2) the right to opt-out of the sale of their personal information;
- (3) the right to access certain data and have it deleted; and
- (4) the right to receive full service from companies at an equal price even if they exercise those privacy rights.²⁶⁷

The reach of this law—meaning to which companies it applies—is the issue, however. Unlike the GDPR, the law applies only to companies with gross revenue of more than \$25 million that sell data on more than 50,000 consumers a year and earn at least 50% of its revenue from selling personal information from consumers.²⁶⁸ These conditions do not apply to all background check companies.

More recently, the California Privacy Rights Act of 2020 (“CPRA”) was on the ballot in November 2020 and passed.²⁶⁹ It will

263. *Id.*

264. *A02005 Summary*, N.Y. ST. ASSEMBLY (Apr. 12, 2019), <https://nyassembly.gov/leg/?bn=A02005&term=2019> [<https://perma.cc/X6UM-K4FW>]; A02005C, 2019–2020 State Assemb., Reg. Sess. (N.Y. 2019).

265. S. 568, 2013–2014 State Assemb., Reg. Sess. (Cal., 2013), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568 [<https://perma.cc/8AJ2-2DJE>].

266. *Id.*

267. Dominique-Chantale Alepin, *Social Media, Right to Privacy and the California Consumer Privacy Act Competition*, 29 CAL. LAWS. ASS’N. J. ANTITRUST & UNFAIR COMPETITION L., 100–01 (2019).

268. *Id.* at 100–02.

269. Lothar Determann, *California Privacy Rights Ballot Initiative: Businesses, Watch This Space*, THE RECORDER (May 22, 2020), <https://www.law.com/therecorder/2020/05/22/california-privacy-rights-ballot-initiative-businesses-watch-this-space> [<https://perma.cc/Q2ML-4D67>].

go into effect January 1, 2023.²⁷⁰ Interestingly, the CPRA would establish a government agency to enforce the law and regulations to privacy protection passed to date in California.²⁷¹ This would remove enforcement from the province of the Attorney General. The CPRA also includes a new right to correction to allow consumers to correct information businesses collect about them.²⁷² But the CPRA also heightens the threshold for consumers of a business in order for the law to apply to that business, meaning the reach of the privacy protections is smaller.²⁷³ The full effect of the law is still being discussed by privacy scholars.²⁷⁴

Other legislatures have contemplated the RTBF but not made much progress. Iowa's legislature has considered the Right to be Forgotten Act.²⁷⁵ This bill allowed individuals to request certain content be removed from the internet, but the content had to be of "minimal value."²⁷⁶ Content with "minimal value" was defined as "information related to an individual that is inaccurate, irrelevant, inadequate, or excessive" and included information that is no longer relevant, particularly in comparison to the harm it is causing an individual.²⁷⁷ A request under the law put the ball in the information holder's court, suggesting removal or that the holder notify the requestor why the information will not be removed. The bill remains under consideration after being amended in March 2020.²⁷⁸

Washington came close to passing a Privacy Act in 2020.²⁷⁹ While the Act prioritized protecting consumer data rather than a right to be forgotten, it did allow for error correction by consumers.²⁸⁰ The Hawaii House of Representatives has contemplated an amendment to the state constitution that would permit individuals

270. *Id.*; see also Alepin, *supra* note 267, at 100–01.

271. Determann, *supra* note 269; Alepin, *supra* note 267, at 100–01.

272. Determann, *supra* note 269; Alepin, *supra* note 267, at 100–01.

273. Determann, *supra* note 269; Alepin, *supra* note 267, at 101.

274. Determann, *supra* note 269; Alepin, *supra* note 267, at 102.

275. S. 2351, 88th Gen. Assemb., Reg. Sess. (Iowa 2020), <https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=SF%202351> [<https://perma.cc/H3BC-3NRR>].

276. *Id.*

277. *Id.*

278. *Id.*

279. S. 5376, 66th Leg., Reg. Sess. (Wash. 2019), <https://lawfilesextra.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5376-S2.pdf?q=20200720194042> [<https://perma.cc/3F35-4CY2>].

280. Mark Harmsworth, *Small Business and 'The Right to be Forgotten'*, WASH. POL'Y (Mar. 20, 2020), <https://www.washingtonpolicy.org/publications/detail/small-business-and-the-right-to-be-forgotten> [<https://perma.cc/PKV5-TSMM>].

to request information be deleted from the internet.²⁸¹ The bill, titled “Proposing an Amendment to the State Constitution Establishing the Right to be Forgotten,” was similar in its wording to the Iowa bill mentioned above.²⁸² Specifically, it allowed individuals to request deletion of “information regarding themselves that is published on the Internet when the information is found to be no longer necessary or is irrelevant for the original purposes for which the information was collected.”²⁸³ The amendment was introduced in 2018 and little progress has been made.²⁸⁴ New Mexico’s legislature considered the “Right to Be Forgotten Act,” which required “certain persons that provide public information to remove damaging information upon request.”²⁸⁵ This bill was very similar to New York’s law and has been tabled indefinitely since February 2019.²⁸⁶ A similar bill in Massachusetts has not made progress since 2016.²⁸⁷

This activity at the state level communicates a push by some parties in the United States to begin to regulate how data is used and disseminated. The U.S. Chamber of Commerce suggested model privacy legislation that would allow for data deletion requests by consumers, but the legislation had exceptions for data considered free speech.²⁸⁸ At the congressional level, Senator Mark Warner published a white paper with policy proposals mirroring measures in the GDPR, including something akin to the RTBF.²⁸⁹

But acceptable norms moving forward remain in flux, and the RTBF risks being lost within a broader discussion regarding online

281. H.R. 2572, 30th Leg., Reg. Sess. (Haw. 2020), https://www.capitol.hawaii.gov/session2020/bills/HB2572_HD1_.HTM [<https://perma.cc/R5XW-CXJA>].

282. H.R. 2223, 29th Leg., Reg. Sess. (Haw. 2018), https://www.capitol.hawaii.gov/session2018/bills/HB2223_.pdf [<https://perma.cc/2R2Z-S3G5>].

283. *Id.*

284. Hurubie Meko, *Beyond ‘Clean Slate’: Some Privacy Advocates Argue for ‘a Right to be Forgotten’*, LANCASTER ONLINE (Jan. 21, 2019), https://lancasteronline.com/news/local/beyond-clean-slate-some-privacy-advocates-argue-for-a-right-to-be-forgotten/article_ba3bd458-1b4f-11e9-8a01-1b33b204a2e5.html [<https://perma.cc/UKD6-7ZJH>].

285. H.R. 437, 54th Leg., Reg. Sess. (N.M. 2019), <https://nmlegis.gov/Legislation/Legislation?Chamber=H&LegType=B&LegNo=437&year=19> [<https://perma.cc/QA4U-HYL7>].

286. *Id.*

287. H.R. 1356, 189th Gen. Ct., Reg. Sess. (Mass. 2015), <https://malegislature.gov/Bills/189/H1356> [<https://perma.cc/9ZAG-DMV3>].

288. *U.S. Chamber Releases Model Privacy Legislation, Urges Congress to Pass a Federal Privacy Law*, U.S. CHAMBER OF COM. (Feb. 13, 2019), <https://www.uschamber.com/technology/us-chamber-releases-model-privacy-legislation-urges-congress-pass-federal-privacy-law> [<https://perma.cc/ZJ4B-PRFW>].

289. MARK R. WARNER, POTENTIAL POLICY PROPOSALS FOR REGULATION OF SOCIAL MEDIA AND TECHNOLOGY FIRMS 15 (2018).

platforms regulating political speech. This is an illustration of how speech norms continue to dominate the discussion. For example, both major political parties have conveyed concern regarding the lack of accountability social media platforms have in the United States. The administration of President Donald Trump launched the tech bias reporting tool in May 2019 to combat political censorship.²⁹⁰ President Trump issued an Executive Order in May 2020, claiming that “[o]nline platforms are engaging in selective censorship that is harming our national discourse.”²⁹¹ The Center for Democracy and Technology challenged this Order, claiming it violated the First Amendment rights of social media platforms.²⁹² Now there are proposals to amend § 230 of the Communications Decency Act to require social media companies to obtain certification that they are acting in a politically neutral fashion.²⁹³ And Speaker of the House Nancy Pelosi has expressed similar concerns about § 230.²⁹⁴

Unsurprisingly, social media companies have responded by attempting to create content oversight boards that moderate user content. Facebook outsourced this job to a third party Oversight Board that reviews content disputes.²⁹⁵ Twitter’s fact-check program began in May 2020, during the COVID-19 pandemic, and was designed to combat COVID-19 misinformation.²⁹⁶ This policy of intervention, not fully available to the public, was later used to combat users of Twitter who desired to “manipulat[e] or interfer[e] in elections or other civic processes.”²⁹⁷ But these efforts have also been attacked as violating the First Amendment rights of users.²⁹⁸

290. Emily Birnbaum, *White House Launches Tool for Reporting Social Media ‘Bias’*, THE HILL (May 15, 2019, 5:45 PM), <https://thehill.com/policy/technology/443934-white-house-launches-tool-for-reporting-social-media-bias> [<https://perma.cc/BQD5-QRCL>].

291. Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (June 2, 2020).

292. Makena Kelly, *Trump’s Twitter Order Violates the First Amendment, New LawsUIT Claims*, THE VERGE (June 2, 2020, 4:57 PM), <https://www.theverge.com/2020/6/2/21278517/donald-trump-twitter-executive-order-lawsuit-challenge> [<https://perma.cc/7AYC-QFNX>].

293. Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2019).

294. Eric Johnson, *Nancy Pelosi Says Trump’s Tweets “Cheapened the Presidency”—and the Media Encourages Him*, VOX (Apr. 12, 2019, 12:50 PM), <https://www.vox.com/2019/4/12/18307957/nancy-pelosi-donald-trump-twitter-tweet-cheap-freak-presidency-kara-swissher-decode-podcast-interview> [<https://perma.cc/VL9Y-7RYD>].

295. *Oversight Board Bylaws*, FACEBOOK 5 (Jan. 2022), https://about.fb.com/wp-content/uploads/2020/01/Bylaws_v6.pdf [<https://perma.cc/V7B9-AB77>].

296. Yoel Roth & Nick Pickles, *Updating Our Approach to Misleading Information*, TWITTER BLOG (May 11, 2020), https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html [<https://perma.cc/A7U2-7YGF>].

297. *Civic Integrity Policy*, TWITTER (Oct. 2021), <https://help.twitter.com/en/rules-and-policies/election-integrity-policy> [<https://perma.cc/3BT8-GXJP>].

298. Elizabeth Culliford & Katie Paul, *With Fact-Checks, Twitter Takes on a New Kind*

While these issues are beyond the purview of this Article, they are indicative of the *climate* in which any proposed RTBF initiative—national or state—is likely to be perceived. The reality is that the First Amendment will continue to be used as a sword by those using technology to disseminate (or withhold) information, and that any law permitting the RTBF will be viewed as anathema to the First Amendment rights of the party holding the information.

Further, without clarity as to who *owns* the information and data, robust rights for individuals are unlikely to follow. This is a key distinction between the EU and American approach. As Haber notes, the EU decided to recognize control over some personal information, whereas American law remains ambiguous at best and frankly deferential to the large technology firms accumulating the data (and claiming ownership without question) in the first place.²⁹⁹ This conflict over ownership of the data has downstream effects on whether something like the right to be forgotten actually conflicts with free speech and expression principles.³⁰⁰ The weaponization of data accumulation and dissemination through reference to speech norms will continue. And that assumes that arrestees or those who have been convicted could even claim ownership in the data.

In sum, neither theories of privacy, existing privacy law, nor recent legislation relating to the RTBF provide much promise for enforcing expungement against private actors. Entrenched free speech and expression norms help to ensure expungement is incomplete.

3. The Limits of Reputation Law

Reputation finds little protection in American constitutional, statutory, or common law. No federal constitutional right to reputation exists. In *Paul v. Davis*, where a local police chief sent photographs of “active shoplifters” to local businesses for posting, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment did *not* address the tortious, defamatory acts of public

of Task, REUTERS (May 30, 2020, 6:31 PM), <https://www.reuters.com/article/us-twitter-factcheck/with-fact-checks-twitter-takes-on-a-new-kind-of-task-idUSKBN2360U0> [<https://perma.cc/T4DE-YNSG>]; Kelly Tyko, *Trump Threatens to ‘Strongly Regulate’ or ‘Close Down’ Social Media Platforms After Twitter Fact Check*, USA TODAY (May 27, 2020, 9:28 AM), <https://www.usatoday.com/story/tech/2020/05/27/election-fact-check-trump-twitter-mail-in-ballots/5265036002/> [<https://perma.cc/6S7E-JFKY>].

299. See Haber, *supra* note 12, at 370–71.

300. *Id.* at 371.

officials.³⁰¹ The Sixth Circuit relied on a similar case, *Wisconsin v. Constantineau*,³⁰² to hold in favor of a right to reputation in *Paul v. Davis*.³⁰³ In *Constantineau*, there was a similar effort to brand alcoholic patrons of liquor stores with no property interest involved.³⁰⁴ As Jacobs has summarized, “[r]eputational damage resulting from dissemination of arrest information did not violate a property or liberty interest protected by the Due Process Clause.”³⁰⁵

Without the protection of the federal Constitution, common law torts like defamation and invasion of privacy might be relevant to protect one’s reputation.³⁰⁶ Defamation law is designed to protect against the spreading of false rumors. There are two types: libel and slander. Libel involves written or recorded words; slander involves oral communications.³⁰⁷ For the law to provide protection, a statement must be false and harmful to one’s reputation.³⁰⁸ Further, the speaker must be acting culpably; reasonable mistakes are a defense.³⁰⁹ Plaintiffs must prove falsity,³¹⁰ which is of course a troubling requirement for someone trying to *reduce exposure* of previously negative information in the case of an expungement. The resurfacing of the information in the suit itself in order to prove or disprove the claim chills the use of litigation in the first place.³¹¹ More importantly for our purposes, the First Amendment protects the publication of truthful information, even if it is damaging to someone’s reputation.³¹² This includes the private dissemination of criminal history records.³¹³

301. 424 U.S. 693, 694–95, 712 (1976).

302. 400 U.S. 433 (1971).

303. 424 U.S. at 697.

304. 400 U.S. at 434, 437.

305. JACOBS, *supra* note 6, at 206.

306. *See Gertz v. Robert Welch*, 418 U.S. 323, 345–46 (affirming that states have wide latitude in defining common law standards for defamatory statements injurious to a private individual’s reputation).

307. RESTATEMENT (SECOND) OF TORTS § 568 (AM. L. INST. 1977).

308. DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 118 (2007).

309. RESTATEMENT (SECOND) OF TORTS §§ 580A, 580B (AM. L. INST. 1977).

310. *Id.*

311. *See* RICHARD A. POSNER, *OVERCOMING LAW* 545 (1995); SOLOVE, *supra* note 308, at 120–21 (discussing story of a man who sued for defamation, only to lead to the mass discovery of the information he alleged was untruthful).

312. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496–97 (1975) (holding that accurately publishing information obtained from public records is not sanctionable).

313. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580–81 (1980).

In other words, the Supreme Court has constitutionalized the tort of defamation, subjecting it to scrutiny under the First Amendment. Doris Del Tosto Brogan notes that how successful expungement petitioners are classified could make a difference under existing defamation law: “Are expungees limited purpose public figures, private figures involved in matters of public interest, or simply private figures?”³¹⁴ However, whether classified as public figures or private figures in matters of public interest does not seem to make a difference under existing law, as the falsity of the underlying event would still need to be proved.³¹⁵ Brogan suggests that the Supreme Court has never addressed this question directly.³¹⁶ In *Dickerson v. New Banner Institute, Inc.*, the Court hinted that expungement means no more, for purposes of federal law, than that the state has mitigated the effects of the record under state law.³¹⁷

Invasion of privacy torts can also be used to protect reputation. The most plausible torts in this field are probably related to the public disclosure of private facts and false light, respectively, but the types of facts considered protected are limited,³¹⁸ and the crucial element of false light—proving falsity—is difficult when the historical event underlying the criminal record was true.³¹⁹ But because criminal records are not considered private facts, and instead are conceived as public records, this tort is unlikely to provide protection.³²⁰

In sum, the question is this: can an individual who has achieved an expungement bring a cause of action against a private entity or individual who shares expunged criminal history information? The answer, under current law, is no. Under *Cox Broadcasting Corp. v. Cohn*, the Supreme Court protected the publication of criminal matters of public interest.³²¹ And because public criminal records

314. Brogan, *supra* note 93, at 32.

315. *Id.* at 31–32 (noting standards established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

316. *Id.* at 32–33.

