Expungement, Defamation, and False Light: Is What Happened Before What Really Happened or is There a Chance for a Second Act in America?

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The book club's leader ask[ed] what Fitzgerald meant when he said there are no second acts in American lives. "He [is] saying that the past is always with us," replies D'Angelo Barksdale, a middle manager in a drug-dealing empire . . . "You can say you somebody new. You can give yourself a whole new story. But what came first is who you really are, and what happened before is what really happened."[1]

"The past is whatever the records and the memories agree upon . . . [T]he past is whatever the Party chooses to make it. It also follows that though the past is alterable, it never has been altered in any specific instance. For when it has been re-created in whatever shape is needed at the moment, then this new version is *the past, and no different past can ever have existed . . . In Newspeak it is called [D]oublethink."*[2]

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1. Colin Marshall, *The Wire Breaks Down The Great Gatsby, F. Scott Fitzgerald's Classic Criticism of America*, OPEN CULTURE (Aug. 15, 2012), http://www.openculture.com/2012/08/ithe_wirei_breaks_down_ithe_great_gatsbyi_f_scott_fitzgeralds_classic_criticism_of_america_nsfw.html.

2. GEORGE ORWELL, 1984 213–14 (Signet Classics 1961) (1949).

INTRODUCTION

Once an individual who was convicted of a crime has served her sentence and satisfied any post-release conditions imposed, she has, as the saying goes, paid her debt to society and should be able to get on with her life. But easy access to criminal records by employers, media outlets, and even nosy neighbors can undermine the individual's ability to re-enter productive society. Responding to arguments that the albatross of a criminal record is among the most burdensome of the collateral consequences that follow a criminal charge or conviction, and contributes significantly to recidivism,[3] most states have enacted statutory

3. *See, e.g.*, Anna Kessler, Comment, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403, 405–06 (2015) ("The American criminal justice system often turns 'even a minor offense into a life sentence by permanently keeping [ex-offenders] out of a job.'"); 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. INTER ALIA 11, 11–12 (Nov. 7, 2016), http://ylpr.yale.edu/inter/alia/effectiveness-certificates-

expungement or erasure statutes.[4] But "[i]t's far easier to get a criminal record than to eradicate one."[5] So even if the court seals a record, or orders it destroyed or erased,[6] the footprints of that record will remain spread all over the web, just a click away. Indeed, its shadow may even remain in the official court records ordered to be expunged.[7] And, in this data-driven, information-addicted era, what was once a public record available only through government sources now will be captured and made easily accessible in any number of venues not subject to expungement laws.[8] What happens, then, when a news outlet—or even a

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relief-collateral-consequences-relief-mechanisms-experimental (citing statistics indicating that between 70 and 100 million Americans have a criminal record and detailing 44,500 collateral consequences of criminal convictions such as denial of public housing and disenfranchisement); *see also* Doe v. United States, 168 F. Supp. 3d 427, 441–42 (E.D.N.Y. 2016) (order granting a federal certificate of rehabilitation and noting how difficult it is for prospective employers to give the appropriate weight to an applicant's past criminal record).

4. *See 50-State Guide to Expungement and Sealing Laws*, COLLATERAL CONSEQUENCES RESOURCE CENTER (Jan. 13, 2016), http://ccresourcecenter.org/2016/01/13/expungement-and-sealing-laws/ [hereinafter "*50 State Guide to Expungement Laws*"] (providing a comprehensive list of judicial expungement, sealing and set-aside laws in all fifty states); *see also* Chris Skall, *Journey Out of Neverland: Cori Reform,* Commonwealth v. Peter Pon, *and Massachusetts's Emergence as a National Exemplar for Criminal Record Sealing*, 57 B.C. L. REV. 337, 341 (2016) (noting that "[m]ost states have statutory provisions authorizing courts to seal or expunge records," but that states have enacted such provisions "in a disparate and non-uniform fashion"). As noted below, these statutes provide a variety of remedies and go by a variety of titles. For the purposes of this Article I will use the terms "expungement" and "expunge" throughout to encompass the range of remedies, except where it is necessary to make a distinction.

5. Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 341 (2015) (quoting Gary Fields & John R. Emshwiller, *Fighting to Forget: Long After Arrests, Criminal Records Live On*, WALL STREET J. (Dec. 25, 2014), https://www.wsj.com/articles/fighting-to-forget-long-after-arrests-records-live-on-1419564612) (internal quotation marks omitted). In the Internet age, damage to employment opportunity is not limited to criminal records. *See The Internet Never Forgets*, SCIENTIFIC AMERICAN (Aug. 18, 2008), http://www.scientificamerican.com/article/the-internet-never-forgets/ (recounting an instance when a job applicant sent a video of himself to a prospective employer that was later posted online and has diminished his employment prospects).

6. Expungement statutes provide a range of remedies that themselves typically do much less than actually delete an individual's criminal record. *See 50 State Guide to Expungement Laws*, *supra* note 4 (noting that most states' laws "reach only minor offenses or non-conviction records" and that there is no federal expungement statute for federal convictions); *see also infra* notes 73–106 and accompanying text (exemplifying the nature of expungement statutes).

7. For a discussion of what various states' expungement statutes require regarding records, *see infra* notes 73–106 and accompanying text (illustrating different expungement statutes that exist).

8. *See* Laura K. McKenzie, Note, *The Right to Domain Silent: Rebalancing Tort Incentives to Keep Pace with Information Availability for Criminal Suspects and Arrestees*, 69 VAND. L. REV. 875, 876–79 (2016) (noting that an individual's options for removing an online story about an arrest or criminal investigation "range from inadequate to nonexistent"); *see also* Logan Danielle Wayne, Comment, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253, 258–60 (2012) (discussing the prevalence of data brokers that collect criminal conviction records and are often not required to update their records to reflect a later record expungement).

private person—communicates an expunged criminal record? Does the individual have a cause of action against the speaker for that communication? Is it actually or "constructively"[9] false in a way that might support a cause of action for defamation or under the false light tort?

This Article will describe the problems faced by individuals who are harmed by the publication of criminal records that have been expunged, and explore possible remedies available.

Although it is beyond the scope of this Article, the questions I address can only be fully understood against the background of the crushing mass-criminalization problem and the devastating impact of the collateral consequences that flow from even a minor criminal record. As many others have reported, a staggering number of individuals whose lives have been derailed by criminal records have committed only minor, non-violent crimes, often swept up in the vortex of the broken-windows approach to policing.[10] In a 2015 article, Jenny Roberts noted that over the past four decades, approximately "one in three people in the United States has some type of criminal record[,] . . . and the FBI adds between 10,000 and 12,000 new names to its database each day."[11] At the time she researched her article, Roberts reported that the FBI had 77.7 million individuals in its database.[12] The majority of these records are for minor crimes. Roberts explains:

> People are arrested . . . for things like littering, disorderly conduct, possession of paraphernalia, driving with a license that has been suspended for failure to pay parking tickets, trespassing, turnstile jumping, or being drunk and causing people to stop and become annoyed or harassed. Many others have criminal records for minor drug possession.[13]

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9. Black's Law Dictionary defines constructive as:

> That which is established by the mind of the law in its act of *construing* facts, conduct, circumstances, or instruments, that which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law[.]

Constructive, BLACK'S LAW DICTIONARY (4th ed. 1968) (citing Middleton v. Parke, 3 App. D.C. 149, 160 (D.C. Cir. 1894)).

10. Mass criminalization describes a different, even more pervasive problem than the more well-known issue of mass incarceration. *See* Joel Rogers, *Foreword: Federalism Bound*, 10 HARV. L. & POL'Y REV. 281, 294 (2016) (noting that "[b]etween a quarter and a third of adult Americans have [criminal] records now, and each day the FBI adds another ten thousand new names to its arrests database, which already contains records on eighty million individuals"); *see also* Roberts, *supra* note 5, at 338 (citing statistics showing that 75 percent of all criminal court cases are misdemeanor "quality of life" offenses).

11. Roberts, *supra* note 5, at 325–26.

12. Roberts, *supra* note 5, at 326.

13. *Id.* at 338; *see also* Laura Cohen, *When the Law is Guilty: Confronting the Mass*

Most troubling, the impact of mass criminalization falls most heavily on minority populations.[14] A comprehensive analysis of solutions to the phenomenon of mass criminalization lies beyond the scope of this Article and the competence of this author. Others have taken on the issue with intelligence and thoughtful suggestions for reform.[15] But it is clear that the pendulum of criminal justice reform swings back and forth.[16] We appear to be in an era of increasing faith in mass criminalization and of reliance on the prison-industrial complex as offering solutions to perceived problems, especially in our cities, so vividly chronicled in Ava DuVernay's stunning film *13th*.[17] The real solution to the problems I attempt to address here must lie in comprehensive criminal justice reform. In the absence of that, I will analyze whether other remedies might exist to provide some relief.

First, I will briefly summarize representative expungement statutes which purport to erase the criminal record *post facto*. I conclude that even the most robust expungement protocols do not protect individuals because it is simply impossible to erase the record of an arrest, charge, or conviction from all the places it might appear, especially in this data-driven information age. Indeed, sometimes expungement does more harm than good by deluding the expungee into relying on the fact that the record has been erased effectively, only to have it discovered by a prospective employer, lender, or other third party who then concludes the expungee is both an ex-con and a liar.

I then analyze whether it is possible to prevent access to criminal records or control publication of such information in the first instance,

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Incarceration Crisis in the United States, 66 RUTGERS L. REV. 841, 843 (2014) (citing statistics regarding incarceration for minor, non-violent offenses).

14. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (The New Press 2010) (asserting that the United States imprisons racial and ethnic minorities at a rate far greater than any other country); *see also* Congressman John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 383 (2013) ("The mass incarceration of African Americans . . . serves as a system of racial control similar to Jim Crow-era laws") (internal citation omitted); Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 967–68 (2013) ("From encounters with law enforcement officers on our nation's streets, roads and highways, to arrest, to charging decisions (including youth charged as adults) to sentencing and to incarceration, poor African-Americans and Latinos are disproportionately injected into the criminal justice system and remain stuck in it."); 13TH (Kandoo Films 2016).

15. *See, e.g.*, ALEXANDER, *supra* note 14; Conyers, *supra* note 14, at 383; 13TH, *supra* note 14; Roberts, *supra* note 5, at 338; *see also* Cohen, *supra* note 13, at 843 (citing statistics regarding incarceration for minor, non-violent offenses).

16. *See* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 765–79 (2011) (detailing the uneven history of the restoration of rights and reputation after conviction in America).

17. 13TH, *supra* note 14.

concluding that this is impossible because of important and appropriate constitutional guarantees protecting the right to access and the right to publish information concerning matters of public interest.[18]

If it is not possible to prevent access to and publication of criminal records, can tort causes of action at least provide some remedy, and perhaps caution restraint on those who would publish criminal records? To answer this question, I examine potential tort claims, specifically, defamation and false light. I conclude that tort law offers no real remedy. In the context of a privacy claim, protection of the right to access and to publish publicly available records foreclose a privacy action. In the context of defamation and false light, such claims fail because the claimant cannot prove the essential element—falsity—when the information published is in fact true. In this regard, I discuss whether claimants might invoke a notion of constructive falsity—that is, relying on a fiction that would allow the process of expungement to miraculously transform what was once in fact true (arrest, charge, conviction) to "constructively false." Again, the answer must be no. Important constitutional limitations on imposing sanctions, even in the form of damages, for publication of truthful speech, especially about a matter of public interest, foreclose such claims. The Supreme Court's robust protection of speech laid out in *New York Times v. Sullivan*[19] indicates clearly that the Court would not tolerate such a fiction. And this is as it should be.

Next I consider whether, in the context especially of online publications (where the potential for harm is greatest because of the long shelf-life and ready accessibility of such publications), statutory provisions might require publishers to correct the record or to publish addendums to reports of criminal records following expungement. Again, Supreme Court precedent clearly indicates that such forced speech would be found to violate the First Amendment.[20]

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18. As noted below, criminal proceedings and criminal conduct have been found to be matters of public interest for First Amendment purposes. *See infra* notes 124–159 and accompanying text (citing to numerous cases that illustrate this point).

19. N.Y. Times Co. v. L. B. Sullivan, 376 U.S. 254, 283 (1964) (holding that a public official can recover for defamation only by proving by clear and convincing evidence that the defendant acted with reckless disregard (actual malice) for the truth or falsity of the communication). The Court noted that it viewed the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270 (internal citations omitted).

20. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 262 (1974) (holding that a state law requiring a newspaper to provide print space to political candidates violated the First Amendment); *see also infra* notes 272–281 and accompanying text (describing *Tornillo* in more detail).

Against this background, I offer a modest suggestion: Publishers, specifically online publishers, should voluntarily adopt policies under which, in certain well-defined circumstances, they would publish addendums to publications of criminal records, indicating that the record has been officially expunged, and perhaps the circumstances justifying the expungement.

I. THREE STORIES

"Reality continues to ruin my life."[21]

For over a century, courts have wrestled with how to protect the idea of a second act for individuals involved in the criminal justice system while also protecting the law's essential commitment to the marketplace of ideas informed by free and robust expression of truthful information. The early cases drew on Warren and Brandeis's groundbreaking article, "The Right to Privacy," and Dean Prosser's synthesis of four tort causes of action sounding in privacy, specifically invoking the "disclosure of private facts" cause of action. That approach did not work well. More recently, individuals have turned to false light and defamation for remedies. Is there a cause of action that can provide relief in these cases? Is there even a real harm in need of a remedy, or are consequences—intended and unintended, direct and indirect—simply a reality that those with a criminal record try futilely to control?

To set the stage for our discussion, I begin with three stories of individuals whose lives were ruined by publication of details of their criminal pasts.

Gabrielle Darley Melvin: Tried and Acquitted—In 1918, Gabrielle Darley shot Leonard Topp, her lover and pimp, after he abandoned her for another woman. She was arrested and tried for murder. In her defense, "she told a pitiful story of love, abandonment, and betrayal."[22] She was acquitted.[23] In 1919, she married Bernard Melvin and, at least as she told it, turned away from her past to live an "exemplary, virtuous, honorable, and righteous life" as Mrs. Melvin, caring for the family home and taking her place in "respectable society" among many friends who knew nothing of her previous life.[24] In 1925, actress-turned-producer Dorothy

21. BILL WATTERSON, THE COMPLETE CALVIN AND HOBBES (Andrews McMeel Publishing 2005).

22. LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 216 (Stanford University Press 2007) [hereinafter "LIFE'S DARK SECRETS"].

23. Melvin v. Reid, 297 P. 91, 91 (Cal. Ct. App. 1931).

24. *Id.* Mrs. Melvin's new life may not have been as respectable as she described it. There is evidence she continued working as a prostitute and madam after marrying Mr. Melvin. *See* LIFE'S

Davenport, or as she was known, Mrs. Wallace Reid,[25] produced a movie called *The Red Kimono*, which was part of a series of exposé films focusing on serious social issues of the day.[26] The film told Gabriella Darley Melvin's story as a cautionary, socially conscious tale. It cast Darley as an innocent young woman exploited by her lover—a smooth talker who lured Darley from her abusive home with promises of love and a better life. But instead, he forced her into a life of prostitution, only to later abandon her in order to marry another woman, using Darley's money to buy the ring. A distraught Darley tracked Topp down in California and shot him dead, leading to her trial for murder. Reid described the film as being based on a true story, and used the now Mrs. Melvin's actual birth name, Gabriella Darley. Melvin reported that because of the film, her friends and family learned of her difficult past, were scandalized, and shunned her. Melvin's new life as an upstanding citizen was ruined.

Marvin Briscoe: Convicted and Rehabilitated—In 1956, Marvin Briscoe and at least one accomplice "hijacked a truck in Danville, Kentucky."[27] After some time on the run, and a gun battle with police, Briscoe surrendered, eventually pleaded guilty to several crimes, and was sentenced to prison.[28] According to Briscoe, shortly after these events he "abandoned his life of shame and became entirely rehabilitated and . . . lived an exemplary, virtuous and honorable life . . . assum[ing] a place in respectable society," marrying, starting a family, and making new friends, all of whom were "[un]aware of this incident [from] his earlier life."[29] Just over a decade after the hijacking, Briscoe's epiphany, and his rehabilitation, *Reader's Digest* published a five-page article

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DARK SECRETS, *supra* note 22, at 218 (citing to how difficult it already was for Mrs. Melvin to start all over again).

25. Ms. Davenport married her co-star, swashbuckling silent film lead Wallace Reid. It was Reid's death from morphine addiction that is believed to have inspired Dorothy Davenport to launch the film series, which included an expose on the horrors of addiction. *See* John Sinnott, *The Red Kimona*, DVD TALK (May 31, 2008), http://www.dvdtalk.com/reviews/33379/red-kimona-the/ (highlighting Ms. Davenport's film career).

