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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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EXPUNGEMENT, DEFAMATION AND FALSE LIGHT :  
IS WHAT HAPPENED BEFORE WHAT REALLY HAPPENED OR IS  
THERE A CHANCE FOR A SECOND ACT IN AMERICA?

*Doris DeTosto Brogan\**

*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."<sup>1</sup>*

*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 ....<sup>2</sup>*

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

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<sup>1</sup> 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/the\\_wire\\_breaks\\_down\\_the\\_great\\_gatsby\\_by\\_f\\_scott\\_fitzgeralds\\_classic\\_criticism\\_of\\_america\\_nsfw.html](http://www.openculture.com/2012/08/the_wire_breaks_down_the_great_gatsby_by_f_scott_fitzgeralds_classic_criticism_of_america_nsfw.html).

<sup>2</sup> George Orwell, 1984 213-14 (Signet Classics 1961) (1949).

record is among the most burdensome of the collateral consequences that follow a criminal charge or conviction, and contributes significantly to recidivism,<sup>3</sup> most states have enacted statutory expungement or erasure statutes.<sup>4</sup> But “[i]t’s far easier to get a criminal record than to eradicate one.”<sup>5</sup> So even if the court seals a record, or orders it destroyed or erased,<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> What happens, then, when a news outlet or even a private person, communicates an expunged criminal record? Does the individual have a cause of action against the speaker for that

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<sup>3</sup> See, e.g., Anna Kessler, Comment, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403, 405-6 (2015); 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.; *Doe v. United States*, 168 F. Supp. 3d 427, 442 (E.D.N.Y. 2016).

<sup>4</sup> 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*]; see also Chris Skall, Note, *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, 341-42 (2016). 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 or remedies, except where it is necessary to make a distinction.

<sup>5</sup> 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 ST. J., Dec. 25, 2014, <http://www.wsj.com/articles/fighting-forget-long-after-arrests-records-live-on-1419564612>) (internal quotation marks omitted; *The Internet Never Forgets*, SCIENTIFIC AMERICAN (August 18, 2008), <http://www.scientificamerican.com/article/the-internet-never-forgets/>).

<sup>6</sup> Expungement statutes provide a range or 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; see also *infra* notes 67-99 and accompanying text.

<sup>7</sup> For a discussion of what various states’ expungement statutes require regarding records, see *infra* notes 67-99 and accompanying text.

<sup>8</sup> 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); 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).

communication? Is it actually, or “constructively”<sup>9</sup> 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 a criminal records that had been expunged, and explore possible remedies available.

Although it is beyond the scope of this article, consideration of the questions I address can only be fully understood against the background the crushing problem of mass criminalization 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.<sup>10</sup> 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 data base each day.”<sup>11</sup> At the time she researched her article, Roberts reported that the FBI had 77.7 million individuals in its database.<sup>12</sup> 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

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<sup>9</sup> . Black’s Law Dictionary defines constructive as:

[t]hat 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[.]

BLACK’S LAW DICTIONARY 386 (Revised 4th ed. 1968) (citing *Middleton v. Parke*, 3 App. D.C. 149, 160 (D.C. Cir. 1894)).

<sup>10</sup>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); see also Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 Wis. L. Rev. 321, 338 (2015).

<sup>11</sup> See *id.* at 326..

<sup>12</sup> *Id.*

possession.<sup>13</sup>

Most troubling, the impact of mass criminalization falls most heavily on minority populations.<sup>14</sup> 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.<sup>15</sup> But it is clear that the pendulum of criminal justice reform swings back and forth.<sup>16</sup> 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 *13<sup>th</sup>*.<sup>17</sup> 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

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<sup>13</sup> *Id.* at 338 (2015); *See also*, Laura Cohen, When the Law Is Guilty: Confronting the Mass Incarceration Crisis in the United States, 66 Rutgers L. Rev. 841, 843 (2014) (citing statistics regarding incarceration for minor, non-violent offenses).

<sup>14</sup> *See*, generally, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) (asserting that the United States imprisons racial and ethnic minorities at a rate far greater than any other country); Congressman John Conyers, Jr., The Incarceration Explosion, 31 Yale L. & Pol’y Rev. 377, 383 (2013); 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.”); Ava DuVernay, 13<sup>th</sup>, ([Kandoo Films 2016](https://www.netflix.com/title/80091741)) available at <https://www.netflix.com/title/80091741>.