317. 460 U.S. 103, 114–15 (1983).

318. SOLOVE, *supra* note 308, at 119.

319. *See* Brogan, *supra* note 93, at 6.

320. Haber, *supra* note 12, at 366–67, 376.

321. 420 U.S. 469, 496 (1975). *Cox Broadcasting* was followed by several other cases holding similarly. *See also* *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (holding that statute prohibiting publication of truthful information identifying juvenile offender violated First Amendment); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978) (prohibiting criminal punishment for news media publication of truthful information); *Okla. Publ'g Co. v. Dist. Ct.*, 430 U.S. 308 (1977) (protecting publication of truthful information about minor

necessarily relate to the public interest, *Cox Broadcasting* provides a defense to the entity publishing information otherwise expunged.

Brogan has entertained the idea of whether a petitioner, having obtained an expungement, could use defamation or false light torts as a way to obtain relief.³²² But the Second Circuit, in *Martin v. Hearst Corp.*, appears to have rejected this theory.³²³ Although the plaintiff had obtained an expungement under the state statute, and that statute *permitted* the plaintiff to deny the record *ever existed*,³²⁴ the information ultimately published was true. The statute could not change that for purposes of tort law, meaning the plaintiff was powerless to stop the spread of information by private parties. Even a notion of “constructive falsity,” propped up by the guarantees of a strong state expungement law, seems doomed to fail under existing Supreme Court precedent because it would constitutionalize a totally different definition of truth than exists in current precedent.³²⁵ *Martin* essentially formalized, in case law, the limits of the expungement law at issue. Thus, existing reputation law does not provide much promise for extending the reach of expungement law.

C. *The Limits of Private Expungement: The Case of Private Expungement by Newspapers*

Newspapers and media organizations have responded to this problem by moving towards private expungement of their own records over the past few years.³²⁶ This practice follows earlier litigation against pernicious sites that shared mugshots of individuals and only allowed removal for a high price.³²⁷ News publications started to change their policies relating to mugshots and the reporting of crime, opting to publish fewer mugshots and allow

in criminal proceeding).

322. Brogan, *supra* note 93, at 6.

323. 777 F.3d 546, 552–53 (2d Cir. 2015).

324. CONN. GEN. STAT. ANN. § 54-142a(e)(3) (2016). Similar laws exist elsewhere. Brogan, *supra* note 93, at 18–19.

325. See Brogan, *supra* note 93, at 36–40.

326. This section builds from a more in-depth treatment of mine of the phenomenon of expungement by newspapers, which originally appeared in the *Northwestern Law Review Online*. Murray, *supra* note 31 (documenting examples of newspaper expungement and considering normative implications of the practice).

327. LAGESON, *supra* note 12, at 84–85 (describing mugshot litigation).

individuals to request the removal of negative information in old stories.³²⁸

A few examples illustrate the point. Gatehouse Media, one of the largest news organizations in the United States, stopped using slideshows of mugshots.³²⁹ The *Houston Chronicle* has a similar practice³³⁰ and the *Orlando Sentinel* only publishes mugshots in major crime stories.³³¹ The *New Haven Independent* has a policy against publishing photos or names of arrestees unless a public figure or public emergency is involved or they are able to interview the person accused.³³² In 2018, the *Biloxi Sun Herald* restricted coverage of crimes to those presenting an imminent safety concern and that were part of a trend.³³³ WCRB-TV in Chattanooga, Tennessee, allows individuals to request removal of names and photos from old stories associated with minor crimes, such as nonviolent offenses.³³⁴

Since these practices have become public there has been a massive uptick in requests for removal of information from news websites.³³⁵ Newspapers process requests *after* information has been

328. Laura Hazard Owen, *Fewer Mugshots, Less Naming and Shaming: How Editors in Cleveland Are Trying to Build a More Compassionate Newsroom*, NIEMANLAB (Oct. 18, 2018, 9:29 AM), <https://www.niemanlab.org/2018/10/fewer-mugshots-less-naming-and-shaming-how-editors-in-cleveland-are-trying-to-build-a-more-compassionate-newsroom> [https://perma.cc/D23C-8ASQ].

329. Kristen Hare, *Gannett Took Mugshot Galleries Off Former GateHouse Sites Yesterday*, POYNTER (June 10, 2020), <https://www.poynter.org/reporting-editing/2020/gannett-took-mugshot-galleries-off-former-gatehouse-sites-yesterday> [https://perma.cc/TTG2-Y7RW]; Marc Tracy, *Gannett, Now Largest U.S. Newspaper Chain, Targets 'Inefficiencies'*, N.Y. TIMES (Nov. 19, 2019), <https://www.nytimes.com/2019/11/19/business/media/gannett-gatehouse-merger.html> [https://perma.cc/8WTH-HSA3].

330. Keri Blakinger, *Newsrooms Are Rethinking Their Use of Mugshots in Crime Reporting*, POYNTER (Feb. 11, 2020), <https://www.poynter.org/ethics-trust/2020/newsrooms-are-rethinking-their-use-of-mugshots-in-crime-reporting> [https://perma.cc/T6WZ-RZ5N].

331. *Orlando Sentinel Discontinues Arrest Mugshots Database*, ORLANDO SENTINEL (June 12, 2020), <https://www.orlandosentinel.com/about/os-ne-arrest-mugshots-database-ended-20200612-p4hte2i2fbzxn2cpgheuxoe-story.html> [https://perma.cc/JF32-83HH].

332. Shan Wang, *No Mugshot Exploitation Here: The New Haven Independent Aims to Respect the Reputations of Those Arrested in the Community It Covers*, NIEMANLAB (Feb. 14, 2017, 10:57 AM), <https://www.niemanlab.org/2017/02/no-mugshot-exploitation-here-the-new-haven-independent-aims-to-respect-the-reputations-of-those-arrested-in-the-community-it-covers/?relatedstory> [https://perma.cc/29VC-QHQL].

333. Blake Kaplan, *Why the Sun Herald Is Changing How It Covers Crime*, SUN HERALD (Dec. 17, 2018), <https://www.sunherald.com/news/local/article223016770.html> [https://perma.cc/N6HD-JMTF].

334. Callie Starnes, *WRCB to Limit the Use of Mugshots*, WRCB (June 19, 2020), <https://www.wrcbtv.com/story/42268515/wrcb-to-limit-the-use-of-mugshots> [https://perma.cc/XWGG-3-2KJE].

335. Rick Edmonds, *Newspapers Hit With a Wave of Requests to Take Down Embarrassing Archived Stories*, POYNTER (Sept. 30, 2016), <https://www.poynter.org/ethics-trust/2016/>

published. Newspaper editors have created adjudicatory processes that resemble the expungement space to respond to the quantity of requests they have received.³³⁶ The ethics editor for the USA Today Network stated that “take-down requests are weighed on a case-by-case basis with senior editors, and some situations may require legal guidance.”³³⁷

The Cleveland Plain-Dealer was one of the first newspapers to launch a “right to be forgotten” experiment in 2018.³³⁸ Requests tend to relate to identifying information in old news stories that appear in the newspaper’s online archives.³³⁹ A committee considers these requests on a monthly basis and the paper reports approving nearly fifty percent of the requests.³⁴⁰ The editor asked people to join the committee who he thought “would come in with open minds and not be tied to dogmatic tradition.”³⁴¹ *The Boston Globe* has a “Fresh Start Initiative” that is similar to the process at *The Cleveland Plain-Dealer*.³⁴² At its outset, the *Globe* pointed to the “nationwide reckoning on racial justice,” noting how past stories can have a “lasting negative impact on someone’s ability to move forward with their lives.”³⁴³

Why are media entities doing this? The tradition of journalism as the first repository of history and the freedom of the press weigh against it, but news entities point to the existence of the stories as a “social issue” tied to membership in the community.³⁴⁴ The current criminal justice moment, plus the easy accessibility to people’s past facilitated by the internet, has made the harm of perpetual

newspapers-hit-with-a-wave-of-requests-to-take-down-embarrassing-archived-stories [https://perma.cc/YHX8-2AXF].