26. *Id.*

27. Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 36 (Cal. 1971), *overruled by* Gates v. Discovery Commc'ns, Inc., 101 P.3d 552 (Cal. 2004). The truck, which may have looked like it was transporting valuable merchandise, was actually carrying four bowling pin spotters from Yonkers, New York, worth little on any resale market available to Briscoe. *Id.*

28. JAMES HIGDON, THE CORNBREAD MAFIA 64–67 (Lyons Press 2013).

29. *Briscoe*, 483 P.2d at 36. From the opinion in *Briscoe*, one might conclude that the hijacking was something of an unusual foray into crime by Briscoe—a bumbling misadventure. However, Higdon describes Briscoe as a "young tough" who, along with his accomplice in the hijacking, conducted a "reign of terror," which included arson, beatings, and shootings. *See* HIGDON, *supra* note 28, at 64 (describing this "reign of terror").

entitled "The Big Business of Hijacking" that focused on truck hijacking as a crime phenomenon. The photo introducing the article included a caption exclaiming: "Today's highwaymen are looting trucks at a rate of more than $100 million a year."[30] The article chronicled numerous hijackings, including Briscoe's, which it described as follows: "Typical of many beginners, Marvin Briscoe and [another man] stole a 'valuable-looking' truck in Danville, Ky., and then fought a gun battle with the local police. . . . "[31] The article did not specify the year that any of the crimes it described took place (specifically, it did not mention that Briscoe's crime occurred in 1956), but did mention dates from 1965 through publication of the article in 1968 in the text. Although he was referred to only in that one sentence, after the article was published Briscoe reported that his young daughter, who had not known about his past, learned of her father's criminal history, and that friends and family now shunned him because of what was revealed in the article.

Lorraine Martin: Arrested but not Prosecuted—Lorraine Martin and her two sons were arrested on August 20, 2010. Police searched their home on suspicion that the family was involved in a drug ring. The search of their home yielded "marijuana, scales, plastic bags, and drug paraphernalia."[32] Local news sources, including Hearst Publishing outlets, covered the arrest. On August 26, 2010, one of the Hearst company's online newspapers reported that the police "arrested [Martin] and charged [her] with numerous drug violations . . . after police received information that a pair of brothers were [sic] selling marijuana in town."[33] On August 27, 2010, a Hearst broadcast outlet published an online article reporting that Martin was "arrested on Aug. 20 after police say they confiscated 12 grams of marijuana, scales and traces of cocaine from [her] house."[34] The articles were truthful and remained online.[35] Just over a year later, the state decided not to prosecute Martin and entered a *nolle prosequi*,[36] an action that essentially suspends the proceeding without any final determination, but that permits the possibility of reinstating the charges within the applicable statute of limitations.[37] In Martin's case,

30. *Briscoe*, 483 P.2d at 36.
31. *Id.* (alteration in original) (internal quotation marks omitted).
32. Martin v. Hearst Corp., 777 F.3d 546, 548 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 40 (2015).
33. *Id.* at 549.
34. *Id.*
35. *See id.* ("Martin concedes that [the] reports were accurate at the time they were published.").
36. *Id.*
37. *See, e.g.*, Roberts v. Babkiewicz, 582 F.3d 418, 420 (2d Cir. 2009) (quoting Cislo v. City of Shelton, 692 A.2d 1255, 1260 n.9 (Conn. 1997)) ("[Under Connecticut law,] [a] nolle prosequi is a 'unilateral act by a prosecutor, which ends the pending proceedings without an acquittal and without placing the defendant in jeopardy.'").

charges were not reinstated, and, pursuant to Connecticut's Erasure Law, the record of her arrest was—well—erased. The Connecticut erasure statute specifies that when charges "ha[ve] been nolled . . . [and] at least thirteen months have elapsed since [the] nolle, all police and court records and records of the state's or prosecuting attorney . . . pertaining to such charge shall be erased. . . . "[38] Despite its name, erasure under the statute does not involve destruction of the record; rather, the record is sealed and kept from disclosure.[39] The statute also specifies that the erasure shall occur by operation of law and that "the clerk or the person charged with the retention and control of such records shall not disclose to anyone their existence or any information pertaining to any charge so erased. . . . "[40] That "seal" has power; once a record is erased and sealed, the subject of the record is deemed not to have been arrested *ab initio*.[41] Further, this person "legally could state that he or she had not been arrested with respect to the relevant charges[,]"[42] and the statute states that he or she could swear to that under oath.[43]

Relying on the Erasure Statute, Martin asked the media outlets to remove the earlier stories reporting her arrest. They refused, and she sued, alleging claims for libel, false light, negligent infliction of emotional distress, and appropriation.[44]

Consider the cases together: In *Briscoe*, an accurate report of an arrest and guilty plea gave rise to a privacy cause of action. In *Melvin*, an accurate report of life facts and an acquittal gave rise to a privacy cause of action. However, the outcomes of both these cases were later called into question by a series of U.S. Supreme Court decisions beginning with *Cox Broadcasting*, which held that truthful reports of facts relating to criminal matters of public interest are protected by the First Amendment.[45] Indeed, the California Supreme Court, responding to these

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38. CONN. GEN. STAT. § 54-142a(c)(1) (2017). The statute also provides for erasure when an accused is found not guilty or the charges have been dismissed. *Id.* § 54-142a(a).

39. *See* Skall, *supra* note 4, at 350 n.67 ("'Erasure,' as used in the [Connecticut] statute, does not refer to the physical destruction of records, but rather to the act of sealing the records and keeping them from public view.").

40. CONN. GEN. STAT. § 54-142a(c)(1) (2017).

41. *See id.* § 54-142a(e)(3). The statute provides that the subject may "swear under oath" as to the erasure. *Id.*

42. Cislo v. City of Shelton, 692 A.2d 1255, 1261 (Conn. 1997).

43. CONN. GEN. STAT. § 54-142a(e)(3) (2017); *see also Cislo*, 692 A.2d at 1261 (noting the history of amendments to § 54-142a(c) since its enactment in 1963).

44. *See* Martin v. Hearst Corp., 777 F.3d 546, 549 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 40 (2015) (describing Martin's argument that even though she was arrested, once erasure occurred, it became false to publish statements about her arrest). Martin also sued for negligent infliction of emotional distress and invasion of privacy all based on the reports. *See id.*

45. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 470 (1975) (holding that protection of freedom

holdings, overturned *Briscoe* explicitly in *Gateway v. Discovery Communications*,[46] and many commentators question the continued viability of the public disclosure tort, particularly in cases involving criminal proceedings or other matters falling into the broad sweep of matters of public interest.[47] In *Martin*, the plaintiff, no doubt informed by the *Cox* line of cases, hinged her claims on falsity. Although not pleaded as such, *Martin* must have contemplated constructive falsity, created by the Erasure Statute's retroactive rewriting and sealing of the record of Martin's actual arrest, and effective nullification of that arrest. Nonetheless, Martin's case was dismissed.[48] The Second Circuit found that the information in the articles was in fact true, and that they accurately reported the facts, despite the operation of the Erasure Statute, and so "her various publication-related tort claims necessarily fail[ed]."[49]

Was the California court right in its first take on *Briscoe* and *Melvin*? As the court in *Melvin* stated, and the court in *Briscoe* repeated, "[o]ne of the major objectives of society . . . and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal."[50] In *Briscoe*, the court did consider the public interest argument; it anticipated and responded to what the U.S. Supreme Court would later say, recognizing that "[t]he public has a strong interest in enforcing the law, and this interest is served by accumulating and disseminating data cataloguing the reasons men commit crimes, the methods they use, and the ways in which they are apprehended."[51] But in

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of press provided by First Amendment bars state from sanctioning truthful publication of rape victim's name when information is legally obtained); *see also* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 97 (1979) (holding statute prohibiting publication of truthful, lawfully obtained information identifying alleged juvenile offender violated First Amendment); Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 829 (1978) (finding criminal punishment of news media for publishing truthful, lawfully obtained information regarding confidential proceedings of Judicial Inquiry violated First Amendment); Okla. Publ'g Co. v. Dist. Court in & for Okla. Cty., 430 U.S. 308, 311 (1977) (holding truthful publication of name of minor involved in criminal proceeding, legally obtained, was protected by First Amendment). For a fuller discussion of the *Cox* line of cases, see *infra* notes 141–156 and accompanying text (illustrating that the U.S. Supreme Court found this issue pressing).

46. Gates v. Discovery Commc'ns, Inc., 101 P.3d 552, 559 (Cal. 2004).

47. S*ee, e.g.*, Diane L. Zimmerman, *Requiem for A Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 337 (1983) (stating common law private-facts tort has failed to become usable and effective means of redress for plaintiffs and is "both constitutionally and practically untenable").

48. *Martin*, 777 F.3d at 546.

49. *Id.* at 552.

50. Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 41 (Cal. 1971) (quoting Melvin v. Reid, 297 P. 91, 93 (Cal. Ct. App. 1931), *overruled by* Gates v. Discovery Commc'ns, Inc., 101 P.3d 552 (Cal. 2004)).

51. *Briscoe*, 483 P.2d at 40.

balancing the competing interests, the state court analyzed whether disclosing the detail of the individual's name and connecting his criminal past with his rehabilitated present was important.[52] It concluded it was not, and that interest in this particular detail of truthful information amounted to mere curiosity which did not outweigh society's interest in rehabilitation.[53] "[S]ociety should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime."[54]

In *Briscoe* and *Melvin*, the aggrieved individuals sought their remedies in privacy actions, arguing that the passage of time and their rehabilitation transformed what may have been a matter of public interest into a private matter.[55] *Martin*, on the other hand, argued that the operation of the Erasure Statute actually transformed the facts, or erased them.[56] Expungement or erasure statutes such as the one at issue in *Martin* foster the policy interests the courts in *Briscoe* and *Melvin* sought to protect. They are designed to minimize the collateral damage of arrest and conviction and to facilitate reentry into society, thus reducing the risk of recidivism.[57] Should these policies trump the public's interest in the details of crimes? The Connecticut legislature gave the statute at issue in *Martin* teeth, as noted above, by providing that Martin could deny her criminal record.[58] If Martin could swear under oath that she was never arrested, how could a news outlet's report that she was arrested be protected as truthful speech? Yet, how could it not, without descending into Orwellian Doublethink?[59] In his thoughtful opinion in *Martin*, Judge Wesley drew on the *Rubáiyát*, observing: "The Moving Finger has

52. *Id.*

53. *Id.*

54. *Id.* at 41.

55. Melvin v. Reid, 297 P. 91, 91 (Cal. Ct. App. 1931); *Briscoe*, 483 P.2d at 36.

56. Martin v. Hearst Corp., 777 F.3d 546, 549 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 40 (2015).

57. *See* Roberts, *supra* note 5, at 327 ("Collateral consequences are the purportedly nonpunitive, noncriminal consequences that can flow automatically or as a matter of discretion from a criminal conviction. These consequences affect a person's employment and housing prospects, parental rights, educational opportunities, freedom of movement, and just about every other aspect of daily life."); *see also* Jon Geffen & Stefanie Letze, Note, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota*–State v. Schultz, 31 WM. MITCHELL L. REV. 1331, 1332 (2005) ("A publicly available criminal record is devastating to an individual's hope of re-integrating into society. . . . ").

58. *See supra* notes 36–41 and accompanying text (discussing Connecticut's Erasure Law, CONN. GEN. STAT. § 54-142a (2017)).

59. ORWELL, *supra* note 2, at 213–14. As noted above, in Orwell's *1984*, the party could just rewrite history, and once rewritten, the old version disappeared—never was: "[T]hough the past is alterable, it never has been altered in any specific instance. For when it has been re-created in whatever shape is needed at the moment, then this new version *is* the past, and no different past can ever have existed." ORWELL, *supra* note 2, at 213.

written and moved on."[60] The poet added that "nor thy [p]iety nor [w]it [s]hall lure it back to cancel half a [l]ine, [n]or all thy [t]ears wash out a [w]ord of it."[61] But an expungement or erasure statute can—or can it?

This Article uses these cases, focusing primarily on the *Martin* case, as a backdrop for consideration of how to balance the interests of the individual and society in rehabilitation and policies that support a "second chapter" in people's lives, with the competing interest in preserving free, informed, and robust debate, and the constitutional protections for truthful speech, addressing primarily whether a truthful report of an arrest or conviction, once expunged,[62] should give rise to falsity-based claims sounding in defamation or false light.

II. EXPUNGEMENT: INTO THE MEMORY HOLE[63]

"Three may keep a secret, if two of them are dead."[64]

Expungement as a concept gained footing as a result of mid-twentieth century criminal law reform movements that focused on rehabilitative justice and the notion of a redeemed former offender. Such reform began in the 1940s in specialized sentencing regimes designed for juveniles, both because they were more likely to be rehabilitated, and because it seemed unfair to burden the youthful offender with a record for a lifetime given what was understood even then about the realities of brain development in adolescents.[65] Eventually, in what one commentator described as "the optimistic temper of the times," the idea of wiping the slate clean, both to encourage and to reward real rehabilitation, was extended to adult offenders as well.[66] Although the optimistic

60. *Martin*, 777 F.3d at 552 n.7 (citing *Rubáiyát of Omar Khayyam*, stanza 71 (Edward Fitzgerald trans., 4th ed. 1879)).

61. *Id.*

62. See *supra* notes 49–91 and accompanying text for a discussion of the various expungement options. Jurisdictions apply a variety of names and remedies to the processes available to cleanse a criminal record. For convenience, I will usually rely on expungement and expunge to capture the various models.

63. [T]hey were nicknamed memory holes. When one knew that any document was due for destruction . . . it was an automatic action to lift the flap of the nearest memory hole and drop it in, whereupon it would be whirled away on a current of warm air . . . to the enormous furnaces which were hidden somewhere in the recesses of the building.

ORWELL, *supra* note 2, at 37–38.

64. BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK 53 (1914).

65. *See, e.g.*, Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1709–10 (2003) [hereinafter "*Starting Over*"] (describing the early idea that children's "antisocial conduct was . . . temporary"); *see also* A. Rae Simpson, *Young Adult Development Project*, MIT WORK-LIFE CENTER, http://hrweb.mit.edu/worklife/youngadult/brain.html (last visited Feb. 4, 2017) ("[T]he human brain does not reach full maturity until at least the mid-20s.").

66. *Starting Over*, *supra* note 65, at 1710–11.

rehabilitative tenor of the 1950s and 1960s soon gave way to a more retributive approach to criminal justice,[67] most jurisdictions (except the federal government) have adopted some mechanism for sealing, expunging, or erasing records.[68]

A. State Expungement Laws

What these provisions are called, and the exact details of how they function in terms of who may seek relief, how the individual seeks relief, and what precise relief is granted, differ widely from state to state.[69] For our purposes, the nature of the relief granted is the most important issue. Quite appropriately, most jurisdictions provide different expungement relief depending on the nature of the circumstances and the characteristics of the individual. Consistent with the history of expungement jurisprudence, juvenile offenders are given more generous relief, as are individuals who are charged and acquitted or individuals who are charged or arrested, but who are not ultimately prosecuted. Those convicted of felonies are typically given the least in terms of expungement remedies. Misdemeanors generally fall in the middle.[70] But again, our focus here is on the remedy itself and what it means, regardless of whether it is the right result given the seriousness of the crime, or the age or status of the offender. Therefore, I will begin by looking at representative statutory provisions and examining how expungement is implemented as the necessary background for understanding how expunged information remains available, and how subsequent reports of expunged information should be handled, but without focusing unnecessarily on the status of the

67. *Starting Over*, *supra* note 65, at 1714–15.

68. *See* Amy Shlosberg et al., *Expungement and Post-Exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353, 355–57 (2014) (explaining how forty-five states and Washington, D.C., have some process to expunge criminal records, while the federal government does not allow expungement for most offenses); *see also 50 State Guide to Expungement Laws*, *supra* note 4 (comparing the methods that the states take in expunging a criminal record).

69. *See* Roberts, *supra* note 5, at 323 ("There is no one definition of sealing or expungement. These terms have a variety of definitions under different state laws, which can range from actual destruction of a record to leaving the record open to the public but marking it 'expunged.'"); *see also* David A. Weintraub, *When Does "No" Mean "Yes"? With Expungements, of Course*, 88 APR N.Y. ST. B.J. 47, 48–49 (2016) (surveying various states' expungement statutes); *50 State Guide to Expungement Laws*, *supra* note 4 (discussing how expungement "may involve destruction of records . . . limited restriction on public access . . . [or] no limit of public access at all—although some records may be sealed").