<sup>15</sup> *See*, e.g. *See* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Congressman John Conyers, Jr., The Incarceration Explosion, 31 Yale L. & Pol’y Rev. 377, 383 (2013); Ava DuVernay, 13<sup>th</sup>, <https://www.netflix.com/title/80091741>; Jenny Roberts, Expunging America's Rap Sheet in the Information Age, 2015 Wis. L. Rev. 321, 338 (2015); *See also*, Laura Cohen, When the Law Is Guilty: Confronting the Mass Incarceration Crisis in the United States, 66 Rutgers L. Rev. 841, 843 (2014) (citing statistics regarding incarceration for minor, non-violent offenses).

<sup>16</sup> *See* Margaret Colgate Love, Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act, 54 How. L.J. 753, 765-779 (2011).

<sup>17</sup> Ava DuVernay, 13<sup>th</sup>, [supra note 14.](#)

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, 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.<sup>18</sup>

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, including claims for invasion of privacy (briefly) 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*,<sup>19</sup> 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 on-line 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

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<sup>18</sup> As noted below, criminal proceedings and criminal conduct have been found to be matters of public interest for first amendment purposes. See text at notes 118-152.

<sup>19</sup> 376 U.S. 254 (1964).

precedent clearly indicates that such forced speech would be found to violate the first amendment.

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.

### THREE STORIES: “REALITY CONTINUES TO RUIN MY LIFE.”<sup>20</sup>

*“[It was a story because William Grant was prosperous, owned a business, married the banker’s daughter, was generally admired. In its own way, William Grant’s story was inspiring, a cautionary tale. ... More to the point, [the] story was the truth, and fortified by fact.”*<sup>21</sup>

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 market place 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 those with a criminal record try futilely to control.

To set the stage for our discussion, we 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

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<sup>20</sup> Bill Watterson, THE COMPLETE CALVIN AND HOBBS (2005).

<sup>21</sup> Ward Just, THE EASTERN SHORE, at 90.

“told a pitiful story of love, abandonment and betrayal.”<sup>22</sup> She was acquitted.<sup>23</sup> 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.<sup>24</sup> In 1925, actress-turned-producer Dorothy Davenport, or as she was known, Mrs. Wallace Reid,<sup>25</sup> produced a movie called *The Red Kimono*, which was part of a series of exposé films focusing on serious social issues of the day.<sup>26</sup> 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.”<sup>27</sup> After some time on the run, and a gun battle with police, Briscoe surrendered, eventually pleaded guilty to several crimes, and was sentenced

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<sup>22</sup> Lawrence M. Friedman, *GUARDING LIFE’S DARK SECRETS, LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* 216 (2007) [hereinafter *LIFE’S DARK SECRETS*]

<sup>23</sup> *Melvin v. Reid*, 297 P. 91, 91 (Cal. Ct. App. 1931).

<sup>24</sup> *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 DARK SECRETS*, *supra* note 22, at 218.

<sup>25</sup> 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 Kimono*, DVD TALK (May 31, 2008), <http://www.dvdtalk.com/reviews/33379/red-kimona-the/>.

<sup>26</sup> See *id.*

<sup>27</sup> *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, actually was carrying four bowling pin spotters from Yonkers, New York, worth little on any resale market available to Briscoe.

to prison.<sup>28</sup> 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.”<sup>29</sup> Just over a decade after the hijacking, Briscoe’s epiphany and his rehabilitation, *Reader’s Digest* published a five-page article entitled “The Big Business of Hijacking” which 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.’”<sup>30</sup> The article chronicled numerous hijackings, including Briscoe’s which it described as follows: “Typical of many beginners, Marvin Briscoe and [an accomplice] stole a ‘valuable-looking’ truck in Danville, Ky., and then fought a gun battle with the local police....”<sup>31</sup> 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.”<sup>32</sup> 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.””<sup>33</sup> On August 27, 2010, a Hearst broadcast outlet published an online article reporting that Martin was

<sup>28</sup> James Higdon, *THE CORNBREAD MAFIA* 64-67 (2013).

<sup>29</sup> *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.

<sup>30</sup> *Briscoe*, 483 P.2d at 36.

<sup>31</sup> *Id.* (internal quotation marks omitted).

<sup>32</sup> *Martin v. Hearst Corp.*, 777 F.3d 546, 548 (2d Cir. 2015), *cert. denied*, 136 S.Ct. 40 (2015).

<sup>33</sup> *Id.* at 549.