336. *Id.*

337. *Id.*

338. Chris Quinn, *We’re Expanding Our Right-to-be-Forgotten Experiment*, CLEVELAND.COM (Sept. 12, 2018) [hereinafter *Our Right-to-be-Forgotten Experiment*], https://www.cleveland.com/metro/2018/09/were_expanding_our_right-to-be.html [https://perma.cc/J2N5-XGZK]; Chris Quinn, *Journalists Are Key to a Right to be Forgotten in the United States, and Cleveland.com is Helping Spur the Conversation*, CLEVELAND.COM (Mar. 11, 2020) [hereinafter *Journalists Are Key*], https://www.cleveland.com/news/2019/10/journalists-are-key-to-a-right-to-be-forgotten-in-the-united-states-and-clevelandcom-is-helping-spu-r-the-conversation.html [https://perma.cc/5VZA-XQ26].

339. See sources cited *supra* note 338.

340. See sources cited *supra* note 338.

341. Owen, *supra* note 328.

342. *The Globe’s Fresh Start Initiative: Submit Your Appeal*, BOS. GLOBE, https://www.bostonglobe.com/2021/01/22/metro/globes-fresh-start-initiative-submit-your-appeal/?p1=Article_Inline_Text_Link [https://perma.cc/LB7V-CK9R] (Jan. 22, 2021, 3:35 AM).

343. *Id.*

344. *Id.*

news stories more visible. Reporting on crime with identifying information can have the unintended consequence of long-term stigmatic harm that needs remedying at a later date. Additionally, following up on older news stories to update them with positive developments in someone's life can make a huge difference in reentry.

While the standards utilized by the media entities involved in these determinations are neither uniform nor particularly transparent, for the more difficult cases, *The Cleveland Plain-Dealer* asks “whether the value to the public of maintaining the stories with names is greater than the value to the subjects of the stories in having their names removed.”³⁴⁵ The *Globe's* standard of review is similar, stating “we think the value of giving someone a fresh start often outweighs the historic value of keeping a story widely accessible long after an incident occurred.”³⁴⁶ During its review, the *Globe* runs a background check of the applicant.³⁴⁷ And in the FAQ section on its website, it identifies several factors considered by the committee reviewing applications:

[T]he severity of the crime or incident; whether there is a pattern of incidents; how long ago the story was published; how old the person was at the time of the incident; whether the person involved was in a position of public trust; and the value of keeping the information public.³⁴⁸

These considerations look very similar to the balancing that occurs under many formal expungement regimes, although it is privacy and media rights centric, rather than criminal justice focused.³⁴⁹

In terms of procedure and eligibility, the *Globe's* Fresh Start Initiative is open to all, whether charged or convicted, or even if the information in an article is noncriminal but damaging. Higher standards exist for cases “involving public figures or serious

345. *Journalists Are Key*, *supra* note 338.

346. *The Globe's Fresh Start Initiative: Frequently Asked Questions*, BOS. GLOBE, https://www.bostonglobe.com/2021/01/22/metro/globes-fresh-start-initiative-frequently-asked-questions/?p1=Article_Inline_Text_Link [https://perma.cc/9JXC-CG4C] (Jan. 22, 2021, 3:48 AM).

347. *Id.*

348. *Id.*

349. *The Cleveland Plain-Dealer* Editor, Chris Quinn, describes the two competing forces as “tradition” (relating to newspapers as recorders of history) and “suffering” (felt by those with damaged reputations). See *Our Right-to-be-Forgotten Experiment*, *supra* note 338; *Journalists Are Key*, *supra* note 338; *Radiolab: Right to be Forgotten*, WNYC STUDIOS (Aug. 23, 2019), <https://www.wnycstudios.org/podcasts/radiolab/articles/radiolab-right-be-forgotten> [https://perma.cc/YB7Z-ZUMP].

crimes” than run-of-the-mill cases.³⁵⁰ The papers encourage applicants who do apply without the assistance of lawyers. The application is not too complicated, requiring identifying and demographic information, the past news story, and any documents the requestor thinks relevant, such as official records.³⁵¹ Individuals also can submit a personal narrative about why modification of the original story is warranted.³⁵² The *Plain-Dealer*’s request process is similar, with an online application and contact email provided.³⁵³

III. COMPLETING EXPUNGEMENT THROUGH THE LIMITS OF PUNISHMENT AND THE PROMISE OF PRIVATE ACTION

The primary contention in this Article is that addressing the problem of expunged criminal records persisting post-expungement requires a significant counterweight to entrenched transparency norms and the realities of a surveillance-based economy that is here to stay. There is a tradition of transparency when it comes to the activities of the criminal justice system. The Supreme Court has consistently reaffirmed access norms,³⁵⁴ and the availability of public criminal records has followed. Further, the Court has regularly upheld the right of publishing entities and media agencies to disseminate such information under the First Amendment.³⁵⁵ In an age where anyone who uses the internet can claim the status of a publisher under the First Amendment, limiting access or compelling erasure by private actors to mitigate harm in this regime is both unlikely and unwise.

Further, existing theories of privacy have struggled to erect strong privacy protections in the law. Any protections that did exist are now being overtly challenged by the age of surveillance. Privacy protections also cut against laws like the Freedom of Information Act, which reaffirm norms of access and transparency.³⁵⁶ Finally, protections for reputation are essentially nonexistent, and to the extent that they exist, require piecemeal litigation. In short,

350. *The Globe’s Fresh Start Initiative: Frequently Asked Questions*, *supra* note 346.

351. *The Globe’s Fresh Start Initiative: Submit Your Appeal*, *supra* note 342.

352. *Id.*

353. *Fill This Form Out for Your Right to Be Forgotten*, CLEVELAND.COM, <https://www.cleveland.com/metro/2019/01/fill-this-form-out-for-your-right-to-be-forgotten.html> [https://perma.cc/6E9H-UF8D] (Feb. 16, 2021, 12:08 PM) (including email address for requests).

354. *See supra* notes 165–66.

355. *See supra* note 315.

356. *See* 5 U.S.C. § 552.

existing law has little to offer the successful expungement petitioner whose official criminal record has been expunged, only to learn that information continues to exist and be shared by private parties.

This Part responds to this legal quagmire and proposes two possible paths to deal with this problem, neither of which rests on privacy concepts. First, the theories of punishment underlying criminal justice itself provide an alternative path that moves away from the privacy paradigm. Whether retributive or utilitarian, the philosophical and ethical presuppositions underlying the criminal law and punishment, and how those institutions operate within a liberal, democratic society suggest limits on the furnishing of public criminal records. This approach is somewhat extra-legal, simultaneously recognizing the limits of law and existing legal norms and commitments, while calling on private actors to realize their relationship to the criminal system's limits. The hope is to justify structures and frameworks that incentivize action on the part of private actors that will counteract the formal limits of expungement law. Highlighting the relationship of private actors to the institutions of criminal law and criminal punishment is essential to minimizing the amount of harm potentially caused by continued usage and dissemination of such information.

To be clear, this proposal steers in a different direction than development of a robust right to be forgotten enshrined in law. In fact, it is built from the conclusion that such a right in American law is neither likely to arise nor a wise policy pursuit. It concedes that such a right is seriously problematic on First Amendment grounds, demanding a degree of coercion that is antithetical to established norms in American law. Completing expungement after official erasure requires something more foundational than simply the force of law. The contention is that the remedy must develop from what it means to be a participant in a democratic framework that maintains a criminal law and institutions of punishment designed to reaffirm social norms without severing social bonds forever.³⁵⁷

357. See generally Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1487–88, 1490, 1496, 1513 (2016); Murray, *supra* note 32 (contending that the remedy should develop from restorative retributivism which focuses on restoring the social implications and consequences of criminal law); Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1 (2012) (contending that within liberal democracies, remedies for criminal laws should develop from a political retributivist perspective); Dan Markel, *Are Shaming Punishments Beautifully*

A. *Two Possible Paths for Addressing Private Use*

This section contends that the corollaries to punishment theory can serve as an effective counterweight to the norms and laws that currently enable private entities to reflexively obtain, publish, and use criminal record information. As Christopher Bennett has identified, this is the field of foreseeable harms that result from the infliction of formal punishment, but that are experienced outside the boundaries of the formal criminal system.³⁵⁸ Thus, there is an important dichotomy at work: when the government officially inflicts punishment versus when private actors are permitted to inflict harms (whether formally labeled punitive or not) in the wake of formal punishment. There is an argument to be made that state permission of privately inflicted harm, built on utilizing criminal record history information as a proxy for decision-making, amounts to at least accessories to formal punishment, and therefore *is*, at the very least, punitive.³⁵⁹ If that holds, then theories of punishment themselves can inform the regulation of private usage of the information. And multiple theories of punishment can be utilized to serve this function, whether classically retributive, utilitarian, or restorative. Several scholars have persuasively demonstrated how retributivist and consequentialist theories, when applied to the era of mass criminalization, contain proportionality limits.³⁶⁰ Those limits can touch official recordkeeping³⁶¹ and dissemination. This section builds on their work and others, as well as my own, to propose a framework for dealing with the private spaces with records.