70. *See 50 State Guide to Expungement Laws*, *supra* note 4 (describing how most of the new state expungement laws cover minor offenses); *see also 50-State Comparison Judicial Expungement, Sealing, Set-aside*, COLLATERAL CONSEQUENCES RESOURCE CENTER (last updated June 2017), http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparisonjudicial-expungement-sealing-and-set-aside/ [hereinafter "*50 State Guide Comparison Chart*"] (comparing the various state expungement laws).

individual, the procedural posture of the charges, or the seriousness of the crime. Others have chronicled this.[71]

Some jurisdictions actually destroy the records, and say so clearly. For example, the standard expungement order in Pennsylvania, which permits expungement under fairly limited circumstances, requires the "[Commonwealth to] expunge and destroy the official and unofficial arrest, expungement and other documents pertaining to the arrest or prosecution[.]"[72] Alabama permits an individual to petition the court to order a juvenile record destroyed five years after the individual attains majority,[73] and allows the court to "expunge nonconviction records of nonviolent felonies and misdemeanors, including [specifically] cases where the charges were dismissed[,]" requiring all agencies with these records to eliminate and remove them within thirty days.[74] South Carolina's statute provides (with some minor exceptions) that when a charge has been dismissed or the accused found not guilty, "all records must be destroyed and 'no evidence of the record . . . [may] be retained by any municipal, county, or State law enforcement agency.'" [75] Illinois uses the word expunged and then explicitly defines the term to mean that records held by criminal agencies must be destroyed and any listing or index including the individual's name must also be destroyed.[76] The Illinois legislature deals more gingerly with court records providing that when a record is expunged, the court records must be impounded, and under certain circumstances, the name of the individual "obliterated on the official index," and court personnel must respond to inquiries about these records "as it does in response to inquiries when no records ever

71. To be sure, the trend in expungement laws is to give the greatest relief to juvenile offenders who have subsequent clean records, and to those wrongfully charged. *See, e.g.*, *50 State Guide Comparison Chart*, *supra* note 70 (showing various state expungement laws for juvenile offenders); *see also* Roberts, *supra* note 5 (discussing the scope of state expungement laws); *see generally* Wallace Wade, *Who's Lying Now?: How the Public Dissemination of Incomplete, Thus Half-Truthful, Criminal Record Information Regarding a Statutorily Rehabilitated Petty Offender is an Unjust Penalty and Why Laws Regarding Expungement of and Restrictions on Dissemination of Criminal Records Information in California Must Be Reformed*, 38 W. ST. U. L. REV. 1 (2010) (noting the ineffectiveness of California's statutes on expunging juveniles' records).

72. Doe v. Zappala, 987 A.2d 190, 192 (Pa. Commw. Ct. 2009).

73. *See* ALA. CODE §§ 12-15-136, 12-15-137 (2016). The court enters a destruction order, which requires that "all references including arrest, complaints, referrals, petitions, reports, and orders shall be removed from all department or agency official and institutional files and destroyed." *Id.* § 12-15-137(b).

74. *50 State Guide Comparison Chart*, *supra* note 70 (citing ALA. CODE §§ 15-27-1-2, 41-9-625 (2016)). "Eliminate and remove" would seem to contemplate destruction of the records.

75. *50 State Guide Comparison Chart*, *supra* note 70 (citing S.C. CODE ANN. § 17-1-40 (2016)).

76. 20 ILL. COMP. STAT. § 2630/5.2(a)(1)(E) (2017) ("'Expunge' means to physically destroy the records or return them to the petitioner and to obliterate the petitioner's name from any official index or public record, or both.").

existed."[77]

While some jurisdictions in some instances call for the actual destruction or obliteration of records that have been expunged, more frequently the provisions call for sealing or limiting access to the records. Exactly what this means again differs from state to state. For example, the Louisiana code provides: "'Expunge a record' means to remove a record of arrest or conviction, photographs, fingerprints, disposition, or any other information of any kind from public access."[78] But the statute is clear that remove does not mean destroy: "'Expunge a record' does not mean destruction of the record."[79]

Indiana provides that for certain misdemeanors, when the court grants expungement, it must order the involved law enforcement agencies to "prohibit the release of the person's records or information in the person's records to anyone without a court order, other than a law enforcement officer acting in the course of the officer's official duty[,]" and must "[o]rder the central repository for criminal history information maintained by the state police department to seal the person's expunged conviction records."[80] Records sealed under this subdivision may be disclosed only to limited officials (including prosecutors, the FBI, defense attorneys, mortgage investigators, and interestingly, the Supreme Court and bar examiners in the context of bar admissions).[81] Further, in a quite remarkable provision, the statute requires that when the name of an individual granted expungement is included in an opinion or memorandum decision, the court must take the following steps:

> (1) redact the opinion or memorandum decision as it appears on the computer gateway administered by the office of technology so it does not include the petitioner's name (in the same manner that opinions involving juveniles are redacted); and
>
> (2) provide a redacted copy of the opinion to any publisher or organization to whom the opinion or memorandum decision is

77. *Id.* § 2630/5.2(d)(9)(A)(iii).

78. LA. CODE CRIM. PROC. ANN. art. 972(1) (2017).

79. *Id.*

80. IND. CODE § 35-38-9-6(a)(1)–(2) (2016).

81. *Id.* § 35-38-9-6(a)(2). The issue of how bar applicants and bar examiners should respond under various expungement protocols, especially those that specify the individual may deny under oath the expunged record, raises serious concerns for applicants, law schools, and bar officials. *See, e.g.*, Mitchell M. Simon, *Limiting the Use of Expunged Offenses in Bar and Law School Admission Processes: A Case for Not Creating Unnecessary Problems*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 79 (2014) (discussing the impact of expunged offenses in the law school and bar admission processes); *see generally* Lydia Johnson, *The Illusion of a Second Chance: Expunctions Versus the Law School and State Bar Application Processes*, 9 FLA. A & M U. L. REV. 183 (2013) (discussing the problems with the disclosure questions on law school applications).

provided after the date of the order of expungement.[82]

The Indiana statute does specifically state that the court is not required to destroy these opinions, just redact the expunged individual's name in its records. But the fact that the statute contemplates sending the redacted opinion to various "publishers" appears to contemplate that Lexis, Westlaw, et al., are expected to take some action. Would they? Must they?[83] Indiana's acknowledgement of the problem, and the legislature's efforts to manage information after it has been disseminated, informs our discussion as yet another effort to rewrite the record.

Maryland provides for expungement of some records and shielding of others. According to the Maryland statute, expungement requires the information to be removed from public inspection, which can be by either "obliteration" or "removal to a separate secure area to which persons who do not have legitimate reason for access are denied access."[84] Under "Disposition of Expunged Records," the Maryland Court Rules specify that expunged court files "shall be removed from their usual and customary filing or storage location."[85] Files must be placed in a "manila envelope" that carries the docket number, as well as the Clerk's Certificate of Expungement and Caution, which reads in relevant part:

> I HEREBY CERTIFY that this sealed envelope contains the case file relating [to the docket matter] . . . which records have been expunged . . . CAUTION: This envelope is not to be unsealed or the contents or any part thereof disclosed to any person except pursuant to a written Order of the Court, under penalty of a fine of up to $1,000, imprisonment for up to one year . . . and to dismissal from employment.[86]

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82. IND. CODE ANN. § 35-38-9-6(c) (2016).

83. Online catalogues of court proceedings, coupled with the evolution of fast and efficient search engines that can locate this material using just a name, have created a nasty privacy problem for individuals who must expose often highly intimate, sometimes embarrassing details to a court for any variety of reasons (for example, actions for benefits or insurance coverage; family disputes; competency proceedings; etc.). A mess to be sure, but one that is beyond the scope of this Article and addressed by a good number of excellent scholarly articles. *See, e.g.*, Amanda Conley et. al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772 (2012) (addressing the problems that are created with easily accessible online court records); Symposium, *Panel One: General Discussion on Privacy and Public Access to Court Files*, 79 FORDHAM L. REV. 1 (2011) (discussing the concern of disclosing private information with the increase of public accessibility to court files); Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307 (2004) (arguing that the traditional balance of disclosure of judicial records and the need to limit disclosure is upset when judicial records are available online).

84. MD. CODE ANN., CRIM. PROC. § 10-101(e) (West 2016).

85. MD. RULE 4-512.

86. *Id.*

The Clerk is required to keep an alphabetical listing of expunged records, but that list is to be kept in a locked cabinet in a secure area with no public access.[87]

On the other hand, shielding under the Maryland statute "means to render a court record and police record relating to a conviction inaccessible by members of the public."[88] A shielded record is accessible to specific individuals, including law enforcement and certain employers and licensing agencies that are required by law to do criminal background checks,[89] but those individuals are prohibited from disclosing the shielded information to anyone other than those specifically identified by the statute.[90] In addition, the Maryland statute specifies that Maryland's criminal records search engine must not "in any way refer to the existence of specific records shielded" under the statute.[91] Shielding applies to fewer (typically less serious) offenses and is easier to accomplish (it does not require a court hearing), while expungement applies to more serious matters and is harder to accomplish, but may provide stronger protections.

Some states call for correction of the record, but not full expungement.[92] For example, Arizona provides that a person "wrongfully arrested" may petition the court to require an entry on the person's court and criminal records "that the person has been cleared."[93] The statute also limits access: "The order shall further require that all law enforcement agencies and courts shall not release copies of or provide access to such records to any person except on order of the court."[94] Ironically, this might actually undercut the effectiveness of the correction.

Of particular interest for our purposes, several states permit the individual to deny that the record ever existed, and sometimes that the facts memorialized in it ever happened, through expungement or sealing. For example, as noted above, Connecticut's Erasure Statute, which was in play in the *Martin* case, specifies that for matters where charges were never prosecuted, or where the accused was acquitted, erasure means that

87. *Id.*

88. MD. CODE ANN., CRIM. PROC. § 10-301(e) (West 2016).

89. *Id.* § 10-302(b)(2).

90. *Id.* § 10-306(a).

91. *Id.* § 10-304.

92. *See, e.g.*, State v. Mohajerin, 244 P.3d 107, 112 (Ariz. Ct. App. 2010) (discussing how Arizona's statute allows for "notation of clearance" but does not authorize expungement or that law enforcement be denied access).

93. ARIZ. REV. STAT. § 13-4051(A) (LexisNexis 2016).

94. *Id.* § 13-4051(B).

the arrest is deemed never to have happened, and the individual "may so swear under oath."[95] Delaware provides that when a record of a juvenile offense is expunged, the offense "does not have to be disclosed as an arrest by the petitioner for any reason."[96] Similarly, Ohio provides that when a juvenile record is expunged, "the person who is the subject of the expunged records properly may, and the court shall, reply that no record exists with respect to the person upon any inquiry in the matter."[97] Washington's sentencing reform act provides for a broad range of offenders who satisfactorily complete their sentence to have them vacated.[98] Once the sentence is vacated, the statute specifies that "[f]or all purposes . . . an offender whose conviction has been vacated may state that the offender has never been convicted of that crime."[99]

On a related note, many of these statutes also stipulate that the effect of an expungement is to decree by operation of law that the event did not occur. There is some slippage among jurisdictions regarding whether this applies to the legal proceeding (the arrest that did not result in a charge or a charge that did not result in a conviction), or the underlying facts (the real-world events that gave rise to the legal proceeding). Connecticut's statute, for example, provides that when a charge is not prosecuted, it is expunged and that the person "shall be deemed to have never been arrested,"[100] while Illinois (in a statute addressing juvenile convictions) specifies that once an expungement order is entered, "the offense . . . shall be treated as if it never occurred."[101]

B. Expungement—A Cruel Illusion?

As this sampling demonstrates, states offer a range of protections for expunged, sealed, or erased records. But, as noted above, even under the most protective regimes, the idea of expungement may be a cruel "illusion."[102] The record may remain in public repositories by virtue of

95. Martin v. Hearst Corp., 777 F.3d 546, 549 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 40 (2015); CONN. GEN. STAT. ANN. § 54-142a(e)(3) (West 2016).

96. DEL. CODE ANN. tit. 10, § 1019(c) (2017).

97. OHIO REV. CODE ANN. § 2151.358(F) (West 2017).

98. *See* WASH. REV. CODE ANN. § 9.94A.640(2) (West 2016) (laying out the guidelines pertaining to what constitutes a satisfactory completion of a sentence).

99. *Id.* § 9.94A.640(3).

100. CONN. GEN. STAT. ANN. § 54-142a(e)(3) (West 2016).

101. 705 ILL. COMP. STAT. 405/5-915(2.6)(i) (2016).

102. *See* Wade, *supra* note 71, at 14–15 (explaining the differences between the legal and dictionary definitions of the term "expungement" as analogous to complete erasure, in contrast to California Penal Code § 1203's express language stating that expungement does not relieve a party from the "obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office"); *see also* Roberts, *supra* note 5, at 323 (explaining that expungement has varied definitions across jurisdictions); *see also* Wayne, *supra* note 8, at 257

delay or mistakes in effectuation of the order. Or, it may remain in some index or listing, or as the shadow of a record not completely erased everywhere. But even more important, the information subject to expungement, erasure, or sealing was once public, and so was likely disseminated. Therefore, it lurks in a variety of places not subject to the constraints of expungement laws, including media reports, the files of data brokers, scholarly journals, or as Wallace Wade observed, even in "a compulsive newspaper-clipper's attic."[103] He illustrated his point by drawing on the medieval penance for gossipers: they were required to cut open a pillow and release the feathers from the rooftop, and then try to retrieve them—the effort to recapture all the feathers providing vivid imagery of the futility of recapturing the gossip, or in our case, the information, once let fly.[104]

Often the expungement statutes attempt to address this issue. California's statute makes an effort to recapture the information from some sources, requiring that consumer reporting agencies "no longer . . . [report]" criminal records if the individual was pardoned or an arrest resulted in *nolle pros* or an acquittal.[105] Similarly, Connecticut's statute requires data collection agencies that acquire and report criminal records to "permanently delete such erased records" and adds that these entities "shall not further disclose such erased records."[106] And, as noted above, Indiana requires that the court redact the names of individuals who have been granted expungement from various opinions and memoranda and to send these redacted opinions to publishers, presumably with the hope that they, too, will redact the names.[107] Several federal statutes seek to achieve the same results, but only in narrow contexts, such as restricting the use of criminal records in credit reporting under the Fair Credit Reporting Act.[108] How effective such requirements are in getting

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(discussing how expungements do not provide complete legal relief).

103. *See* Wade, *supra* note 71, at 10, 30, 35 (noting that California Government Code § 6253.5 allows disclosure of "whereabouts and victims of crime" for use in "scholarly, journalistic, political, or governmental purpose," addressing the existence of issues regarding limits on private investigators' and credit reporters' use of such information, and noting that it is nearly impossible to completely erase all record of an arrest because evidence can remain in a variety of places outside the usual government databases such as a newspaper archive); *see also* Wayne, *supra* note 8, at 255 (discussing how "expungement orders do not apply to non-government sources . . . at great cost to individuals with expunged records").

104. Wade, *supra* note 71, at 23 n.143.

105. CAL. CIV. CODE § 1786.18(a)(7) (West 2010).

106. CONN. GEN. STAT. ANN. § 54-142e(b) (West 2016).

107. *See* MD. RULE 4-512 (outlining the process of recording expunged records in Maryland); *see also* MD. CODE ANN., CRIM. PROC. § 10-101(d)–(e) (West 2016) (which specifically defines the procedures described in MD. RULE 4-512).

108. *See* 15 U.S.C. § 1681c(a)(2) (2012) (prohibiting credit reporting agencies' use of arrest

actual compliance from the entities directed to delete the records remains to be seen. Further, such piecemeal efforts that address only certain sources leave many other places where the information will remain. To replace the "feathers" metaphor with one my father used for futile tasks, it is like sweeping the sun off the roof.

C. An Alternative: Forgive, Not Forget (And Say So Out Loud)

Some who advocate for reform designed to lessen the collateral impact of conviction are moving away from the remedies of expungement and erasure and toward a system that acknowledges the past but admits (or exclaims) rehabilitation. As Judge Gleeson, who issued what has been identified as the first federal Certificate of Rehabilitation,[109] observed, there are two general approaches to limiting the collateral consequences of convictions: (1) the "forgetting" model, in which a criminal record is deleted or expunged so that society may forget that the conviction ever happened; and (2) the "forgiveness" model, which acknowledges the conviction but uses a certificate of rehabilitation or a pardon to symbolize society's forgiveness of the underlying offense conduct.[110]

Judge Gleeson noted that momentum for the forgiveness argument has been increasing—and that argument convinced him to take the extraordinary step of issuing his self-styled Certificate of Rehabilitation.[111] Relevant to our inquiry, Judge Gleeson explained that employers (and in the broader range of instances, those who do research on an individual's history for whatever reason) do not have the time to

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records that precede issuance of credit reports by more than seven years).

109. *See* Jesse Wegman, *A Federal Judge's New Model for Forgiveness*, N.Y. TIMES (Mar. 16, 2016), http://www.nytimes.com/2016/03/16/opinion/a-federal-judges-new-model-for-forgiveness.html?_r=0 (explaining that Judge Gleeson designed a "federal certificate of rehabilitation" to obviate employment struggles faced by a woman who had served the entirety of her prison sentence for staging a false car accident to gain insurance benefits). While the federal system does not statutorily provide such relief, many states do. According to one media report, fourteen states have adopted some form of certificate of rehabilitation; *see* Eli Hager, *Forgiving vs. Forgetting*, THE MARSHALL PROJECT (Mar. 17, 2015, 5:53PM), https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting#.6wOWmwn5D (explaining Barack Obama's 2003 Illinois State Senate bill that would provide those who had been arrested, or completed an incarceration or probation, a Certificate of Relief from Disabilities showing employers that they were rehabilitated and would no longer be judged for their crimes).