“arrested on Aug. 20 after police say they confiscated 12 grams of marijuana, scales and traces of cocaine from [her] house.”<sup>34</sup> The articles were truthful and remained online.<sup>35</sup> Just over a year later, the state decided not to prosecute Martin and entered a *nolle prosequi*,<sup>36</sup> 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.<sup>37</sup> In Martin’s case, 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* . . . at least 13 months have elapsed since [the] *nolle*, all police and court records and records of the state’s attorney . . . pertaining to such charge shall be erased.”<sup>38</sup> Despite its name, erasure under the statute does not involve destruction of the record; rather, the record is sealed and kept from disclosure.<sup>39</sup> 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 . . . .”<sup>40</sup> 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*.<sup>41</sup> Further, the statute states that this person “legally could state that he or she had not been arrested with respect to the relevant charges [,]” and could swear to that under oath.<sup>42</sup>

Relying on the Erasure Statue, Martin requested the media outlets to remove the earlier stories reporting her arrest. They refused, and she sued,

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<sup>34</sup> *Id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See id.*

<sup>37</sup> *See, e.g.,* Roberts v. Babkiewicz, 582 F.3d 418, 420 (2d Cir. 2009) (quoting Cislo v. City of Shelton, 240 Conn. 590, 692 A.2d 1255, 1260 n. 9 (Conn. 1997)) (“[In Connecticut,] [a] *nolle prosequi* is a ‘unilateral act by a prosecutor which ends the [prosecution] without an acquittal and without placing the defendant in jeopardy.’”).

<sup>38</sup> CONN. GEN. STAT. ANN. § 54-142a(c)(1) (West 2016). The statute also provides for erasure when an accused is found not guilty or the charges have been dismissed. *See id.* § 54-142a(a).

<sup>39</sup> *See* Skall, *supra* note 4 at 350 n. 67 (citing Doe v. Manson, 438 A.2d 859, 861 (Conn. 1981)).

<sup>40</sup> CONN. GEN. STAT. ANN. § 54-142a(c)(1) (West 2016).

<sup>41</sup> *See id.* § 54-142a(e)(3).

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

alleging claims for libel, false light, negligent infliction of emotional distress and appropriation.<sup>43</sup>

Consider the three 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 a conviction gave rise to a privacy cause of action. However, the outcomes of both these cases were later called into question by a series of US 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.<sup>44</sup> Indeed, the California Supreme Court, responding to these holdings, overturned *Briscoe* explicitly in *Gateway v Discovery Communications*,<sup>45</sup> 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.<sup>46</sup> 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. 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

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<sup>43</sup> See *Martin v. Hearst Corp.*, 777 F.3d 546, 549 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 40 (2015). *Martin* also sued for negligent infliction of emotional distress and invasion of privacy all based on the reports. *See id.*

<sup>44</sup> See generally *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that protection of freedom 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 (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 (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*, 430 U.S. 308 (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 *supra* notes 120-140 and accompanying text.

<sup>45</sup> 101 P.3d 552 (Cal. 2004).

<sup>46</sup> See, 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”).

various publication-related tort claims necessarily fail[ed].”<sup>47</sup>

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.”<sup>48</sup> 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.”<sup>49</sup> But in 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. 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. “[S]ociety[] should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime.”<sup>50</sup>

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. Martin, on the other hand, argued that the operation of the Erasure Statute actually transformed the facts, or erased them. Expungement or erasure statutes such as 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, reducing the risk of recidivism.<sup>51</sup> Should these policies

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<sup>47</sup> *Martin*, 777 F.3d at 552.

<sup>48</sup> *Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34, 41 (Cal. 1971), *overruled by* *Gates v. Discovery Commc’ns, Inc.*, 101 P.3d 552 (Cal. 2004); *see also* *Melvin v. Reid*, 297 P. 91, 93 (Cal. Ct. App. 1931).

<sup>49</sup> *Briscoe*, 483 P.2d at 40.

<sup>50</sup> *Id.* at 41.

<sup>51</sup> *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, *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 . . .”).

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.<sup>52</sup> 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? In his thoughtful opinion in *Martin*, Judge Wesley drew on the *Rubáiyát*, observing that: “The Moving Finger has written and moved on.”<sup>53</sup> The poet added that “not piety, nor wit nor all one’s tears can cancel even half a line.”<sup>54</sup> 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,<sup>55</sup> should give rise to falsity-based claims sounding in defamation or false light.

#### EXPUNGEMENT: INTO THE MEMORY HOLE<sup>56</sup>

“Three may keep a secret, if two of them are dead.”<sup>57</sup>

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 régimes 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

<sup>52</sup> See *supra* notes 36-41 and accompanying text.