Bennett's observation suggests that if the foreseeable harms inflicted by private usage of the information are not "punishment," then theories of punishment can do some, but not all the work. For,

Retributive? Retributivism and the Implications for the Alternative Sanctions Debate, 54 VAND. L. REV. 2157 (2001) (contending that punishment should be developed based on the wrong committed and blameworthiness to the offender).

358. Christopher Bennett, *Invisible Punishment is Wrong – But Why? The Normative Basis of Criticism of Collateral Consequences of Conviction*, 56 HOW. J. CRIME & CRIM. JUST. 480, 484 (2017).

359. A common counterpoint to this argument is that nonstate action cannot be punishment. That is a fair point, assuming certain premises, such as punishment, is only defined by formal legal definition. But individual actors can act *punitively* even if not formally classified as punishment. For example, responding to the misbehavior of a child, without involving the state, can be punitive.

360. Scholars such as Jeffrie Murphy, Paul Robinson, Alice Ristroph, Mary Sigler, and countless others have addressed this question. See *supra* notes 25, 28 and *infra* notes 362, 387.

361. Corda, *supra* note 26, at 46.

if such harms are not punitive per se, but still the logical heirs to formalized punishment, private actors, by virtue of participation in a democratic society and in relationship to that system itself, have a responsibility *not* to harm in a punitive fashion, or shall I say, act punitively *like official actors*. A responsibility of participants in a democratic community is to refrain from acting like the state. That is a burden of being in a shared democratic enterprise, and of being in relation to the criminal law *and its limits*, suggesting the phrase, “doing the time” should actually mean something in the private world. Whether we like it or not, we are all in relationship with the institutions of criminal law. Some go through it, others work in it, and still others, by virtue of being *outside* of it, are necessarily marking its limits. Hence, when private actors continue the stigma after the formal limits of the criminal law have been utilized, they are dangerously close to usurping public authority to impose punishment. But even if that is unpersuasive, and such harms are fully private and nonpunitive, the existence of relationships between parties in a shared, democratic enterprise suggests some responsibility for how to handle the information, rather than just blind deference to the private will of individual actors that has harmful effects downstream.³⁶²

In sum, whether we classify private holding and usage of already expunged information as formally punitive or not *only* informs the *nature of* the responsibility for handling the information, not whether any responsibility exists at all. The contention is that creating legal structures by reference to these theoretical underpinnings of the criminal law and punishment itself, within a democratic community, has more promise than that offered by existing law, which only builds from nebulous notions of privacy whose one constant is being a state of flux. Specifically, renewed attention must be paid to the role of the state as the *sole* punisher, which implies the state determines when punishment ends and that private actors do not disrupt that judgment given their antecedent consent to state responses to criminal behavior.³⁶³ This approach highlights the societal and communal interest in fostering real reentry, born from relationships within a shared democratic

362. See Mary Sigler, *Defensible Disenfranchisement*, 99 IOWA L. REV. 1725, 1733–38 (2014) (describing how the framework underlying liberal, democratic society presumes the possibility of reintegration and the reinstallation of trust between those who have offended and those who have not).

363. The state imposes restraints on *itself* through Constitutional provisions like the Ex Post Facto Clause, Cruel and Unusual Punishment Clause, and the Double Jeopardy Clause.

project. It emphasizes the relational nature of the criminal law enterprise, however distanced in practice our culture, obsessed with incarceration and its accessories, has become from those first principles. Ultimately, completing expungement demands some work of the formal law, and *investment* in the relationships underlying the law itself.

To be clear, the theory I propose below in sections III.B. and III.C builds on the work of scholars and intellectual giants as well as some prior work of my own. Various thinkers appear at different times and depending on how the situation is diagnosed. For if the persistent existence of such information in private hands and the subsequent harms inflicted are conceived as punishment (despite formal classification in law otherwise), then punishment theory has a seat at the table. For that strand of the argument, I pull from scholars mentioned previously—Murphy,³⁶⁴ Robinson,³⁶⁵ Ristroph,³⁶⁶ and others³⁶⁷—to piece together a set of principles that could serve as a counterweight to the problem of the eternal criminal record and the usage of digitally elusive criminal record history information. The argument is that *if* private keeping and usage of such information *is* or *extends* punishment, or is an accessory of formally classified punishment, *then* retributivist, utilitarian, and expressivist theories of punishment, especially as they conceive proportionality, offer a counterweight to the perpetual availability and usage of such information. That is especially the case if the state has already spoken with respect to an official expungement.

But if the use of such information is conceived as wholly civil, beyond formal criminal law and punishment, and exclusively within the realm of private harms, then something more qualified is necessary to serve as a counterweight, although it cannot be from within the privacy/reputation paradigm given the analysis in Part II.³⁶⁸ In that situation, punishment theory can inform, but not totally. It can only define where state activity should be exclusive, thereby implying similar private activity is less justified within a

364. See *supra* note 28.

365. See *supra* note 25 and *infra* notes 384–85 and accompanying text.

366. See *infra* note 387 and accompanying text.

367. See generally *infra* sections III.B–D.

368. See generally *supra* section II.B.2.

democratic system. The work of Bennett,³⁶⁹ Hoskins,³⁷⁰ Sigler,³⁷¹ and Markel,³⁷² building on theories of shared duties in a common democratic enterprise, can help to make sense of the situation, calling on private actors to think twice before they reflexively use the information.

B. *The Punishment Theory Problems with Punitive Private Use*

When the state grants an expungement, it has made multiple judgments. First, it has decided that the stigma stemming from a public criminal record should end.³⁷³ Second, it has decided that formal contact between the state and the individual—via the public criminal record—should cease or be severely limited (in jurisdictions where sealing, rather than full expungement, is the norm).³⁷⁴ Third, it has made a judgment about the individual pursuing the expungement: that rehabilitation is no longer in question and that the risks to public safety are not sufficient to justify perpetual publicity.³⁷⁵ Finally, the state has determined that the elimination of the public criminal record will foster a journey towards complete reintegration.³⁷⁶ All of these acts by the state relate to the purposes of punishment, and what punishment is.

They correspond to what Alessandro Corda has labeled as the purposes of criminal recordkeeping in the first place: notice to the public that wrongdoing carries stigma.³⁷⁷ One purpose of public criminal recordkeeping is to track, surveil, and hopefully deter additional criminal activity.³⁷⁸ This makes public criminal

369. See *supra* note 358 and *infra* notes 390, 398, 401, 407, 411–14, 418–21 and accompanying text.

370. See generally ZACHARY HOSKINS, *BEYOND PUNISHMENT?: A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION* (2019) (discussing the moral justifications of collateral legal consequences).

371. See *supra* notes 362 and *infra* notes 389–97 and accompanying text.

372. See *supra* note 357 and accompanying text.

373. In many jurisdictions with expungement regimes, courts are tasked with determining whether the petitioner's interests in rebuilding the petitioner's reputation outweigh the state's interest in retaining the information. In states where automatic or "clean slate" laws have been passed, the legislative justification involves a concern for how stigma from a criminal record inhibits reentry. See *supra* section I.B.

374. Expungement can mark the end of formal contact with the system, closing the book (with a positive result) on a criminal case. See Murray, *supra* note 77, at 2841.

375. See Murray, *supra* note 10, at 711 (describing how existing expungement law is built on utilitarian premises relating to rehabilitation and incapacitation).

376. See Radice, *supra* note 41, at 1369–70.

377. Corda, *supra* note 15, at 11.

378. *Id.*

recordkeeping, in effect, an act of expressivist, incapacitative, and general deterrence principles. This is why the practice has been labeled *punitive in effect*,³⁷⁹ even if not formal punishment by law.