110. Doe v. United States, 168 F. Supp. 3d 427, 442 (E.D.N.Y. 2016) (citing David J. Norman, Note, *Stymied by the Stigma of a Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences*, 31 QUINNIPIAC L. REV. 985, 1006 (2013)).

111. *See id.* at 442, 445–46 (noting that there are both practical and philosophical reasons for the forgiveness model's gained traction, and several states had already adopted similar remedies). Judge Gleeson patterned both his inquiry and his certificate on similar state remedies. *Id.* at 444–45; see *id.* at 447 to view the actual certificate Judge Gleeson used.

scour the entire record of a former offender.[112] Therefore, he undertook the analysis for them. He reviewed "each page of Doe's trial transcript, presentence report, probation reports, deposition transcript, and other documents she and the government provided . . . or a holistic view of her character and competency today," and concluded "that there [was] no relationship between Doe's conviction and her fitness to be a nurse."[113] As Judge Gleeson recognized, it is unlikely that those who rely upon or disseminate criminal records will have the resources (or the inclination) to undertake such a thorough analysis.[114] Rather, the record typically will stand on its face and yield judgments about its meaning, usually damaging to the individual.[115]

Exacerbating the problem, Frank Pasquale describes the impulse to instantly share information as an "accelerationist ethic" and notes the push to what is described in the information world as "frictionless sharing."[116] To illustrate, he quotes Gawker's CEO as saying:

> Whatever information we have, whatever insight we have, whatever knowledge we have, our impulse is to share it as quickly as possible, and sometimes with as little thought as possible. . . . Before you can think about it too much, just put it out there, just share it out there.[117]

Even more chilling, Pasquale describes extortion sites that capitalize on this "frictionless sharing" by trolling for mug shots and records, posting them, and then demanding money from the individuals depicted in exchange for taking down the pictures and records.[118]

In light of this, the forgiveness argument is persuasive for a number of reasons, both principled and pragmatic.[119] For our purposes, the pragmatic arguments are most significant, particularly considering the

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112. *Id.* at 441–42.

113. *Id.* at 442.

114. *Id.* at 441–42.

115. *See, e.g.*, Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1328 (2017) (explaining that past offenders are permanently reduced to "second-class status," regardless of whether they have completed their required sentence); Anna Kessler, Comment, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403, 405 (2015) (addressing the general public discrimination faced by those with criminal histories).

116. Frank Pasquale, *Reforming the Law of Reputation*, 47 LOY. U. CHI. L.J. 515, 520 (2015).

117. *Id.* at 519–20 (quoting Jonathan Mahler, *Gawker's Moment of Truth*, N.Y. TIMES (June 12, 2015), http://www.nytimes.com/2015/06/14/business/media/gawker-nick-denton-moment-of-truth.html).

118. *Id.* at 536–37.

119. *See* Love, *supra* note 16, at 759 (discussing the history of the restoration of rights and reputation after conviction in America). For a comprehensive argument to replace blame with forgiveness as the guiding principle of the criminal justice system, *see* Nichola Lacey & Hanna Pickard, *To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice*, 35 OXFORD J. OF LEGAL STUD. 665, 669–88 (2015) (advancing "responsibility without blame," evolutionary, instrumental and ethical arguments for the forgiveness model).

futility of efforts to force "forgetting" in an age of modern technology and in light of First Amendment constraints. But is it possible to force real forgiveness? Even assuming a good-faith effort, knowing about a criminal record yet not having it influence one's thinking and judgments sounds like Dostoevsky's polar bear task: "Try . . . not to think of a polar bear, and you will see that the cursed thing will come to mind every minute."[120] Against this background, we will use Ms. Martin's case as a hypothetical to explore possible solutions.

III. PREVENTING THE HARM BEFORE IT HAPPENS

"If people are constantly falling off a cliff, you could place ambulances under the cliff, or build a fence at the top of the cliff."[121]

Given the difficulty of recapturing, correcting, or erasing criminal records, why not simply make them unavailable to the public, including the media in the first place, or at least prohibit publication of these records? The answer, of course, is that there are constitutional restraints on such strategies. Public access to judicial proceedings boasts a long history in Anglo-American jurisprudence.[122] In the United States, this commitment to open access finds its inspiration in a Meiklejohnian philosophy of an informed electorate as essential to a functioning democracy.[123]

A. Restricting Access to Trials and Criminal Proceedings

A line of Supreme Court cases, beginning with *Richmond Newspapers v. Virginia*, established a constitutional "presumption of openness" for criminal trials, later extending this presumption to other steps involved in

120. Lea Winerman, *Suppressing the "White Bears,"* 42 MONITOR ON PSYCHOLOGY 44, 44 (Oct. 2011) http://www.apa.org/monitor/2011/10/unwanted-thoughts.aspx (citing FYODOR DOSTOEVSKY, WINTER NOTES ON SUMMER IMPRESSIONS 49 (David Patterson Trans. 1997) (internal quotation marks omitted) (noting that research by psychologist Daniel Wegner confirms Dostoevsky's impressions)).

121. John McDougall, *Denis Burkitt, MD Opened McDougall's Eyes to Diet and Disease*, THE MCDOUGALL NEWSLETTER (Jan. 2013), https://www.drmcdougall.com/misc/2013nl/jan/burkitt.pdf (quoting Dr. Denis Burkitt).

122. *See generally* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 556–57 (1980) (finding that the First and Fourteenth Amendments require allowance for press and public to attend criminal trials).

123. *See* Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 945–46 (2009) [hereinafter "*Privacy and Access to Court Records*"] (explaining Alexander Meiklejohn's strong push in 1979 for a right of public admittance to trials as a First Amendment issue, the resolution of which was "intimately linked to the processes of republican self-government"); *see also Richmond Newspapers, Inc.*, 448 U.S. at 575–76 ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.") (internal quotation marks omitted).

criminal proceedings.[124] To be clear, this recognition of a presumption of access is not absolute, but rather a qualified right—a point the Court makes in each of the cases.[125] Under modern application of the *Richmond* rule, the question of access is determined by applying a balancing analysis. The court must ask: "(1) whether the proceeding traditionally has been open to the public; and (2) whether public access would play a 'significant positive role in the functioning of the particular process in question.'"[126] If the answer to these two questions is yes, the court must meet what amounts to a strict scrutiny standard to close the proceeding. The court must make "specific, on the record findings . . . demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'"[127] Applying this standard, "the courts of appeals have found a First Amendment right of access to [a range of proceedings:] bail hearings, suppression hearings, guilty pleas, and sentencing hearings."[128] Thus, closing the proceeding will rarely meet constitutional muster.

B. Restricting Access to Court Records

The logic of the open courtroom cases drives a similar outcome in cases involving access to records of criminal proceedings, although the Supreme Court has never squarely held that this right is constitutionally protected. Rather, in *Nixon v. Warner Communications*, the Court found a common law right to access court records, but not necessarily a constitutionally protected right to access.[129] Nonetheless, the Court

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124. *See generally Richmond Newspapers, Inc.*, 448 U.S. at 555 (considering fourth retrial of accused murderer); *see also* Press-Enterprise Co. v. Superior Court of Cal. for Cty. of Riverside, 478 U.S. 1, 3 (1986) (determining "whether petitioner ha[d] a First Amendment right of access to the transcript of a preliminary hearing growing out of a criminal prosecution"); *see also* Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596, 596 (1982) (examining whether state can exclude press from testimony of minor rape victims during trial).

125. In a case decided before *Richmond Newspapers*, (never expressly overruled but limited in its application by subsequent cases) the Supreme Court found that closing a suppression hearing was appropriate under the particular circumstances of that case. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 368–69 (1979). While *Richmond Newspapers* and the line of cases following it never overruled *Gannett*, it is worth noting that *Gannett* stated there is no constitutionally protected right of access, and reasoned that the constitutional protection of an open trial is personal to the defendant. *See id.* at 391–94. *Richmond* and its progeny, as noted in the text, found a constitutionally protected interest in public access to the criminal process in the First Amendment, a right that inures to the good of the public, not the individual. *See Privacy and Access to Court Records*, *supra* note 123, at 949–50.

126. John Gerhart, *Access to Court Proceedings and Records*, 18 COMM. L. 11, 12 (Summer 2000) (citing *Press-Enterprise Co.*, 478 U.S. at 10).

127. *Press-Enterprise Co.*, 478 U.S. at 13–14; *see also Privacy and Access to Court Records*, *supra* note 123, at 948 (discussing the First Amendment right for public admittance at trial).

128. *Privacy and Access to Court Records*, *supra* note 123, at 948.

129. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 608–09 (1978). Ultimately, the Court

noted: "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."[130] In addition to the common law right, many circuit courts have recognized a qualified constitutionally protected right to access court documents—including plea agreements, sentencing motions, and even docketing systems—based on the *Richmond Newspapers* line of cases, decided after *Nixon*. These courts typically apply the two-part test and the strict scrutiny standard described above to challenges to access.[131]

Courts and law enforcement have responded by making a vast trove of records available. "Today, almost all states have publicly available Internet databases of criminal records."[132] The federal courts' Internet search engine provides access to federal court records and includes a search-by-name index.[133]

One Supreme Court case that must be distinguished is *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*.[134] The case involved a Freedom of Information Act ("FOIA") request by reporters seeking FBI criminal identification records, or rap sheets. The FBI denied the request, citing one of FOIA's explicit exemptions, and the Court upheld that denial.[135] The Court's decision to deny access turned on its interpretation of FOIA's privacy exception and, more important, on its determination that the material being sought did not constitute a public record of a criminal proceeding.[136] The rap sheets being sought were a compilation of information submitted by a variety of sources, and as such were an agency record (a FOIA term of art) and not a record of "what the government was up to."[137] The Court reasoned that in the case of FOIA,

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denied access to twenty-two hours of President Nixon's secret tapes that had been played at the criminal trial of the Watergate conspirators, relying on an explicit provision by Congress regarding how such historical presidential materials would be archived and disseminated. *See id.* at 610.

130. *Id.* at 597.

131. *See* Gerhart, *supra* note 126, at 14 (discussing the two-part test that asks whether this has been traditionally open to the public and then if public access would play a significant role); *see also Privacy and Access to Court Records*, *supra* note 123, at 948–49 (explaining that right of public admittance at trial equals republican self-government).

132. Roberts, *supra* note 5, at 328.

133. *Privacy and Access to Court Records*, *supra* note 123, at 922.

134. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 749 (1989) [hereinafter "*Reporters Comm*."].

135. *Id.* at 753, 780.

136. *Id.* at 765.

137. *See id.* at 751–52 (explaining that rap sheets are compiled by the FBI from information submitted by local, state, and federal law enforcement agencies, and include vast amounts of information). The Court noted that the sheer volume of records, the amount of information contained for each individual, and the number of sources supplying records often results in records that contain incorrect or incomplete information, and sometimes information about persons other

the statute giveth, and the statute taketh away. Because the material did not constitute a record of a criminal proceeding per se, any right of access that existed was created by Congress through FOIA, and that right of access could be, and in fact was, limited by the nine congressionally created exemptions to FOIA's right of access.[138] The Court found that Exemption 7(C) protected these particular agency records.[139] In reaching its conclusion that important privacy concerns were involved, the Court recognized a crucial principle in modern privacy jurisprudence: Large compilations of information that previously may have been publicly available, but that had been scattered about and difficult to access, create dangerous threats to personal privacy when accumulated in ways that make them readily accessible.[140]

C. Restricting Publication of Criminal Records and Proceedings

Given the protection offered the right of access to criminal proceedings and to the records of those proceedings, might it be possible to restrict the publication or dissemination of sensitive information once obtained? Again, the answer is no—indeed, an even more resounding no. Efforts to prohibit or punish publication of legally obtained materials have been struck down consistently by the Supreme Court. As the Court reasoned in *Cox Broadcasting Co. v. Cohn*, "[w]e are reluctant to embark on a course that would make public records generally available to the media but forbid their publication."[141] While the Court insists that there is no absolute prohibition, a line of cases beginning with *Cox* has consistently refused to punish or prohibit accurate reporting of even the most sensitive and sensational information.

In *Cox*, a reporter learned the name of a rape and murder victim who was a minor because the reporter was in the courtroom at the time the defendants pleaded guilty to the crime. The reporter then disclosed the victim's name in his broadcast report about the proceedings. The victim's

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than the person whose record it is supposed to be. *Id.*

138. The Freedom of Information Act, 5 U.S.C. § 552(b) (2012).

139. *See Reporters Comm.*, 489 U.S. at 756. Exemption 7(C) permits (but does not require) an agency to refuse to release law enforcement records whose production "'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" *See id.* (quoting 5 U.S.C. § 552(b)(7)(C) (2012)).

140. *See id.* at 763–71. As noted below, it is the ready access made possible by sophisticated search engines that compounds the problems created by the existence of criminal records. This concept informed the weight the Court gave Exemption 7(C)'s privacy interests. Further, the Court distinguished these compiled records noting "when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir." *Id.* at 780.

141. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975).

father sued for invasion of privacy, relying on both a Georgia statute that criminalized the publication of a rape victim's name and Georgia's common law privacy tort. The Supreme Court struck down the Georgia statute and held that allowing a privacy claim based on the accurate publication of judicial records such as this would violate the First and Fourteenth Amendments.[142] The Court explained: "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."[143] By labeling judicial proceedings—and indeed all criminal proceedings—as matters of public interest, the Court set the bar high, cloaking these matters in the protective mantle of *New York Times Co. v. Sullivan* and its progeny.[144]

The Court next decided *Nebraska Press Association v. Stuart*.[145] In that case, the judge in a sensational murder trial entered an order prohibiting publication of any accounts of confessions, admissions, or facts "strongly implicative" of the accused.[146] Because of the posture of *Nebraska Press* (a challenge to the order itself, not a defense to publication in violation of the order), the Court correctly characterized the issue as involving a prior restraint and imposing what amounted to an insurmountable hurdle.[147] The Court observed that prior restraints come with a heavy presumption against validity and that the party seeking to uphold a prior restraint "carries a heavy burden."[148] Despite what the Court admitted to be the trial judge's responsible efforts to ensure that the defendants receive a fair trial in a sensational atmosphere, the Court struck down the order as violating the Constitution.[149] One year later, the Court decided *Oklahoma Publishing v. District Court* and struck down a pretrial order forbidding publication of an 11-year-old murder defendant's name and photo—material that had been obtained during a

142. *Id.* at 491, 496–97.

143. *Id.* at 492.

144. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (constitutionalizing the tort of defamation, which placed a high threshold on the element where the communication in question relates to either a public figure or a matter of public interest); *see also infra* notes 165–171 (discussing *New York Times Co. v. Sullivan* in detail).

145. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 539 (1976).

146. *Id.* at 570.

147. *See id.* at 558 (holding that the respondent now has the burden of showing the justification for the imposition of the restraint).

148. *Id.*

149. *See id.* at 569–70 (resulting from both the specific facts of this case as well as the heavy burden that is now imposed on the respondent).

detention hearing in open court.[150]

In *Landmark Communications, Inc. v. Virginia*, decided a year after *Oklahoma Publishing*, a newspaper publisher was criminally prosecuted for reporting that a judge was under investigation by a judicial inquiry panel, in violation of a Virginia statute that prohibited anyone, including those not involved in the proceeding, from divulging such information.[151] Again, the Court held that this proceeding was a matter of public interest.[152] The Court found the Commonwealth's argument that there were compelling reasons to keep this information confidential—specifically, that "the public interest is not served by discussion of unfounded allegations of misconduct which defames honest judges and serves only to demean the administration of justice"—unconvincing, and held that criminal punishment of a third party who published legally obtained information violated the Constitution.[153]

Smith v. Daily Mail is the next case in this line of what became virtually annual forays into this issue. In *Smith*, the Court considered whether a statute that prohibited publication of an underage criminal defendant's name without permission from the court was constitutional. Again, the Court struck down the law. The Court began its analysis by stating that it did not matter whether it viewed the statute as a prior restraint or a sanction for publishing truthful information because either one "requires the highest form of state interest to sustain its validity."[154] *Smith* presented slightly different facts than the earlier cases in that the reporters in *Smith* did not obtain their information from court records or from being in the courtroom. Rather, they interviewed people at the crime scene, engaging in what the Court called "routine newspaper reporting

150. *See* Oklahoma Publ'g Co. v. Dist. Court, 430 U.S. 308, 308–11 (1977) (holding that under Oklahoma law, the judge could have closed the detention hearing and other court proceedings because they involved a juvenile (although as noted above, the court would have had to make a case for closure)).

151. Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 831–32 (1978).

152. The Court stated as follows:

> Although it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition will not respond to public commentary, the law gives "[j]udges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions." The operations of the courts and the judicial conduct of judges are matters of utmost public concern.

Id. at 838–39 (alteration in original) (citing Bridges v. California, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting)).

153. *Id.* at 840–42.

154. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 101–02 (1979). This was surprising since the Court as recently as three years earlier had dubbed prior restraints "the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

techniques."[155] On one hand, this makes the *Smith* holding slightly less on point for the specific question at hand—the constitutionality of restraining or sanctioning publication of judicial proceedings. But it also vividly demonstrates the futility of attempts to control factual information—seal it in one place if you will, but the facts remain, and can be discovered. "The truth is out there."[156]

In *The Florida Star v. B.J.F.*, the newspaper discovered and published a rape victim's name because a member of the Sheriff's department erroneously put a document reporting the crime that included the victim's name in a bin in the pressroom.[157] As in *Smith*, the information the reporter published was, by definition, not part of a public government record. While police reports left in the pressroom were routinely made available to the media, Florida law specified that "police reports which reveal the identity of the victim of a sexual offense are not among the matters of 'public record' which the public, by law, is entitled to inspect."[158] Nonetheless, consistent with *Smith*, the Court held that publishers of legally obtained information that related to a matter of public interest could not be punished or exposed to legal sanctions.[159] But again, the Court explicitly refused to state a broad rule, noting:

> Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense.[160]

But, in fact, in case after case, even in light of extraordinarily compelling circumstances, the Court has consistently struck the balance in favor of permitting access and protecting publication. It seems, therefore, that efforts to restrict access to information or to prohibit

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155. *Smith*, 443 U.S. at 103.

156. *The X-Files*, "Opening Credits" (20th Century Fox Television 1993–2002); *see, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 395 (1981). The attorney-client privilege reflects this same lesson; it protects communication but cannot somehow cloak the facts as they exist in the real world.

157. The Florida Starr v. B.J.F., 491 U.S. 524, 526–27 (1989).

158. *Id.* at 536.

159. *See id.* at 540–41 (stemming from the need to preserve First Amendment Rights). The opinion explains as follows:

> When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant. Where important First Amendment interests are at stake, the mass scope of disclosure is not an acceptable surrogate for injury.

Id. at 540.

160. *Id.* at 541.

publication of information once lawfully obtained will not survive constitutional challenges.

These cases also close the door to privacy-based actions for damages flowing from the publication of truthful information. Indeed, that is what dooms cases like Briscoe's and Melvin's. But what about Ms. Martin's claims? The *Cox* line of cases dealt with truthful information. Ms. Martin hinged her cause of action on falsity, suing in defamation and false light.[161] Might an individual whose record was expunged sue for defamation or false light, arguing that according to the law, her record no longer exists and it is as if she never was accused of or committed the acts reported? Unlikely, at least outside the boundaries of Orwell's Oceania.

IV. TRUE LIES—FALSITY-BASED CLAIMS

"I don't mind being called a liar. I am. I am a marvelous liar. But I hate being called a liar when I am telling the perfect truth."[162]

In the case that inspired this Article, Ms. Martin alleged that the publication—specifically, the continued availability of the report of her arrest—was false as a result of the erasure of that record.[163] Can expungement give rise to a falsity-based cause of action by transforming once-true reports into false reports? To answer this question, I now explore defamation and false light, and the requirement of falsity.

A. Defamation: The Elements and the Constitution

To state a claim for defamation, a party must plead a false and defamatory publication, of and concerning the plaintiff, made with at least negligence, without an applicable privilege.[164] Given the subject matter involved, the easiest element to prove for the person whose record is being expunged is defamatory meaning. The Second Restatement defines defamatory communication as one that "tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[165] The Restatement further identifies imputation of criminal conduct as among the most serious forms of defamatory communication. [166] Thus, reporting that someone is guilty of a crime easily clears the threshold. And in light

161. Martin v. Hearst Corp., 777 F.3d 546, 549 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 40 (2015).

162. PATRICK ROTHFUSS, THE WISE MAN'S FEAR 1002 (DAW Books, 2011).

163. *Martin*, 777 F.3d at 550.

164. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

165. *Id.* at § 559.

166. *Id.* at § 570.

of the collateral impact of simply having a criminal record, reporting even the charge also clears this hurdle.[167] The real issues arise with the requirement of falsity, especially in light of the constitutionalization of the tort of defamation.

Early common law did not require the plaintiff to prove falsity as an element of the prima facie case; the plaintiff was presumed to have a good reputation, putting the rabbit in the hat regarding falsity.[168] The defendant could rebut this by carrying the burden of proving truth as an absolute defense.[169] But beginning with *New York Times Co. v. Sullivan*, the Supreme Court constitutionalized the tort of defamation, placing high thresholds on some of these elements, especially where the communication in question relates to a public figure or a matter of public interest. In *Sullivan*, the Court carved out protection for even false speech in order to provide breathing room that the Court reasoned was critical to ensure the robust debate essential for a functioning democracy and a free society.[170] The Court held that in order to recover damages for a false and defamatory statement, a public official must show, by clear and convincing proof, that the publisher either knew the information communicated was false, or acted with reckless disregard for the truth or falsity of the information.[171]

The *Sullivan* standard was later extended to public figures engaged in matters of public interest.[172] Then, in *Gertz v. Robert Welch, Inc.*, the Court held that while a private person (as distinct from a public official or public figure) involved in a matter of public interest (as distinct from

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167. *See, e.g.*, Armstrong v. Shirvell, 596 F. App'x 433, 442 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 403 (2015) (discussing how the essence of a defamation claim involves harm to a person's reputation); Hatfill v. N.Y. Times Co., 416 F.3d 320, 333 (4th Cir. 2005) (discussing how a false statement that is a matter of public concern must be provable as false before it can be liable under defamation law); Cianci v. New Times Publ'g Co., 639 F.2d 54, 61 (2d Cir. 1980) (discussing the interplay of opinions and defamation in regards to the press).

168. *See, e.g.*, Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 770 (1986) (noting that common law presumed that an individual's reputation is good so statements defaming a person are presumptively false).

169. *See id.* (noting the common law rule holds that "[s]tatements defaming [a] person are . . . presumptively false" but defendant may prove "truth of statements" which provides "absolute defense").

170. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (placing constitutional limits on the states' ability to impose damages in actions for defamation because of the need to give speech breathing room).

171. *See id.* (explaining that any other standard of proof would limit public debate and thus free speech); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974) (noting that there is a competing interest between an individual right and the constitutional right to free speech).

172. *See* Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 164 (1979) (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130, 162–65 (1967) (Warren, C.J., concurring)) (explaining further that the standard of bringing a defamation action was not expanded to private individuals).

a private matter) would not be held to the *Sullivan* actual malice standard, the Constitution did impose thresholds on certain elements.[173] Specifically, *Gertz* held that liability could not be imposed without a showing by clear and convincing evidence of at least fault (understood to mean at least negligence) with respect to the truth or falsity of the publication.[174]

Finally, the last piece critical to this analysis comes with *Philadelphia Newspapers, Inc. v. Hepps*. In *Hepps*, the Court rejected the common law rule that presumed falsity and held that the Constitution required the plaintiff (even a private figure, at least when the matter was of public interest) to carry the burden of pleading and proving falsity.[175]

The *Sullivan* line of cases radically changed the law of defamation by taking what had been a virtually strict liability tort for which the key element of falsity could be presumed and imposing what often amounts to impossibly high barriers to recovery. In doing so, the Court created a cottage industry surrounding the questions of who is a public figure, what is a matter of public interest, and how the status of the public figure (i.e., public official, public figure, general purpose public figure, limited purpose public figure, or private figure) intersected with the nature of the communication (e.g., matter of public interest or newsworthy material).[176]

Are expungees limited purpose public figures, private figures involved in matters of public interest, or simply private figures? Some courts have categorized criminal defendants as limited purpose public figures (public figures for the purpose of their involvement in criminal activity or in the criminal process) and are therefore subject to *Sullivan*'s imposition of almost impossible hurdles; other courts have found them to be private figures involved in a matter of public interest and so subject to the more forgiving *Gertz* standards.[177] Either interpretation requires the plaintiff to prove falsity.[178]

The Supreme Court has never faced categorizing criminal defendants head on, but one Supreme Court decision involving a witness—

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173. *See Gertz*, 418 U.S. at 352. In the case of *Gertz*, the matter involved Elmer Gertz, a lawyer, representing the family of a victim who was shot and killed by a police officer in a civil action against the police officer. *Id.* at 325.

174. *Id.* at 349–50.

175. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).

176. *See* Victoria C. Duke, *Calumnious News Reporting: Defamatory Law Is More Than Sticks and Stones for Civic-Duty Participants*, 93 NEB. L. REV. 690, 705–21 (2015), for a thorough discussion of how the consequences of the decision in *Sullivan* have played out.

177. *See id.* at 717 (emphasizing the lack of conformity among jurisdictions on this question).

178. *Gertz*, 418 U.S. at 342–43; N.Y. Times v. Sullivan, 376 U.S. 254, 298–99 (1964).

potentially implicated in espionage—provides guidance. In *Wolston v. Reader's Digest*, Ilya Wolston sued *Reader's Digest* for defamation.[179] Wolston was the nephew of two people who pleaded guilty to espionage.[180] He had been subpoenaed and interviewed several times regarding this matter.[181] At one point he argued that he should not be forced to travel from Washington, D.C., to New York yet again to be interviewed about this matter due to his failing mental health.[182] Nonetheless, the court ordered him to appear. [183] He refused.[184] He then faced a hearing to show cause why he should not be found in contempt.[185] He and his then-pregnant wife appeared to defend his decision at the hearing, but after she broke down on the stand, he agreed to plead guilty to the contempt charge and was sentenced to a one-year suspended sentence with three years of probation conditioned upon his cooperating with the investigation of Soviet espionage.[186] Newspapers covered this fairly extensively at the time, but after about six weeks, the attention died down and Wolston "succeeded for the most part in returning to the private life he had led prior to issuance of the grand jury subpoena."[187] He was never indicted for espionage or accused of being a spy.[188] Many years later, *Reader's Digest* published a book entitled *KGB: The Secret Work of Soviet Secret Agents* which identified Wolston as a KGB agent and a Soviet spy—information Wolston alleged was false.[189]

In analyzing whether Mr. Wolston was a public figure or a private figure, the Court emphasized language from *Gertz* that focused on the individual's role in "injecting himself" into the controversy, and contrasted this with what the Court described as Wolston being "dragged" into this matter.[190] The Court continued, "[a] court must focus on the

179. Wolston v. Reader's Digest Ass'n. Inc., 443 U.S. 157, 160–62 (1979).

180. *Id.* at 161.

181. *Id.* at 162.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 163.

186. *Id.*

187. *See id.* (discussing that even though fifteen stories were written both in Washington and New York about these events, Wolston succeeded in returning to his normal life).

188. *Id.*

189. *See id.* at 159 (arguing that a short time after these events there were two publications where Wolston was identified as a Soviet agent); JOHN BARRON, KGB: THE SECRET WORK OF SOVIET SECRET AGENTS 188 (1974) (demonstrating how simple it was for a person like Wolston to be identified in a publication).

190. *See Wolston*, 443 U.S. at 166–67 (explaining that the fact Wolston voluntarily refrained from attending the grand jury hearing for fear of encountering publicity does not automatically render him a public figure). In fact, the language from *Gertz* cited by *Wolston* was not quite so focused on voluntary action by the individual: "More commonly, an individual voluntarily injects

'nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'"[191] The Court concluded that Wolston, like Elmer Gertz (the lawyer in the *Gertz* case, who represented in a civil case the family of a suspected criminal shot by the police), was a private figure involved in a matter of public interest.[192] Especially relevant here, the Court "reject[ed] the further contention of respondents that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction."[193] The Court seems to instruct us to look at the level to which the individual "engaged the attention of the public in an attempt to influence the resolution of the issues involved[,]"[194] and so attained "special prominence in the resolution of public questions. . . ."[195]

Courts take differing approaches to applying this analysis in the context of criminal defendants. Is the individual's action in thrusting himself or herself into the controversy the crucial determinant? Indeed, the Court in *Gertz* suggested that affirmative action on the part of the individual is important, if not critical, observing that an involuntary public figure, while theoretically possible, would be "exceedingly rare."[196] But should the nature of the controversy—its newsworthiness—play into the analysis? For example, in a thoughtful opinion, the Kansas Supreme Court struggled with this interplay, concluding that the nature of the crime had to be considered.[197] Thus, while the U.S. Supreme Court in *Wolston* focused on the actions of the individual defendant (contrasting Wolston's lack of voluntary action in being thrust into a controversy with the example of a defendant who "use[d] the contempt citation as a fulcrum to create public discussion about the methods being used in connection with an investigation or prosecution," and who therefore might be found a limited purpose public figure),[198] the Kansas court in *Ruebke* considered the sensational nature of the triple murder involved

himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 164 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)).

191. *Wolston*, 443 U.S. at 167.

192. *Id.* (citing *Gertz*, 418 U.S. at 352).

193. *Id.* at 168.

194. *Id.*

195. *Id.* (quoting *Gertz*, 418 U.S. at 351).

196. *See Gertz*, 418 U.S. at 345 (explaining that it is extremely unlikely that individuals can become public figures without intentional action of their own).

197. *See generally* Ruebke v. Globe Commc'ns Corp., 241 Kan. 595, 601 (Kan. 1987) (finding that Ruebke was a limited public figure due partially to the fact that the triple murder alleged against him "by nature was of great concern to the public," and this public concern "thrust Ruebke into the forefront of public attention").

198. *Wolston*, 443 U.S. at 168.

and the intense media coverage to find the defendant a limited purpose public figure.[199] Similarly, in *Marcone v. Penthouse International Magazine for Men*, the Third Circuit found an attorney who was indicted for allegedly engaging in drug-related activities with his clients to be a public figure.[200] The court carefully distinguished Marcone's activity as a lawyer representing drug dealers (in this case, notorious motorcycle gangs) with the lawyer's own conduct of engaging in the activities of the gangs.[201] In its public figure analysis, the court looked at more than Marcone's actions in thrusting himself into the controversy, explaining:

> [T]he status of public figure *vel non* does not depend upon the desires of an individual. . . . Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow. It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient . . . [that the individual] voluntarily engaged in a course that was bound to invite attention and comment.[202]

In the court's mind, apparently, engaging in the criminal activity itself was the course that invited attention and comment, and this was significant in finding Marcone a limited purpose public figure.[203] Recall, a limited purpose public figure is a public figure only with respect to the matter of public interest.[204] And while it may seem the question answers itself, given this analysis, it is worth closing the loop and asking: Are criminal activity and criminal procedures matters of public interest? The *Cox* line of cases detailed above, though dealing with the issue from a slightly different perspective, answers the question with a firm, yes.[205] With this as background, I turn to the viability of an expungee's cause of action for defamation—a cause of action that must rise or fall on whether the expungee can carry the burden of proving falsity.[206]

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199. *See Ruebke*, 241 Kan. at 600–02 (arguing that what made Ruebke a limited public figure was the intense media coverage, Ruebke voluntarily turning himself in, and Ruebke's arrest and indictment for the triple murders).

200. Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1084–86 (3d Cir. 1985).

201. *See id.* (explaining that when determining whether someone is a public figure, one should look to the individual's own actions).

202. *Id.* at 1084 (quoting Rosanova v. Playboy Enter. Inc., 580 F.2d 859, 861 (5th Cir. 1978)).

203. *Marcone*, 754 F.2d at 1086.

204. *See supra* notes 176–177 (discussing how some courts have categorized criminal defendants as limited purpose public figures meaning they are public figures for the purpose of their involvement in criminal activity).

205. *See supra* notes 141–161 and accompanying text (arguing that criminal activities are always a matter of public interest).

206. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 770 (1986).

1. Establishing Falsity: Constructive Falsity

If an expungee is considered a public figure with respect to her criminal activity or charges lodged against her for engaging in criminal activity, in an action for defamation she would be required to prove that the defendant published the defamatory information with knowledge that it was false or with reckless disregard for its truth or falsity.[207] If the expungee is considered a private figure, and the matter is considered to be of public interest, she would still be required to prove falsity, but only that the publisher was negligent with respect to the truth or falsity of the information.[208] In both instances, however, the burden of pleading, proving, and persuading that the communication was false falls squarely on the plaintiff, who must prove this element by at least a preponderance of the evidence.[209] Nat Stern aptly described this as making falsity part of the intrinsic character of a defamation claim.[210] Stern's illumination of the import of this constitutionally driven requirement correctly grasps falsity as essential to a defamation claim, and so informs my analysis.

In order for an expungee to prevail in a defamation claim under the scenarios I have been considering, meeting the Court's constitutionally driven "demonstrably-false" requirement would require the Court to accept a notion of constructive falsity—that is, falsity created by operation of the expungement law that retroactively changes or erases the facts of the expungee's arrest, conviction, or charge. As noted above, the way the law wields the concept of "constructive" may in fact provide a way to understand all forms of expungement. That is, constructive means establishing something that is not and deeming it to be so. We wave our wand and transform "the character assigned to it in its own essential nature" by operation of "the mind of the law in its act of *construing* facts, conduct, [or] circumstances" to make it what we want it to be.[211] The thing acquires that character "in consequence of the way in which it is

207. *Id.*

208. *Id.*

209. *See id.* at 776 (discussing that the plaintiff bears the burden of showing falsity before recovering damages).

210. Nat Stern, *The Intrinsic Character of Defamatory Content as Grounds for a Uniform Regime of Proving Libel*, 80 MISS. L.J. 1, 17–18 (2010).