The implication of this is that the limits of punishment theory are now fair game for restricting the continued existence of public criminal records *after* expungement, and certainly when the records are created and maintained in the first place. Thus, imposing something like proportionality constraints on the creation and maintenance of criminal records—something Corda and others propose³⁸⁰ through desert based and consequentialist principles—makes sense. While that logic proposes a rationale for limiting the default state position of official criminal records perpetuity, more explanation is necessary as to how those principles inform *private use* of such information.

Private use of already expunged information implicates punishment theory limits in two ways: (1) by allowing individuals to usurp authority ceded to the state regarding the limits of punishment; and (2) as a matter of distribution, by allowing private actors to act in ways that violate cardinal principles of proportionality reserved to the state. With respect to the first point, unreflective private use thrusts private actors into the role of the state *after* the state itself—through the authority of the same private actors in a liberal, democratic regime—has already cast judgment on the plight and promise of the petitioner. More concretely, individuals in a liberal, democratic regime cede to the state the *sole* authority to make decisions about punishment. But when, after a judgment about expungement, private actors continue to act *punitively*, and solely on the *basis of the information expunged by the state*, private actors are taking back the authority they ceded to the state. This means, in effect, that private actors are asking the state to make determinations of punishment or not, while simultaneously preserving the ability to do so individually after the fact. This is like a contract premised on a false promise, where one party secretly withholds consent. Hence, private use begins to look like unjustified double punishment that violates the core foundation of the punishment regime in a democratic society: namely that the state decides whether to punish or not in the name of the community. Private use exhibits a desire to have one's cake and eat it too.

379. *See id.* at 46.

380. *Id.* at 43–44; Hugh Lafollette, *Collateral Consequences of Punishment: Civil Penalties Accompanying Formal Punishment*, 22 J. APPLIED PHIL. 241, 246–47 (2005).

This has significant implications for the foundational principles underlying the criminal law and punishment, affecting their legitimacy. Because if the formal levers of the state—again founded upon the consent of individuals who have ceded authority to the state to act in this fashion—are *not* the end of the matter, then the state was never a singular authority in the first place. Private punitive use becomes the real punishment after the window-dressing that is the formal system. It suggests the formalized punishment process misrepresents the real adjudication, meaning it is only a precursor. And that holds despite other core constitutional principles—like the Double Jeopardy Clause—suggest formal processes should end the matter. It undercuts any trust between communities who judge through the criminal law and forgive (or forget) through expungement and those who violated the rules of the community.

The second way in which punishment theory implicates private use is that if private use is *punitive*, it is far too punitive by any serious conception of proportionality, whether understood as a matter of retributivist or consequentialist principles. Proportionality principles aim to ensure that punishment fits the crime. Cardinal and ordinal proportionality principles suggest that a default posture of permanency for *any* type of record—arrest versus conviction, murder versus turnstile jumping—flips this calculus on its head. Thus, for instance, following others, I have argued previously that the original decision by states to make *all* records public and for the same amount of time violates this core principle.³⁸¹

But how would that affect private use? State permitted private use enables private actors to engage in activity that upends any prior proportionality calculation made by the state. And when you consider that the formal act of expungement actually is designed to cease the continued imposition of stigma-based harm, subsequent state permission allows private actors to undo that state judgment. In other words, the state, by refraining from *any* intervention post-expungement, is permitting the disruption of its own prior efforts relating to proportionality.³⁸² It undercuts the finality of its own judgment.

381. See Murray, *supra* note 10, at 680–81 (citing Corda, *supra* note 15, at 6).

382. Ekow Yankah advances a similar argument with respect to a “right to reintegration.” Ekow Yankah, *The Right to Reintegration*, 23 NEW CRIM. L. REV. 74, 74 (2020) (noting how the same justification that “requires protecting civic equality through punishment compels the state to reintegrate offenders after punishment”).

As a matter of distribution, private use is problematic on retributivist and consequentialist proportionality grounds. Retributivist proportionality holds that only the punishment that is due should be meted out.³⁸³ While that concept is mystical to many and underlies one of the chief criticisms of retributivist principles, others have held that it at least imposes barriers on the range of activity that is permitted.³⁸⁴ While a precise proportionality calculation is difficult to measure, what *is not proportional* is not as difficult. Scholars like Paul Robinson have built on this line of thinking to suggest that democratically-informed understandings of desert allow for a careful threading of the needle.³⁸⁵ This could enable something like the creation of a window that is open for a period time and permits permissible private use—sanctioned by law—before the proportionality calculus is disrupted. Thus, for example, FCRA’s supposed limit on reporting arrest information after seven years³⁸⁶ could inform limits of use by private actors after a period of time. Private actors, based on what was written above, are then acknowledged as partners in ensuring that proportionality principles are not violated.

Consequentialist understandings of proportionality have been lauded as less mystical, more capable of measurement, and thereby a better source for legitimate proportionality constraints.³⁸⁷ With respect to criminal records, the idea is that persistent existence and use is in fact, on balance, criminogenic, which inflicts unjustified costs on the individual (who returns to the system) and the state (who must pay for that return).³⁸⁸ State permission of private use that fosters this type of criminogenic effect then goes too far, especially for someone judged worthy of expungement by the state. Thus, when employers or landlords or schools reject applicants, and those rejections are causally connected to criminal activity down the road, private activity has upended the proportionality calculation made by the state. When one considers that expungement regimes are largely built on cost-benefit principles, where courts are tasked with balancing harms and benefits to the

383. See generally *Retributive Justice*, STAN. ENCYC. PHIL., <https://plato.stanford.edu/entries/justice-retributive> [<https://perma.cc/2SYX-6LK9>] (July 31, 2020).

384. See Paul H. Robinson, *Empirical Desert*, in CRIMINAL LAW CONVERSATIONS 29, 31 (Stephen Garvey et al. eds., 2009).

385. See *id.*

386. 15 U.S.C. § 1681c(a)(2).

387. See Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 268–69, 273–74 (2005).

388. See Leasure & Anderson, *supra* note 39, at 271, 279.

individual and state from expungement, private use of already expunged information essentially negates the judgment and legitimacy of that regime.

C. *The Democratic Problems with Nonpunitive Private Use*

For those skeptical that private use can be construed as punitive, there is an alternative route for questioning such use, premised on the core framework underlying a liberal, democratic regime. Mary Sigler, borrowing from R.A. Duff, spoke of “civic trust” underlying the relationships between members of a political community.³⁸⁹ This trust implies rights and responsibilities, vis-à-vis relations to one another and to the state. One of the included responsibilities involves cognizance of foreseeable harms inflicted by the state and responding to them. Christopher Bennett moves from that idea to his theory of “associational duties” between members of a political community, such that awareness of collateral consequences is expected.³⁹⁰ The glue here is what Bennett calls “a special kind of relationship.”³⁹¹

Sigler, in the context of defending some forms of disenfranchisement, describes how lawbreakers violate this “civic trust” through their wrongdoing, and therefore the state and private actors can require verification of worthiness for new trust before extending previously existing rights, like the right to vote.³⁹² But notice the corollary: once that worthiness has been confirmed—either through the action of the individual or through judgment of the state—what ground does the private individual have for not mitigating harms? In the case of the individual with an already expunged record, private use rejects a responsibility on the part of the private actor to recognize the judgment that the person is worthy of restoration *moving forward*.

This notion of private responsibility runs counter to the default, libertarian, or contractual position that private actors are free to respond how they see fit. So why do private actors with this information in their hands have a responsibility? As Sigler points out, the “conception of citizens as officeholders draws on the classical

389. Sigler, *supra* note 362, at 1733–34 (citing RA Duff, *Pre-trial Detention and the Presumption of Innocence*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 115, 123 (Andrew Ashworth et al. eds., 2013)).

390. Bennett, *supra* note 358, at 482.

391. *Id.*

392. Sigler, *supra* note 362, at 1736–38.

notion of *officium*, or duty,” meaning citizenship “is a position of distinctive responsibility.”³⁹³ Thus, the default posture that the state cannot use law *at all* to affect private actor decision-making is not consistent with a robust understanding of what it means to be a member of a democratic political community,³⁹⁴ where libertarian sensibilities are never taken to their extremes and the law can mediate between conflicting interests. As Sigler states: “[t]he bottom line of this account is that the responsibilities of citizenship are broader than the most individualistic versions of liberalism and less demanding than the most ambitious forms of republicanism.”³⁹⁵

This is how private expungement connects with ethical responsibility, suggesting an extra-legal rationale for something akin to the right to be forgotten. The crux of the matter is that by virtue of membership in a political community, individuals *are in a relationship*, whether they like it or not.³⁹⁶ They have responsibilities, whether they like them or not, to act mindful of civic virtue, which necessarily entails openness to reintegration of lawbreakers, especially those persons whom expungement processes have adjudicated worthy of reintegration.³⁹⁷

This undeniably cuts against the grain embedded in a societal culture that defaults to private self-determination unless gross harms ensue. As mentioned above, even access principles developed from the right to know all things relating to governmental activity stem from that understanding. In contrast, the idea of relationship here contemplates a social situation where individuals move beyond self-regarded pursuits,³⁹⁸ recognizing a common enterprise with public values. As Bennett puts it, by virtue of being “fellow participants in a collective democratic enterprise,”³⁹⁹ individuals must be mindful of not extending the effects of formal punishment. This necessarily implies an openness to second chances.

393. *Id.* at 1734–35.

394. Yankah, *supra* note 382, at 76 (“[R]eintegration presses the question: What does liberal democracy owe to even those citizens it rightfully punishes?”).

395. Sigler, *supra* note 362, at 1735.

396. The idea that human beings are in a default position of relationship is not novel. See generally ARISTOTLE, *NICHOMACHEAN ETHICS* (Terence Irwin trans., 3d ed. 2019).

397. Sigler, *supra* note 362, at 1736 (citing Duff, *supra* note 389, at 123) (“[C]itizens also ‘owe it to each other to recognize each other as fellows: not to assume in advance that others are enemies who might attack . . . and against whom [one] need[s] to guard [oneself].’”); Yankah, *supra* note 382, at 80 (noting how reintegration complements the responsibility of the state to punish).

398. Sigler, *supra* note 362, at 1736.

399. Bennett, *supra* note 358, at 482.

And there is no question that the furnishing of second chances *is a public, cultural value and good*, and is, in fact legally sanctioned with a remedy like expungement.⁴⁰⁰ Expungement remedies thus simultaneously signal two things: the seriousness of requiring prior offenders to show they are worthy of trust and the reality that a compromised past does not result in permanent exile from the political community.⁴⁰¹ For the person who has achieved expungement, it is not unreasonable to expect that the law incentivize private actors to recognize those two points.

What does this mean for the handling of criminal records? First, it seems that private furnishing and use of records in a permanent sense runs actors dangerously close to complicity in permanently preventing reintegration to a class of individuals otherwise judged worthy of a second chance. Second, it begs contemplation, by private actors, of how their actions perpetuate or reinforce foreseeable harms from the operation of formal law and punishment, and legitimate recordkeeping by the state. As Bennett suggests, we are dealing with a set of “*foreseeable collateral harms of punishment[,]*” inflicted by private actors.⁴⁰²

Thus, the criminal-civil distinction that normally allows private actors to elide the restraints of punishment cannot save the day entirely. The reality is that any cause the private actor would cite as motivation for the action is necessarily entangled with the offense, as reported by the criminal record.⁴⁰³ Nor is it enough to report that the underlying conduct, rather than the conviction reported by the criminal record, justifies private liberty to act as one sees fit. This is because awareness of foreseeable harms imposes *some* responsibility, even if not the *same* as that for intentionally caused harms. This, of course, is a principle already enshrined in both criminal and civil (tort) law, where the range of duties of private actors calibrates to *mens rea* concepts.⁴⁰⁴

400. Other laws also furnish second chances. The most recent law to be passed, the First Step Act, gives nonviolent offenders a second chance through modification of their sentences. *See generally* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

401. *See* Sigler, *supra* note 362, at 1737.

402. Bennett, *supra* note 358, at 484.

403. *Id.* at 483–84 (“Whether civil or criminal . . . , however, these are still deprivations or harms to which the offender is liable because of their offence, and so it can (justifiably) seem like hair-splitting to insist that the labeling marks an important principled difference.” (citing Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, in *THE CAMBRIDGE LAW JOURNAL* 599 (M.J. Prichard ed., 1997)).

404. *See* MODEL PENAL CODE § 2.01(3) (AM. L. INST. 1962).

In other words, where restraints on formal punishment end, the recognition that such responsibilities exist within a broader moral and legal framework begins. Josh Kleinfeld, in his theory of reconstructivism, calls this how punishment theory is “nestled within a broader theory of justice.”⁴⁰⁵ Similarly, older forms of retributivism hold the same,⁴⁰⁶ and even Robinson’s work, which defers to the empirically validated moral judgments of the community, suggests a framework beyond the formalized purposes of the criminal law⁴⁰⁷ This is the crux of why the formal, criminal-civil distinction cannot be dispositive when it comes to the question of private interaction with the those attempting to reenter.⁴⁰⁸ Private actors, by virtue of their relationship to the punishment apparatus *and the offender*, do not have a morally “free hand”⁴⁰⁹ merely because the moral norms underlying the formal criminal law are no longer the only considerations in play.

And neither does the state. Bennett describes a how a teacher tasked with supervising the thesis of a mentee has the responsibility to simultaneously punish when necessary but not abandon the mentee, lest the entire project of mentorship be lost.⁴¹⁰ Something similar exists with respect to the state and punishment, and the state’s permission for private actors to act without consequence. Bennett states: “it would be a failure in the way society administers punishment if it were simply to impose it and walk away: it would be a denial of the kind of relationship that obtains between the one making the criticism and the one receiving it.”⁴¹¹ Ekow Yankah makes a similar point when describing that while “legal punishment is embedded in the very social project of our living together as a civic community[,]” “criminal law represents a reciprocal duty that flows between a citizen and their civic community.”⁴¹² Put simply, the state and private actors are in “special relationship” with each other *and* with those who encounter the system.⁴¹³

405. Kleinfeld, *supra* note 357, at 1556.

406. Murray, *supra* note 49, at 877–81.

407. *See generally* Robinson, *supra* note 384 (noting how desert-based theories of punishment, grounded in the views of the community, suggest boundaries and degrees of nuance beyond the formalistic assignments made by existing criminal law).

408. Bennett, *supra* note 358, at 486 (“[P]unishment takes place against the background of other duties that we have to the offender, and which cannot all be seen as cancelled by the offence.”).

409. *Id.* at 487.

410. *Id.* at 482.

411. *Id.* at 488.

412. Yankah, *supra* note 382, at 81–82.

413. Bennett, *supra* note 358, at 482, 488. Bennett talks about grounding duties to

And these relationships exist and persist and go deeper than voluntary assumption of responsibilities; they are not reducible to contractual terms or value assigned by the parties.⁴¹⁴ They are inescapable social realities that engender serious responsibility.

Bennett, and others,⁴¹⁵ call this “*citizenship*,”⁴¹⁶ resembling Sigler’s concept of office-holding. Like Sigler, Bennett notes how citizenship is not simply characterized by being “subject [to] an authority.”⁴¹⁷ Instead, it involves *participation* “in that authority; . . . in some sense having responsibility for the care and sustenance of that community.”⁴¹⁸ Returning the issue of use of already expunged criminal records, private actors participate in the authority of the community when they recognize the judgment of the state regarding an expungement *as valid*. Furthermore, acknowledging that they do not possess a morally free hand is consistent with the idea that they have a responsibility for the well-being of the community as a whole and individuals within that community. The people who comprise a political community—whether they have contacted the criminal system or not—remain in relationship and thereby have duties to one another and to the entire enterprise.

Coupling these ideas with the notion that criminal wrongdoing does not permanently sever relationship⁴¹⁹ with the community suggests that there is an argument for private responsibility towards ex-offenders who have been judged worthy of reintegration by the state. Otherwise, private actors can actively resist the restitching of social bonds that the criminal system is tasked with pursuing and that underlie the entire project itself.⁴²⁰ It also would undermine collective self-governance in a democratic society,⁴²¹ and undercut the social equality that the state has said is warranted through an act of expungement that was authorized by the

offenders with human rights, but instead opts for a framework built on the relationships underlying membership in a political community. He states that we have a “richer set of duties to those with whom we are in particular kinds of relationships.” *Id.* at 490.