211. *Constructive*, BLACK'S LAW DICTIONARY (Revised 4th ed. 1968) (emphasis removed); *see also* Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1437 (2007) (explaining how "common law legal fiction treated as true a factual assertion that plainly was false . . . "). Villanova's law school chaplain, a non-lawyer and Augustinian friar, once asked as he puzzled over the law school calendar which described a Monday in December as a "constructive Thursday" what the term meant. After hearing the explanation ("Well, see Jack, it's a fiction."), he chuckled, "So you just make stuff up and call it a legal concept? Awesome!" The clarity of vision, uninhibited curiosity and straightforward manner Father Jack Denny, OSA, brought to our friendship and the law school are much missed since his untimely death in 2016.

regarded by a rule or policy of law . . . implied [or] made out by legal interpretation."[212] Expungement takes something that happened and decrees that it did not, or at least that any record of its happening conceptually does not exist; the individual involved can "truthfully" answer, "No, this did not happen," to a question asking about the expunged facts (which did, of course, happen). It defies the observation quoted in the title of this Article that "what happened before is what really happened,"[213] refuting it with Orwellian logic.[214]

This surely represents good policy in the context of expungement's criminal justice goals. The effects of expungement must be applied beyond the narrow confines of the criminal record itself to have any hope of mitigating the devastating collateral consequences of a criminal record—consequences so eloquently described by Judge Gleeson in explaining his decision to craft a Federal Certificate of Rehabilitation.[215] But, as Judge Gleeson[216] and so many commentators have noted, although we would both forgive and forget the criminal history of a rehabilitated individual in a perfect world, we cannot achieve perfection in reality.[217]

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212. *Constructive*, BLACK'S LAW DICTIONARY (Revised 4th ed. 1968).

213. *See* Marshall, *supra* note 1 and accompanying text (discussing how the past is always with us, and even though it may be said a person is someone new, the past happened first).

214. ORWELL, *supra* note 2, at 213. "[T]he past is whatever the Party chooses to make it . . . [W]hen it has been re-created in whatever shape is needed at the moment, then this new version [IS] the past, and no different past can ever have existed." ORWELL, *supra* note 2, at 213.

215. *See* Doe v. United States, 168 F. Supp. 3d 427, 445–47 (E.D.N.Y. 2016) (explaining that the consequences are not mere trivialities, such as ineligibility to enlist in the military, to serve on a federal jury, and to receive government benefits); *id.* at 445 (explaining that even though the majority of states do not issue a certificate, the "federal system has much to gain from a certification system"); *see also* Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 719 (2012) (citing Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) (stating that collateral consequences "can be more punitive and permanent than a person's actual criminal sentence")).

216. *Doe*, 168 F. Supp. 3d at 446.

217. *See, e.g.*, Roberts, *supra* note 5, at 327, 343 (discussing the crippling effects of a criminal record and how sealing and expungement laws are just one way to solve this problem); Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, CTR. FOR AM. PROGRESS, 34 (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf (discussing a criminal record's potential longstanding effects on a person's economic security, family, and community); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 286–89 (2011) (explaining that even misdemeanors can have long lasting negative effects, especially in an age characterized by access to criminal records available at the click of a button); Wade, *supra* note 71, at 23 (arguing that California's legislative efforts to limit the harsh effects of a criminal record have not been effective, especially given the technological developments that have manifested since the legislation was adopted); *Starting Over*,

We have already seen that efforts to erase or rewrite history have limited effect—as futile as attempting to re-capture feathers let loose from a pillow cut open on a rooftop.[218] Similarly, efforts to impose liability for disclosure of the facts of a criminal record by deeming them constructively false and imposing defamation damages will not work. Constructive falsity would allow us to assume the falsity of the report of a criminal record while simultaneously understanding full well that the presumption of falsity is not fact.[219] Would the Court permit such sleight of hand? A fair reading of the Supreme Court's opinions counsel that it would not. Stern has insightfully described falsity as the "intrinsic element" of defamation—an intrinsic element firmly anchored as constitutionally required. In rejecting the common law presumption of falsity applied to defamatory speech and imposing the requirement that private-party, public-matter plaintiffs must plead, prove, and persuade on the element of falsity, the Court understood the potential for unfairness for deserving defamation plaintiffs who might not be able to meet the burden of proof, even though the speech involved was in fact false, defamatory, and damaging.[220] The Court observed that on the facts of *Hepps* itself, the impact of Pennsylvania's Shield Statute made imposing the burden of proving falsity on the plaintiff even more onerous—perhaps impossible—because the media defendants could invoke the Shield Statute and refuse to divulge their sources, critical to the plaintiff's ability to prove falsity and reckless disregard.[221] Nonetheless, the Court reasoned that in order to provide the breathing room necessary to protect speech, it was willing to insulate even demonstrably false speech from

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supra note 59, at 1717–34 (explaining the unforgiving nature of the American criminal justice system and proposing a legal framework to "limit the scope and duration of collateral legal penalties").

218. *See supra* notes 107–113 and accompanying text (explaining that the efforts to redact names only consider certain locations, which leaves remaining information in other places).

219. *See* Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 319 (2013) ("A legal fiction is often a 'factual statement a judge, a legal scholar or a lawyer tells, while simultaneously understanding full well—and also understanding that the audience understands—that the statement is *not fact*.'").

220. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776–77 (1986) (illustrating the Court's understanding). The Court acknowledged,

> There will always be instances when the factfinding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive. Under a rule forcing the plaintiff to bear the burden of showing falsity, there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false. The plaintiff's suit will fail despite the fact that, in some abstract sense, the suit is meritorious.

Id. at 776.

221. *Id.* at 778–79.

liability.[222]

Moreover, the Court's application of its *Sullivan* jurisprudence in the context of rhetorical hyperbole and parody reinforces the message that the requirement of demonstrable falsity will be strictly enforced. In *Hustler Magazine, Inc. v. Falwell*, the parody ad in question purported to quote evangelist Jerry Falwell describing his "first time" as happening with his mother in an outhouse.[223] The Court reasoned that parody cannot be shown to involve facts, and therefore cannot be shown demonstrably false.[224] Outrageous, harmful and untrue, perhaps, but not false.[225] Therefore, the Court reasoned, the Constitution will not permit the imposition of damages, even in the face of outrageous conduct and verifiable harm.[226]

This leads to the conclusion that the Court will not destabilize its holding in *Hepps*, and indeed the entire *Sullivan* line of cases, by permitting constructive falsity—a legal fiction—to establish the very element the Court found constitutionally essential to the cause of action. At best, fictions are viewed with suspicion. Lisa Kern Griffin suggests that the very name "reveals an underlying sense that there is something dangerously deceptive about them."[227] *Hepps* rejected the use of fiction when it disallowed application of the long-standing concept of presumptive falsity (a form of fiction) and imposed the burden on the plaintiff to prove falsity with convincing clarity, finding the presumption of falsity constitutionally impermissible.[228] The fiction of constructive

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222. *See id.* (discussing the First Amendment's requirement that in defamation cases the Court will protect some falsehood and thereby protect speech that matters).

223. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 48 (1988) (explaining that this parody was modeled after actual comparison advertisements that included interviews with celebrities about their first time drinking Campari Liqueur).

224. *Id.* at 48–50 (determining parody "could not reasonably have been interpreted as stating actual facts about the public figure involved[,]" and if something is not factual, it cannot be shown to be false).

225. *Id.* at 50.

226. *Id.*; *see also* Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (noting that the word "blackmail" used to criticize public official's bargaining tactics was "no more than rhetorical hyperbole, a vigorous epithet[,]" and therefore could not support action for defamation).

227. Griffin, *supra* note 219, at 320. Griffin emphasizes her point, citing the movie *A Civil Action*, where a lawyer explains that the judge will ask "the jury to 'create a fiction that will stand for the truth, but won't be the truth.'" *Id.* at 304 n.125 (quoting A CIVIL ACTION (Touchstone Pictures 1998)). To be fair, the single publication rule discussed above is itself a legal fiction, but one which the Supreme Court has embraced. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 777 (1984). The Court noted that the rule prevented the unnecessary "drain of libel cases on judicial resources" and protected defendants from harassment resulting from multiple suits. *Id.* In *Keeton*, the rule inured to the benefit of the plaintiff who was able to invoke the rule to shop for the longest defamation statute of limitation in the country. *Id.* at 778–81.

228. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776–77 (1986).

falsity would be rooted in a presumption even more constitutionally unsound: it would take a constitutionally required element and, in the face of actual knowledge to the contrary, declare it established. The parody/rhetorical hyperbole line of cases even more convincingly compels this conclusion. If the Court would not weaken the requirement of factual falsity by finding false implication in the parody cases, including one as outrageous as the Falwell parody, it cannot be expected to permit an expungee to wave the magic wand of expungement over the verifiable and truthful facts in an official public record of a criminal or judicial proceeding, and in doing so, deem them (constructively) false.

2. Establishing Falsity: Changed Circumstances

An expungee might take another tack in seeking to establish falsity, an approach suggested by the facts of the *Martin* case. Implicit in Lorraine Martin's demand that the media defendants "correct" their reports (that is, delete them) to reflect the erasure of her criminal record, and her subsequent claims for defamation and false light based on their refusal to do so, is the notion that failure to delete the reports causes the once-true information to become false.[229] The theory posits that information, which was true when it was published, could become false for the purpose of imposing liability in a defamation action by virtue of subsequent events or changed circumstances.[230] This, so the reasoning goes, is especially so in the context of online publications, primarily because they are easily searchable and are arguably republished each time a reader searches and pulls up the article.[231] Further, unlike the case of print publications, it is relatively simple to delete the article entirely (except, of course, for already downloaded versions).

At least for media defendants, this theory will not work to establish

229. This was not directly addressed by the *Martin* court, but the issue was raised in the defendant's brief. *See* Brief for Defendants-Appellees at 10–21, Martin v. Hearst Corp., 777 F.3d 546 (2d Cir. 2015) (No. 13-3315-cv) [hereinafter "Brief for the Defendants"] (arguing that Connecticut's Erasure Statute is limited to expunging official government records of criminal charges that are not pursued, and does not impose a duty on the press to withdrawal or update reports of erased charges); *see also* Brief for the Reporters Comm. for Freedom of the Press as Amicus Curiae in Support of Defendant-Appellees at 11–14, Martin v. Hearst Corp., 777 F.3d 546 (2d Cir. 2015) (No. 13-3315-cv) [hereinafter "Amicus Curiae Brief"] (citing Strada v. Conn. Newspapers, Inc., 477 A.2d 1005, 1010 (Conn. 1984) (arguing that "[j]ournalism would be impossible if subjects of stories could routinely sue over material that they would have liked to see included in the story," and adding that "an omission can constitute libel only when there are 'additional material facts which, if reported, would have changed the tone of the article'")).

230. Brief for the Defendants, *supra* note 229, at 10–21; Amicus Curiae Brief, *supra* note 229, at 11–14.

231. Brief for the Defendants, *supra* note 229, at 10–21; Amicus Curiae Brief, *supra* note 229, at 11–14.

falsity because of the operation of the single publication rule. The single publication rule, which has been universally adopted, provides that "[a]ny one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication" constitutes just one publication and gives rise to one cause of action.[232] The single publication rule most often arises when courts must determine when the statute of limitations begins to run.[233] Functionally, it means a defamatory publication must be judged at the moment of its first publication.[234] That is, all the elements of a cause of action must be assessed at a single moment of publication—to wit, that there was a communication, of and concerning the plaintiff, that is defamatory and demonstrably false.[235]

As with any emerging technology, the advent of online publications raised the question of whether the single publication rule would apply to online media. The majority of courts considering the question have held that the single publication rule applies to online publications, and the fact that each view "reloads" the article does not make each view a new publication.[236] The New York case of *Firth v. State* has been cited as the most influential of these rulings.[237] *Firth* and the other cases finding that

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232. RESTATEMENT (SECOND) OF TORTS § 577A(3) (AM. LAW INST. 1977).

233. *See* Note, *The Single Publication Rule in Libel: A Fiction Misapplied*, 62 HARV. L. REV. 1041, 1042 (1949) (exhibiting the single publication most frequently used to determine when libel action is barred by statute of limitations); *see, e.g.*, Adeline A. Allen, *Twibel Retweeted: Twitter Libel and the Single Publication Rule*, 15 J. HIGH TECH. L. 63, 66 (2014) (discussing the single publication rule, but only in the context of statutes of limitations); *see also "Single Publication Rule" Applied Online*, 7 No. 5 Cyberspace Law. 17 (July/Aug. 2002) (noting that the single publication rule is applied by courts to "determine statute of limitations").

234. *See* Lori A. Wood, *Cyber-Defamation and the Single Publication Rule*, 81 B.U. L. REV. 895, 897–99 (2001) (noting that common law traditionally treated each of a party's several communications as a separate publication, and that the single publication rule "developed . . . in response to the problems caused by the advent of mass publication" to protect defendants from "multiple lawsuits and undue harassment that might result from the dissemination of large-scale communication"); *see, e.g.*, Firth v. State, 775 N.E.2d 463, 465 (N.Y. 2002) (holding that although a website may be altered or viewed multiple times after publication, the statute of limitations is not retriggered).

235. Wood, *supra* note 234, at 898 ("[The single publication rule] combines the right to a cause of action in each jurisdiction where the defendant disseminated the defamatory material into a single cause of action in any one jurisdiction where the dissemination occurred.").

236. *See, e.g.*, Pippen v. NBC Universal Media, LLC, 734 F.3d 610, 615 (7th Cir. 2013) ("Every state court that has considered the question applies the single-publication rule to information online."); *see also* Wood, *supra* note 234, at 895–96, 899 (noting that the trend in the majority of jurisdictions is to apply the single publication rule to Internet publications and quoting Chief Justice Deyer of the Supreme Court of Tennessee, who recognizes the single publication rule allows a single wrong for a single publication).

237. *See* Nationwide Bi-Weekly Admin., Inc. v. Belo Corp., 512 F.3d 137, 143–44 (5th Cir. 2007) (noting that most courts considering the issue applied single publication rule to Internet publications and that most influential case on the issue is *Firth v. State*). The small handful of courts

the single publication rule applies to online publications get it right. Indeed, conceptually, accessing an online source must be understood as the digital equivalent of pulling a book off a shelf or pulling a newspaper off the rack in a library periodicals room. As the court reasoned in *Firth*, rather than supporting the argument that the single publication rule does not apply to online publications, the nature of the Internet makes an even more compelling case for applying the single publication rule.[238] Otherwise, the publisher would face "endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants. Inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise."[239]

As applied, the single publication rule mandates that a snapshot is taken at the moment of publication, and that snapshot defines the publication for purposes of suit. Thus, the single publication rule functions to require that all elements of the cause of action exist at the moment of publication.[240] Therefore, the single publication rule, applied here, forecloses an argument that by not removing the original report after expungement or erasure, the once-true information became false. It had to be false at the moment of publication, and it was not.

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that have found the single publication rule does not apply to online publications in recent years have relied on particular factors that distinguish the cases. *See, e.g.*, Larue v. Brown, 333 P.3d 767, 772–73 (Ariz. Ct. App. 2014) (finding the single publication rule did apply to online publications generally, but the fact that publication drew comments from readers and publishers responded constituted republication); Swafford v. Memphis Individual Prac. Assoc., No. 02A01-9612-CV-0031, 1998 WL 281935, at *8–11 (Tenn. Ct. App. June 2, 1998) (finding the publication in question, which was one of many reports contained in online database updated with new reports and accessed by individual readers, was not subject to single publication rule because there was no "aggregate publication").

238. *Firth*, 775 N.E.2d at 466.

239. *Id.* The court observed:

> [M]any Web sites are in a constant state of change, with information posted sequentially on a frequent basis. For example, this Court has a Web site which includes its decisions, to which it continually adds its slip opinions as they are handed down. Similarly, Web sites are used by news organizations to provide readily accessible records of newsworthy events as they occur and are reported. . . . A rule applying the republication exception under the circumstances here would either discourage the placement of information on the Internet or slow the exchange of such information, reducing the Internet's unique advantages. In order not to retrigger the statute of limitations, a publisher would be forced either to avoid posting on a Web site or use a separate site for each new piece of information.

Id. at 467.

240. *See Pippen*, 734 F.3d at 615 (noting claim for relief for defamation is complete at the time of first publication).

B. False Light

Before moving on, it is appropriate to take a moment to consider whether defamation's step-sibling, false light, might offer the expungee a viable cause of action. To establish a claim for false light, the plaintiff must show that the defendant publicized a matter concerning the plaintiff that placed the plaintiff in a false light.[241] That false light must be "highly offensive to a reasonable person."[242] At its heart, false light is a defamation cause of action lurking within Prosser's original four privacy torts. Its contours are vague, and it is not clear exactly how "highly offensive" falsity differs from "defamatory" falsity, but most consider it a lower standard.[243] Defamatory falsity focuses on verifiable and serious injury to reputation.[244] Definitions of defamatory falsity typically require the utterance to subject the individual to "obloquy, odium, shame, disgrace or other forms of discredit or harm to reputation[,]" and cause the person to be shunned or avoided.[245] The Restatement goes right to the point, stating that a defamatory communication "tends so to harm the reputation of another as to lower him in the estimation of the community. . . ."[246] On the other hand, false light cases turn "entirely on falsity rather than [reputational] harm; the actual and substantial injury element needed to maintain the case has become an easily satisfied formality which seems really to mean only that the plaintiff was irritated enough to sue."[247] Many commentators criticize false light because, as noted above, it is duplicative of defamation. Further, to the extent an independent cause of action exists, it provides a remedy for an inconsequential "harm" and, by evading some of defamation's strict requirements, it threatens the very free and robust speech the Court's

241. *See* RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977) ("One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability. . . . ").

242. *Id.* at § 652E(a).

243. *See supra* notes 232–233 and accompanying text (discussing the false light doctrine in conjunction with the single publication doctrine).

244. *See* Eric Meyer Raudenbush, Note, *Variations on a Theme: Application of* Masson v. New Yorker Magazine, Inc. *to a Spectrum of Misquotation Libel Cases*, 48 WASH. & LEE L. REV. 1441, 1476 n.29 (1991) (noting that "the elements of the false light tort . . . are substantially analogous to those of the libel tort, although the false light action is designed to compensate the plaintiff for injured feelings, as opposed to injured reputation").

245. DAN B. DOBBS, THE LAW OF TORTS 1127 (2000). Dobbs indicates these terms "refer to the same general idea." *Id.*

246. RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1977). While most definitions of defamatory meaning focus on injury to reputation, in *Time, Inc. v. Firestone*, the Supreme Court held that harm to reputation was not constitutionally required, and permitted recovery under Florida law for personal humiliation, mental anguish and suffering. 424 U.S. 448, 460 (1976).

247. Diane L. Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 396 (1989).

Sullivan line of cases seeks to protect.[248] Most troubling, some courts have found that the publication of even truthful information can give rise to a false light claim if that truthful information can be construed to imply something false and offensive.[249] Diane Zimmerman warned of the danger in permitting claims of false light by implication, which she notes can be used to permit "recoveries for false light claims based on a series of dubious inferences."[250]

Despite scholarly hostility toward false light claims, a number of jurisdictions recognize the cause of action.[251] Does false light provide a remedy for the expungee? Again, the answer must be no, and again because of the requirement of falsity. In *Time v. Hill*, the Supreme Court extended the *Sullivan* constitutional mandates to false light claims, requiring, at least in the context of matters of public interest, that the defendant have published the material with "knowledge that the statement was false or with reckless disregard for" its truth or falsity.[252] The falsity may be directly stated, or implied by manipulation of information, but falsity is still the essence of the tort. Thus, in false light, as in defamation, falsity provides the fulcrum, or using Stern's language, the intrinsic character of the claim is falsity—an essential element mandated by the Constitution.[253] While the Supreme Court has not said so specifically, the logic of its jurisprudence in this area drives the conclusion that in false light, as in defamation, the plaintiff bears the burden of proof with respect to falsity.[254] Again, the expungee cannot

248. *See, e.g.*, Sandra F. Chance & Christina M. Locke, *When Even the Truth Isn't Good Enough: Judicial Inconsistency in False Light Case Threatens Free Speech*, 9 FIRST AMEND. L. REV. 546, 568–71 (2011) (discussing the inconsistencies with the First Amendment values and the false light claim); James B. Lake, *Restraining False Light: Constitutional and Common Law Limits on a "Troublesome Tort"*, 61 FED. COMM. L.J. 625, 627, 639–40 (2009) (arguing that because the First Amendment and false light claims are inconsistent, jurisdictions should impose the limits of defamation law on false light); J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783, 785, 883, 886–87 (1992) (showing how false light does not add anything distinctive); Zimmerman, *supra* note 247, at 397–402 (discussing the *Sullivan* line of cases and false light claims).

249. *See* Graboff v. Colleran Firm, 10-cv-1710, 2013 WL 1286662, at *17 (E.D. Pa. Mar. 28, 2013) (explaining false light can be established when the defendant selectively published, knowingly or recklessly, truthful statements in a manner which created a false impression, and this despite accuracy of individual statements because of the intentional presentation of material in a manner that creates the false inference), *aff'd*, 744 F.3d 128 (3d Cir. 2014).

250. Zimmerman, *supra* note 247, at 416.

251. *See* RESTATEMENT (SECOND) OF TORTS § 652E: Case Citations (AM. LAW INST. 1977) (defining the cause of action of false light and listing cases from most states).

252. Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967).

253. Stern, *supra* note 210, at 17–18.

254. *See, e.g.*, Machleder v. Diaz, 801 F.2d 46, 54 (2d Cir. 1986) (stating "defendant may not be held liable for the tort of false light" absent "proof of falsity and some level of fault"). The Supreme Court has not directly spoken on whether *Hepps* applies to false light causes of action,

prove falsity when what is published is truthful information obtained from a public record.

Constructive falsity would not work any better to satisfy the requirement of falsity here than in the context of defamation. As noted, the Supreme Court has applied its *Sullivan* jurisprudence to false light.[255] Therefore, the Court's insistence on proof of falsity as essential to the cause of action forecloses invoking constructive falsity as shown by the analysis above. Even applying the dubious false-light-by-implication doctrine does not help the expungee. To the extent there is an implication (as opposed to an outright statement), the implication is true.

Similarly, the single publication rule, which is applied to false light cases, forecloses an argument that the subsequent expungement or erasure would render the original truthful report false.[256]

V. FORCING "CORRECTION" OF THE RECORD?

Turning back to the case that inspired this Article, did Ms. Martin perhaps get it close to right in the first place? Recall the facts of that case: Following Lorraine Martin's arrest and the filing of drug charges against her, online news outlets published articles reporting the arrests and charges.[257] When the state did not prosecute the charges against Ms.

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but given its holding and rationale in *Falwell*, which applied *Hepps* to an action for intentional infliction of emotional distress, it is reasonable to conclude, as the court in *Machleder* did, that *Hepps* will apply to false light causes of action. *See id.* (citing *Hepps* when determining there must be proof of falsity and fault); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (holding that there must be a false statement of fact and actual malice in order to recover).

255. *See supra* notes 252–254 and accompanying text (noting that in *Hill*, 385 U.S. at 387–88, the Supreme Court extended the *Sullivan* constitutional mandate to false light claims).

256. *See* Graboff v. Am. Ass'n of Orthopaedic Surgeons, 559 F. App'x 191, 194–95 (3d Cir. 2014) (applying the single publication rule to false light, which the court found very similar to defamation, and finding that a continuously posted Internet article did not constitute separate acts of republication); Hoai Thanh v. Ngo, Civ. No. PJM 14-448, 2016 WL 3958584, at *4–5 (D. Md. July 22, 2016) (applying single publication rule to false light claim and noting that to overcome the rule, plaintiff must show that material was republished, rather than merely available online) *aff'd sub nom*, Hoai Thanh v. Hien T. Ngo, No. 17-1110, 2017 WL 3327821 (4th Cir. Aug. 4, 2017) (per curium, unpublished decision); Parnigoni v. St. Columba's Nursery Sch., 681 F. Supp. 2d 1, 19 (D.D.C. 2010) (single publication rule applies to false light claims).

257. Martin v. Hearst Corp., 777 F.3d 546, 548 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 40 (2015). The first article reported:

> A mother and her two sons were arrested and charged with numerous drug violations Aug. 20 after police received information that a pair of brothers were selling marijuana in town. The arrests were part of a two-month-long investigation, which came to a head last week when police executed a search and seizure warrant. Police arrested Edward Martin, 22, Christopher Martin, 20, and their mother, Lorraine Martin, 52, all of 382 Riversville Road. Police said 12 grams of marijuana, scales, plastic bags and drug paraphernalia were found inside the residence.

Debra Friedman, *Mother and Son Charged with Drug Offenses*, GREENWICH TIME (Aug. 26, 2010,

Martin, and ultimately entered a *nolle prosequi*, the arrest records were erased (actually sealed, but with real juice behind the sealing) pursuant to Connecticut's Erasure Statute, and Ms. Martin requested that the publications remove the story of her arrest and charge.[258] The publications refused.[259] The report remained available online, and can be accessed even now.[260] Suppose instead of asking the publications to delete the report, she asked instead that they publish a correction or a clarification—specifically to report the accurate facts that the charges were never prosecuted and her record had been expunged? Such an approach extrapolates from retraction statutes that operate in defamation law.

In the context of defamation actions, some jurisdictions allow a defendant to mitigate the damages owed to the plaintiff, or to avoid the possibility of punitive damages, by preemptively retracting the defamatory statements.[261] Other jurisdictions require the plaintiff to request a retraction and give the publisher the opportunity to do so before seeking certain types of damages.[262] Might these retraction statutes provide support for requiring a clarification or a correction? Probably not.

To begin with, the situations are materially different in two ways: First, retraction statutes, by definition, apply to communications that are punishable—that is, they assume the communications in question are arguably false and defamatory.[263] Despite the broad-reaching impact of its *Sullivan* line of cases, the Supreme Court has never held that defamatory statements themselves are worthy of constitutional protection. Rather, the Court realized that truthful speech needs breathing

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8:06 PM), http://www.greenwichtime.com/local/article/Mother-and-sons-charged-with-drug-offenses-633280.php.

258. *Martin*, 777 F. 3d at 549.

259. *Id.*

260. *See e.g.*, Friedman, *supra* note 257 (for example, as of the time this Article was published, the *Greenwich Time* article could be accessed online).

261. *See, e.g.*, FLA. STAT. § 770.02 (2017) (barring plaintiff from recovering punitive damages if defendant publishes retraction); GA. CODE ANN. § 51-5-11 (2017) (prohibiting plaintiff from recovering punitive damages if defendant publishes retraction or if plaintiff fails to request retraction); MASS. GEN. LAWS 231 § 93 (2016) (allowing defendant to use retraction as way to mitigate damages recoverable by plaintiff); WIS. STAT. § 895.05 (2016) (barring plaintiff from recovering punitive damages if defendant publishes timely correction).

262. *See, e.g.*, ALA. CODE 1975 § 6-5-186 (2016) (requiring plaintiff to ask for retraction five days prior to filing suit and for defendant to refuse to retract for plaintiff to be eligible to recover punitive damages); MINN. STAT. ANN. § 548.06 (West 2016) (allowing plaintiff to only recover special damages unless he or she demands retraction and is refused); OR. REV. STAT. § 31.210 (2017) (requiring plaintiff to either demand retraction or show that defendant "intended to defame the plaintiff" to be able to recover general damages); WIS. STAT. § 895.05 (2017) (requiring plaintiff to ask for retraction before filing suit).

263. *See supra* note 261 and accompanying text (discussing several state retraction statutes).

room, and free and robust debate requires some margin of error to avoid a chilling effect.[264] So, the false and defamatory statement itself is not worthy of protection. Rather, to avoid chilling robust debate, courts do not permit the law to cut too close to the bone in imposing damages.[265] In short, to avoid making speakers timorous and risking stifling truthful speech, some false speech must slip through. But that false speech itself does not have constitutional value. The cases hold that under the proper circumstances (that is, clearing the *Sullivan* bar), courts can impose penalties (or in this case, burdens) on false and defamatory speech.[266] This forms the foundation for the retraction statutes—they impose a burden, but only on publishers of defamatory speech. However, the expungees' cases involve publication of truthful speech, which is constitutionally protected.[267] This represents an important distinction.

Second, the retraction statutes do not require that a retraction or correction be printed.[268] Instead, the statutes provide a means to mitigate damages in a suit by permitting the defendant to elect to publish a retraction in response to a suit or to the defamed person's timely request to do so.[269] By contrast, the remedy of requiring correction would mandate that a media outlet publish additional information amending an original report to reflect the fact that the criminal record reported on was expunged. This falls squarely in the First Amendment bramble bush of compelled speech.

The Supreme Court is nimble and imaginative in interpreting the simple words "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."[270] The Court did not hesitate to read

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264. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 348 (1974) (recognizing that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters," but also "the individual's right to the protection of his own good name").

265. *See id.* at 348 (establishing a "boundary between the competing concerns," that of "the legitimate state interest in compensating private individuals for wrongful injury to reputation," while at the same time "shield[ing] the press and broadcast media from the rigors of strict liability for defamation").

266. The *Sullivan* line of cases, discussed *supra* notes 170–206, set out the circumstances. *See, e.g.*, N.Y. Times v. Sullivan, 376 U.S. 254, 279–80 (1964) (stating that a public official may "recover[] damages for defamatory falsehood relating to official conduct" only if "he proves that the statement was made with" knowledge or reckless disregard for truth or falsity); *see also Gertz*, 418 U.S. at 347 ("[S]o long as they do not impose liability without fault, the States may [set] . . . standard of liability for a publisher . . . of defamatory falsehood.").

267. *See* e.g. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777-78 (1986) (noting that the Constitution requires plaintiffs to bear the burden of showing the speech at issue is false); Garrison v. State of La., 379 U.S. 64, 73-74, 78 (1964) (applying the rule of *New York Times v. Sullivan*, holding that the Constitution absolutely prohibits punishment of truthful speech).

268. *See supra* note 262 and accompanying text (noting several state retraction statutes).

269. *See id.*

270. U.S. CONST. amend. I; *see also* Miami Herald Publ'g. Co. v. Tornillo, 418 U.S. 241, 256–

"abridging" to include compelling speech when it comes to government interference with speech.

While some commentators have observed that the entirety of the Court's compelled speech jurisprudence can be hard to reconcile, that critique only applies to some of the less concrete applications (for example, requiring union dues that go to political causes, or requiring property owners to permit demonstrators to express their views on property open to the public).[271] In cases of true compelled speech, where a speaker is forced to express content that is not the speaker's own (such as the proposal to force media outlets to add information about expungements to published reports of criminal records), the Court has spoken clearly, striking down such attempts. In *Miami Herald Publishing Co. v. Tornillo*, the Court unanimously struck down a Florida statute requiring newspapers that published criticisms of candidates for public office to publish the candidates' responses to the criticisms.[272] The Court found that "[c]ompelling editors or publishers to publish that which 'reason tells them should not be published' . . . operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter."[273] The Court also concluded that forcing a newspaper to allocate space and resources to the mandated responses exacted a penalty, specifically the cost of printing and the necessity to allocate limited resources to the reply instead of other content.[274] The Court added an important concern with intrusion into the editorial process:

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57 (1974) (citing Grosjean v. American Press Co., 297 U.S. 233, 244–45 (1936)) ("Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers."); *supra* notes 141–161 and accompanying text (citing to United States Supreme Court cases where the issue presented was the restriction of publication of criminal records and proceedings).

271. *See* Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. SEIU, Local 1000, 98 CORNELL L. REV. 1023, 1048–50 (2013) (discussing what constitutes compelled speech).

272. *Tornillo*, 418 U.S. at 247, 258 (1974). In contrast, the Court has permitted similar right to reply provisions to be applied to broadcast media, citing the fact that the airwaves are finite, requiring the government to allocate them; thus, broadcasters hold a license as trustees of the public. *See* Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 400–01 (1969) (holding that an FCC order requiring radio station to provide a person attacked in broadcast with time for response, among other things, did not violate the First Amendment because, "of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views," reasoning that "existing broadcasters have often attained their present position because of their initial government selection in competition . . . [resulting in] advantages [that] are the fruit of a preferred position conferred by the Government"). Whether this rationale will continue to justify the distinction in light of the extraordinary expansion of broadcast capacity remains to be seen.

273. *Tornillo*, 418 U.S. at 256 (quoting *Grosjean*, 297 U.S. at 244–45).

274. *Id.* at 256–57 (explaining that as an economic reality, the newspaper cannot indefinitely expand its space to accommodate the mandated responses).

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.[275]

On its face, *Tornillo* appears to foreclose the proposal to require publishers to print corrections or amendments to their published reports. To be sure, there are differences that matter here. But are they enough to clear the Court's concerns?

As noted above, online publications should be considered conceptually comparable to traditional publications.[276] But there are differences. Adding a correction to an online report can be done quite easily and with minimum cost. And, while accessing an online report and pulling a newspaper in a library are in principle the same, the fact that search engines make the online version much more easily accessible might justify imposing a modest burden to correct the report. However, the Court's holding in *Tornillo* likely forecloses this option as well. As noted above, in addition to the burden imposed by the expense, the Court was concerned about insinuating government into the editorial process.[277] The Court expressed concern that requiring the publication of candidates' replies would necessarily result in the publisher not being able to print other content, causing impermissible intrusion on the editorial process.[278] In addition, the Court worried that the specter of being forced to publish replies might make publishers become cautious about reporting on candidates—the archetypal robust debate the First Amendment protects.[279] So, while the expense or commitment of resources might be minimal for an online publisher required to publish a correction or clarification of its report, the insinuation of the government into the editorial process still represents a real and dangerous threat—indeed, it might be the real danger. The Court in *Tornillo* foreshadowed this possibility and noted its concern: "The choice of material to go into a

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275. *Id.* at 258.

276. *See supra* Part IV.A.2 (explaining that an "online source must be understood as the digital equivalent of pulling a book off a shelf or pulling a newspaper off the rack in a library periodicals room").