414. *Id.*

415. See, e.g., AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* (2014).

416. Bennett, *supra* note 358, at 491.

417. *Id.*

418. *Id.*

419. Yankah, *supra* note 382, at 83 (describing how a punishment regime that presumes civic equality necessarily must be open to restoration of that equality).

420. Bennett, *supra* note 358, at 492 (“[P]unishment regimes can play a significant role in denying individuals the benefits of social membership to which they are due.”); see Kleinfeld, *supra* note 367, at 1523–24.

421. Bennett, *supra* note 358, at 492.

community composed of the same private actors. To do otherwise means that private actors are permitted to deny official judgments after they occur, undercutting the very agency underlying the entire system itself, and creating a de facto class of second-class citizens.⁴²² Criminal recordkeeping, in perpetuity, runs directly counter to the cultivation of the social fabric articulated here.⁴²³ And the use of such records without restraint (legal or moral) stunts the development of the capacities of individuals who have contacted the system yet been judged worthy of restoration through the formal act of expungement. State judgments regarding restoration that are authorized by private actors through the legal system must count for something.

D. *The Role of Law*

How can the above ideas inform how the law interacts with private actors who seek to use such information? Given co-existing legal commitments relating to property, speech, and privacy (or the lack thereof), the law's ability to tackle persistent use of privately held criminal records is limited. With that said, there are some ways that the law could incentivize private action.

First, civil law could consider subsidizing action that mitigates harm to ex-offenders who have achieved expungement. While existing expungement law in some states permits successful petitioners to deny the existence of a prior criminal record without being accused of lying, law also could reward private actors, such as employers, for hiring those who have contacted the system. How this reward might take shape is beyond the scope of this Article, but there is no reason why something like tax benefits for employers could not be part of the equation. Another possibility would involve public-private partnerships that create pipelines to steady employment in a particular industry.⁴²⁴ Alternatively, the state could

422. *Id.* at 493; Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 296, 299 (2006).

423. Lerman and Weaver make a similar argument in ARRESTING CITIZENSHIP, and about several aspects of the formal legal system. LERMAN & WEAVER, *supra* note 415, at 95; Bennett, *supra* note 358, at 496 (focusing on improperly motivated police stops repeatedly injuring relationships within the community and to the state); Yankah, *supra* note 382, at 107 ("A state committed to the full reintegration of citizens should have the permanent erasure of one's criminal history as its default rule.").

424. An initiative like this could have a secondary effect on insurance markets and costs for employers. If insurance carriers witness increased hiring of individuals the carriers deem risky, that could result in financial hurt for employers purchasing insurance relating

supplement private good will by alleviating financial burdens on employers in other ways. Such structures are synergistic with creating a choice architecture⁴²⁵ that is pro-reentry.

Granted, one objection to such a proposal might be that such support would unfairly result in a preference for the formerly convicted over the nonconvicted. But can we be so sure? There might be some employers who still prefer to hire individuals who have never encountered the system, and they would be free to go on doing so for the reasons they see fit, as long as such practices comply with employment laws. But that does not preclude the law from encouraging, but not mandating, giving ex-offenders a second look. Moreover, a philosophical response to such an objection is warranted. If punishment is designed to restore baseline civic equality through the proportional imposition of desert or some other measure, then once punishment is over it is hardly unjust to assist in reentry through measures that limit the punitive reach of the state or private actors undercutting state judgments about punishment in the first place.

A second initiative might involve the state investing heavily in ensuring that those who have achieved expungement are able to actually capitalize on that achievement through the restoration of their reputation. This would involve commitment to digital certificates of relief that mitigate the effects of technology that affect the promise of expungement. Certificates of relief are available from judges in some jurisdictions.⁴²⁶ But in many respects, their utility resembles the same issues that come with achieving an expungement on paper. How is the certificate made known to the wider community to counteract the negative effects of a public criminal record? Why are certificates of relief not available at the click of a button, just like public criminal records? Could achieving an expungement allow for connecting successful petitioners with reputation management firms that can alleviate the burdens of digital records? The government could bundle a successful expungement

to on-the-job accidents or crime. That said, insurance markets would likely catch up to the data that shows that riskiness is significantly diminished for those who have achieved official expungement. *See generally* Prescott & Starr, *supra* note 67 (finding that those who obtain expungement have extremely low subsequent crime rates as compared to the general population and experience an upturn in their wage and employment trajectories).

425. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) (generally arguing that changes in behavior through choice architecture and structures can achieve the same objectives as formal policy changes).

426. *Judicial Certificates of Relief: A National Survey*, COLLATERAL CONSEQUENCES RES. CTR. (Aug. 26, 2020), <https://ccresourcecenter.org/2020/08/26/judicial-certificates-of-relief-a-national-survey> [<https://perma.cc/T7LH-87L4>].

with a set of services that aim towards digital restoration. Private firms already invest heavily in managing their reputations. There might also be room for public-private partnership here as well. Reputation management firms could engage in pro bono work for those who have achieved expungement. Setting up such apparatuses might help private actors make decisions that account for the foreseeable harms described above.

A related effort on the part of the state could involve a messaging campaign to private actors to try to move the needle. Similar campaigns have worked to alter private action when the government has characterized previously understood private harms as also involving the public good. The most well-known probably involves anti-smoking campaigns on the basis of potential individual harm and the harms associated with secondary smoke. Between the mid-1980s and early 2000s it was nearly impossible to avoid such messaging. By the mid to late 2000s, private actors had realized that there was a market opportunity to attract consumers by accommodating the preferences of nonsmokers over smokers. Restaurants moved from having smoking sections to requiring smokers to go outside entirely. Similarly, messaging relating to how private use of criminal record information that has been expunged perpetuates harm and undercuts democratic principles could lead some private actors to rethink binary sorting between ex-offenders and those who have not contacted the system.

While the above initiatives are a start, they also concede that the role of law will be limited given existing legal frameworks. Hence, private initiative is necessary to help those who have achieved expungement to fully reenter. In the past two decades, the role of corporations and private firms moving the needle for social issues has become more apparent. Professional sports organizations, entertainment entities, public figures, such as athletes and media personalities, have advocated for certain issues. But there has been no widespread campaign to give those who have achieved expungement a second chance. The responsibilities of participating in a democratic regime suggest more can be done in this field to broaden public and private awareness of the collective obligation to assist members of the community as they attempt to rejoin and become productive.

CONCLUSION

Achieving an expungement marks the end of a long road within the criminal justice system and should confirm the beginning of a

second chance. Official recognition that one has been rehabilitated, is not so risky as to require continued stigma, and is capable of full reintegration into society is a judgment left to the state by expungement law. But the reach of that judgment is limited by the law itself, which simultaneously permits private actors to undo or undercut its effect in various walks of life.

This norm is entrenched and unlikely to go away. Theories of privacy or reputation are in a state of flux in a surveillance economy where the invasion of privacy or the cultivation of reputation are *the primary capital and currency*. Thus, the right to be forgotten—as conceived in non-American legal regimes—is unlikely to manifest in any robust form in American law. This reality thereby requires conception of alternative paths for legal reform when it comes to helping those who have achieved expungement, but then find out that the criminal record information remains and is used almost freely by private actors.

Because a privacy/reputation paradigm is not up to the task of countering the transparency and access norms that are buttressed by the First Amendment and statutory law, an alternative rationale for completing the effect of an expungement is necessary to move the needle. The core claim here is that there are two possible paths, both of which relate to theories of punishment. First, recognition that private use resembles formal punishment or, in other words, is *punitive*, opens the door to the constraints of punishment theory. Second, even if private use is not punishment, the relationships underlying the limits of the criminal law in a broader democratic regime suggest a set of responsibilities for private actors that go beyond the dominant laissez-faire attitude towards the plight of those who have achieved expungement. In short, an alternative rationale for assisting reentry must be grounded in something foundational: the relationships underlying criminal law, punishment, and shared existence within a liberal, democratic regime.

While that rationale has been presented here, it also concedes that the role of law is limited given other core legal commitments in American law. Norms of access and transparency are goods, and to disturb them with coercive erasure of privately held information, or to prevent access entirely, would be to undercut other democratic values. But as with most attempts to use the law as both a sword and a shield, the goal lies somewhere in the middle. The rationale articulated here suggests that there is a way to incentivize reentry by encouraging limited private possession and use while not taking it away entirely. The law can help private actors use or not use this information more charitably. Coupled with well-

informed private initiative, completing expungement becomes much more achievable.