277. *Tornillo*, 418 U.S. at 257 (citing N.Y. Times v. Sullivan, 376 U.S. 254, 279 (1964)) ("[U]nder the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'").

278. *Id.* ("[I]t is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.").

279. *Id.* (suggesting that editors may choose to avoid controversy and thus reduce political coverage).

newspaper . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."[280] The Court could not see "how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees. . . ."[281]

VI. A MODEST PROPOSAL: VOLUNTARY CORRECTION

In the end, law cannot fix the problems created by the existence and truthful reporting of a criminal record, at least without doing serious damage to First Amendment principles. Government mandated publication of corrections will not work either. Thus, most of the potential fixes threaten grave harm to essential constitutional principles, and in all likelihood, fall well short of offering a real remedy anyway. If the law cannot fix what clearly amounts to a severe and unjust harm, are there any other options? Perhaps.

While the Constitution bars the government from requiring a news source to publish amending or correcting information, journalists could voluntarily agree to do so as a best practice. Journalists do not have a binding code of ethics comparable to lawyers, but they do have guiding principles and voluntary ethics rules. For example, the Society of Professional Journalists ("SPJ") publishes a non-binding code that was updated as recently as 2014.[282] SPJ describes the code as "a statement of abiding principles," noting that the code "is not a set of rules," but "rather a guide that encourages all who engage in journalism to take responsibility for the information they provide, regardless of the medium."[283] Further, most news outlets publish their own codes of ethics and hold their reporters accountable to these codes.[284]

Despite popular disdain for the media, journalists traditionally aspire to high standards, while wrestling with how to get to the news, get it right,

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280. *Id.* at 258.

281. *Id.*

282. *See generally SPJ Code of Ethics*, SOC'Y OF PROF'L JOURNALISM (Sept. 6, 2014, 4:49 PM), http://www.spj.org/ethicscode.asp [hereinafter "*SPJ Code of Ethics*"] (demonstrating that journalists have aspirational but not binding codes of ethics).

283. *Id.*

284. *See, e.g.*, *Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments*, N.Y. TIMES (Sept. 2004), https://www.nytco.com/wp-content/uploads/sites/3/NYT_Ethical_Journalism_0904-1.pdf (illustrating one exemplary code of ethics); *Handbook of Journalism: Standards and Values*, REUTERS, http://handbook.reuters.com/index.php?title=Standards_and_Values (last visited Sept. 7, 2017) (listing ten absolutes required of all Reuters reporters); *The Washington Post Standards and Ethics*, AM. SOC'Y OF NEWS EDITORS, http://asne.org/content.asp?contentid=335 (last visited Sept. 7, 2017) (reflecting another well-written code of ethics).

get it out, and survive in an increasingly competitive atmosphere.[285] In the context of criminal justice, the SPJ's Code explicitly acknowledges the tensions involved in handling criminal records, stating that journalists should "[b]alance a suspect's right to a fair trial with the public's right to know" and "[c]onsider the implications of identifying criminal suspects before they face legal charges."[286]

Journalists also understand the implications of both longevity and ready accessibility in the context of online news. Editor Kathy English calls this the "longtail of the news" in a report she authored under the auspices of the Associated Press Media Editors ("APME") Online Journalism Credibility Project.[287] Her paper focused on the rapidly

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285. *See Why Doesn't SPJ Enforce its Code of Ethics?*, SOC'Y OF PROF'L JOURNALISM, http://www.spj.org/ethicsfaq.asp (last visited Sept. 7, 2017) (explaining "all journalism ethics is a balancing act between often conflicting responsibilities" and giving examples of that balancing act: "Seek truth and report it . . . [but] [m]inimize harm[; a]ct independently [but b]e accountable"); *see also* Lene Bech Sillesen, *Exploring Ethics Through Journalism Hotlines: How News Associations Are Keeping Up with Changing Principles*, COLUMBIA JOURNALISM REV. (Sept. 18, 2014), http://archives.cjr.org/behind_the_news/ethics_hotlines.php (discussing how "the Online News Association is crowdsourcing a project that allows journalists to build individual codes of ethics on the premise that one standardized code can no longer represent everyone"); *compare* CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN 79 (Simon & Schuster 1974) (describing Washington Post's Watergate reporting: "Gradually, an unwritten rule was evolving: unless two sources confirmed a charge involving activity likely to be considered criminal, the specific allegation was not used in the paper."), *with* TOM GOLDSTEIN, JOURNALISM AND TRUTH: STRANGE BEDFELLOWS 16 (Northwestern University Press 2007) (arguing two-source rule and hard-and-fast rule of not relying on anonymous sources "would be the loss of a tremendous amount of [important and accurate] news" (citing James B. Stewart, *Consider the Sources*, N.Y. TIMES (July 4, 1999), http://www.nytimes.com/books/99/07/04/reviews/990704.704stewat.html?mcubz=0)). To be sure, the media has not always lived up to these aspirations, especially in the highly charged news culture of the day. However, the shock of the most recent political campaigns, and the emergence of "alt-news" and alternative facts may have jolted journalists into self-reflection and a renewed commitment to such guiding principles. *See, e.g.*, Kyle Pope, *An Open Letter to Trump from the US Press Corps*, COLUMBIA JOURNALISM REV. (Jan. 17, 2017), http://www.cjr.org/covering_trump/trump_white_house_press_corps.php (describing how the Press Corps plans to interact with President Trump during his presidency); Steven Perlberg, *Media Looks Inward After Donald Trump Surprise*, WALL STREET J. (Nov. 9, 2016), https://www.wsj.com/articles/media-looks-inward-after-donald-trump-surprise-1478720405 (discussing the disdain for the media and the media's struggle to compete with social media platforms); Jim Rutenberg & James Poniewozik, *Can the Media Recover from This Election?*, N.Y. TIMES (Nov. 8, 2016), https://www.nytimes.com/2016/11/09/arts/television/after-this-election-can-the-media-recover.html?_r=0 (describing how the 2017 presidential election affected the media).

286. *SPJ Code of Ethics*, *supra* note 282 (illustrating difficulties that journalists have with handling criminal records).

287. *See generally* Kathy English, *The Longtail of News: To Unpublish or Not to Publish*, ASSOCIATED PRESS MANAGING EDITORS ONLINE CREDIBILITY PROJECT (2009), www.apme.com/resource/resmgr/online_journalism_credibility/long_tail_report.pdf (discussing the rationale behind "unpublishing" news).

increasing phenomena (invoked by Ms. Martin in her case) of requests to "unpublish" articles,[288] and editors' efforts to handle these requests.[289] According to English's research, reports of criminal records, especially reports involving minor crimes, represent "a significant source" of requests to unpublish.[290] Editors correctly resist such requests as a form of coercive, content-based censorship. "[T]oday's newspaper has always been tomorrow's historical record," English writes.[291] One publisher challenged even the word "unpublishing," arguing that these requests are actually "asking to censor or rewrite history."[292]

The SPJ's Code of Ethics specifically addresses the issue of corrections and updates, suggesting that journalists "consider the long-term implications of the extended reach and permanence of publication," and "[p]rovide updated and more complete information as appropriate."[293] The *New York Times* takes a restrained approach:

> On rare occasions, the Times will add an addendum to crime stories if the subject contacts the Times to say he or she was acquitted, or that charges were dropped. The Times only does this for stories involving major crimes, and it requires the person involved to supply copies of related legal documents as proof.[294]

The *Times* recognizes that publishing corrections represents a more reasonable alternative than "unpublishing," but explains that its more constrained approach is "just a question of resources. . . . [W]e could spend all of our reporters' time doing follow-ups to 15-year-old stories. It's not what we're in the business of doing."[295]

Other editors have responded, recognizing that even an addendum might not be enough, instead favoring the publication of follow-up stories.[296]As one editor explained, the correction or addendum needs to be as prominent as the original story.[297] "Publishing a follow-up that puts the correct information on the record and links to the previous article is

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288. Unpublish is "a word media organizations have coined to describe public requests to remove content from news Websites." *Id.* at 1.

289. *See id.* at 1, 3–5 (demonstrating some exemplary ways editors created policies to handle requests for unpublishing).

290. *See id.* at 5 (illustrating the growth of such requests over recent years).

291. *Id.* at 1.

292. *Id.* at 4 (internal quotation marks omitted).

293. *SPJ Code of Ethics*, *supra* note 282 (stressing the need to deliberate on ramifications of corrections).

294. Mallory Jean Tenore, *5 Ways News Organizations Respond to 'Unpublishing' Requests*, POYNTER (July 19, 2010), http://www.poynter.org/2010/5-ways-news-organizations-respond-to-unpublishing-requests/104414/.

295. *Id.* (internal quotation marks omitted).

296. *Id.*

297. *Id.*

also a means of ensuring ongoing accuracy[.]"[298]

While not going so far as to support unpublishing on demand, at least one news outlet, GateHouse Communications, reports that it has programmed the websites of some of its online outlets to have police blotter reports "fall off" the websites after six months.[299] Such a practice, a voluntary and automatic purging of certain types of sensitive records, offers one solution. But if this practice were applied broadly, as would be necessary to really solve the problems raised here, it would eliminate—or at least gut—what many recognize as a valuable resource for historical research: comprehensive media archives.[300]

Against this background, I propose a modest solution that focuses exclusively on online publications. I propose that publishers of online media outlets adopt a voluntary policy of correcting reports of criminal records that remain available on their websites under certain circumstances. Based on the *New York Times*' approach, but applied more generously, a workable policy might look like this:

A publisher will publish a brief addendum to its online report of an individual's criminal record, provided the original report is still readily accessible to the public on the publisher's website, and provided the individual who is the subject of the online report submits to the publisher a court order or other law-enforcement-authenticated document indicating that the individual's record has been expunged pursuant to an expungement statute, or that other similar action (such as pardon, commutation, or even the entry of a certificate of rehabilitation) has occurred. The updated publication or article should indicate that it has been amended.

The policy is drafted to apply to online publications for two reasons: First, as noted above, online publications have virtually unlimited shelf-lives, and even elderly reports are easily accessible. This magnifies the harm. Indeed, online publications really represent the heart of the problem addressed in this Article. Second, while amending online publications is not cost-free, the expense and burdens are significantly

298. *Id.* (internal quotation marks omitted). Tenore discusses how journalistic responsibility to ensure ongoing accuracy of content published online may require further reporting, especially in cases involving charges against individuals named in the news. *See id.*

299. English, *supra* note 287, at 5. GateHouse Media "publish[es] 125 daily newspapers, more than 600 community publications and over 555 local market websites. . . . " *About Us*, GATEHOUSE MEDIA, http://www.gatehousemedia.com/about-us/ (last visited Sept. 9, 2017). Such a voluntary and automatic approach offers an intriguing option. It eliminates the impact of coercion on the publisher, and is essentially content neutral. However, it undercuts the concept of news reports as the building blocks of history by erasing entire swaths of information, especially without a view to specific content.

300. *See supra* notes 260–262 and accompanying text.

less than those for print publications, provided the information the publisher is being asked to report is brief and can be easily verified.

Relying on official documentation will relieve news outlets of the burden of independently verifying the information provided.[301] Requiring that the request come from the subject of the report will ensure that only the individual involved can refresh the story, as publishing an addendum necessarily will do. Further, locating the authority to request an addendum with the individual respects the individual's autonomy regarding whether to seek to amend the report or to let it stand.[302] Requiring acknowledgement in the publication that the article has been amended advances the interest of media transparency.[303]

Finally, I propose publishing only an addendum, and not a fully developed follow-up story. Developing and reporting a follow-up story would involve significant time and resources.[304] Further, while a separate, fully developed article might at first blush appear more effective than an addendum, it actually might not be. A correction in the context of an online publication will likely appear adjacent or linked to the original report, and will be brief, easy to find, and easy to read, making it quite likely that the reader will find and read it. A full-blown story might be harder to place near the original story and, because of its length, might not be read, undermining the effectiveness of the remedy.

As noted, as publishers recognize that online content has a long life and is easy to access; they appear willing to entertain realistic policies to address this issue fairly and are wrestling with their options.[305] Thus, publishers might be receptive to such a narrowly crafted policy.

CONCLUSION

Many have argued powerfully that, as a culture, we should be more willing to forgive an individual's criminal past, especially if that

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301. Relying on simply a request for correction without supporting documentation would require a responsible news outlet to commit substantial staff time to research and verify the requested correction. *See supra* note 295 (explaining that it is not economically feasible for news outlets to devote resources to investigating and correcting old stories).

302. To be sure, the publication could in the exercise of its own editorial discretion decide to amend the report or publish an addendum. But some third party should not be permitted to do so except for compelling reasons.

303. *See* English, *supra* note 287, at 16 ("Transparency with our readers demands that we indicate that an article has been edited to correct or update.").

304. *See* Tenore, *supra* note 294 (describing that follow-ups are not always a favored option even though they allow for more context and background than addendums).

305. *See* English, *supra* note 287, at 10–13 (discussing results of survey of newsrooms regarding unpublishing practices); *see also* Tenore, *supra* note 294 (reporting on survey of media outlets: "newsrooms are just beginning to figure out the various ways of ensuring that content that lives online remains accurate") (internal quotation marks omitted).

individual has rehabilitated his or her life.[306] Bernard Kogon and Donald Loughery argue that expungement, which they refer to as "the big lie," does more harm than good, and that the better approach is to leave the record alone and work on changing societal attitudes about offenders.[307] True believers in the power of a free and robust media to inform society (and I count myself among those true believers) would argue that shining a light on the vast numbers of ordinary people with criminal records will do much to de-stigmatize individuals with criminal records, blunting the impact and minimizing the collateral consequences. Unfortunately, such an overly optimistic vision borders on willful naivety, and sacrifices those with records as cannon fodder to what would be a futile experiment.

More promising, perhaps, would be broad-based adoption of Judge Gleeson's approach to certificates of rehabilitation. As he noted, a formal proceeding in which the judge reviews the record in detail and makes findings about an individual's rehabilitation might provide persuasive evidence for an employer, landlord, or lender.[308] In crafting the certificate of rehabilitation in the *Doe* case, Judge Gleeson explained:

> [T]he judicial certificate I am awarding Doe will convey to others that the same court that held Doe accountable for her criminal acts has now concluded after careful scrutiny that she is rehabilitated. In other words, the Court is recommending that she be welcomed to participate in society in the ways the rest of us do.[309]

Initial research indicates that such instruments can have a positive effect on lessening the impact of at least some collateral consequences of a criminal record.[310] Such formal acknowledgement of rehabilitation also works hand in hand with the media policy proposed above.

A number of states provide for certificates of rehabilitation, although

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306. *See, e.g.*, Doe v. United States, 168 F. Supp. 3d 427, 442 (E.D.N.Y. 2016) (noting that the forgiveness model is gaining favor in the reentry community for philosophical and practical reasons); Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL'Y REV. 361, 378 (2016) (describing recent movement in favor of expanding forgiveness remedies); *see generally* Bernard Kogon & Donald. L. Loughery, Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 378 (1970) (arguing that until community bias against offenders is "uprooted, real correctional rehabilitation will remain effectively crippled").

307. Kogon, *supra* note 306, at 388.

308. *See Doe*, 168 F. Supp. 3d at 442–45 (describing how prospective employers do not have time to get a full understanding without the certificate); *see also* Love, *supra* note 16, at 792 (discussing the value of judicial certification of a person's rehabilitation as compared to an administrative board).

309. *Doe*, 168 F. Supp. 3d at 445.

310. *See* Leasure, *supra* note 3, at 13 (suggesting from an empirical study that certificates of relief may be an effective avenue for reducing the stigma of a criminal record for ex-offenders seeking employment).

the federal system has no formal process for this.[311] While this remedy might seem promising, its effectiveness relies on society's willingness to be persuaded by the recitation of rehabilitation. Further, the sheer volume of individuals who might seek certificates might simply overwhelm an already taxed system.[312] Finally, the vast majority of individuals with criminal records are indigent and do not have the funds to hire counsel to navigate the expungement process.[313]

Which of course, brings us back to the problem of over-criminalization and its devastating consequences that, once unleashed, defy efforts to constrain its havoc. Only genuine criminal justice reform can address the essence of the problem. In the absence of that, this modest proposal of voluntary correction offers little more than a make-shift effort to minimize the damage in the shadow of a much larger crisis—a crisis society ignores at its peril.

311. *See Doe*, 168 F. Supp. 3d at 442 (noting "certificates of rehabilitation are largely a product of the state system"); *id.* at 445 (discussing how "[t]he federal system has much to gain from adopting a certification system" and that "[t]he federal system already contemplates certificates of rehabilitation").

312. *See* David J. Norman, *Stymied by the Stigma of a Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences*, 31 QUINNIPIAC L. REV. 985, 1028 (2013) (asking how legal systems should handle "hundreds of thousands" who leave prison and re-enter society).

313. *See, e.g.*, Lorna Collier, *Incarceration Nation*, MONITOR ON PSYCHOL. (Oct. 2014), http://www.apa.org/monitor/2014/10/incarceration.aspx (describing how most prisoners are indigent); *see generally* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (W.S. Hein 2006) (discussing the issues associated with expungement).