<sup>53</sup> *Martin*, at 552 n.7 (citing, *Rubáiyát of Omar Khayyam*, stanza 71 (Edward Fitzgerald trans., 4th ed. 1879)).

<sup>54</sup> See *id.*

<sup>55</sup> Jurisdictions apply a variety of names and remedies to the processes available to cleanse a criminal record. See notes 49-91 and accompanying text. *infra*. For convenience I will usually rely on expungement and expunge to capture the various models.

<sup>56</sup> See Orwell, *supra* note 3, at 37-38 (“[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.”).

<sup>57</sup> Benjamin Franklin, POOR RICHARD’S ALMANACK 53 (1914).

what was understood even then about the realities of brain development in adolescents.<sup>58</sup> 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.<sup>59</sup> Although the optimistic rehabilitative tenor of the 1950s and 60s soon gave way to a more retributive approach to criminal justice,<sup>60</sup> most jurisdictions (except the federal government) have adopted some mechanism for sealing, expunging or erasing records.<sup>61</sup>

#### 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.<sup>62</sup> 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 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.<sup>63</sup> But again, our focus here is on the remedy itself and what it

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<sup>58</sup> 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*]; 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.”)..

<sup>59</sup> *Starting Over*, *supra* note 48, at 1710-11

<sup>60</sup> See *id.* at 1714-15.

<sup>61</sup> See Amy Shlosberg et. al., *Expungement and Post-Exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353, 356, 359 (2014); see also *50 State Guide to Expungement Laws*, *supra* note 4.

<sup>62</sup> 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, 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 . . . no limit of public access at all—although some records may be sealed”).

<sup>63</sup> See *50 State Guide to Expungement Laws*, *supra* note 4; see also *50-State*

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 individual, the procedural posture of the charges or the seriousness of the crime. Others have chronicled this.<sup>64</sup>

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[.]”<sup>65</sup> Alabama permits an individual to petition the court to order a juvenile record destroyed five years after the individual attains majority,<sup>66</sup> and allows the court to “expunge nonconviction records of non-violent felonies and misdemeanors, including [specifically] cases where the charges were dismissed[.]” requiring all agencies with these records to eliminate and remove them within 30 days.<sup>67</sup> South Carolina’s statute provides (with some minor exceptions) that when a charge has been

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*Comparison Judicial Expungement, Sealing, Set-Aside*, COLLATERAL CONSEQUENCES RESOURCE CENTER (last updated December 2016), <http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparison-judicial-expungement-sealing-and-set-aside/> [hereinafter *50 State Guide Comparison Chart*].

<sup>64</sup> See, e.g., *50 State Guide Comparison Chart*, *supra* note 53; see also Roberts, *supra* note 5; 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). 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 53.

<sup>65</sup> See *Doe v. Zappala*, 987 A.2d 190, 192 (Pa. Commw. Ct. 2009); see also CRA.R.CRIM.P. 320 (requiring law enforcement agencies to “file with the Clerk of Court . . . certification which states destruction of records has taken place.”)

<sup>66</sup> See ALA. CODE §§ 12-15-136, 12-15-137 (West 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).

<sup>67</sup> *50 State Guide Comparison Chart*, *supra* note 53 (citing ALA. CODE § 41-9-625 (West 2016)). “Eliminate and remove” would seem to contemplate destruction of the records.

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.’”<sup>68</sup> 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.<sup>69</sup> 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 existed.”<sup>70</sup>

While some jurisdictions in some instances call for the actual destruction or obliteration 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 that “[e]xpunge a record’ means to remove a record of arrest or conviction, photographs, fingerprints, disposition, or any other information of any kind from public access”<sup>71</sup> But the statute is clear that remove does not mean destroy: “‘Expunge a record’ does not mean destruction of the record.”<sup>72</sup>

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.”<sup>73</sup> 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

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<sup>68</sup> 50 *State Guide Comparison Chart*, *supra* note 53 (citing S.C. CODE ANN. § 17-1-40 (West 2016)).

<sup>69</sup> 20 ILL. COMP STAT. ANN 2630/5.2(a)(1)(E) (West 2016) (“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.”)

<sup>70</sup> 20 Ill. Comp. Stat. Ann. 2630/5.2(d)(9).

<sup>71</sup> LA. CODE CRIM. PROC. ANN. art. 972 (West 2016).

<sup>72</sup> *Id.*

<sup>73</sup> IND. CODE ANN. § 35-38-9-6(a)(1)-(2) (West 2016).

the context of bar admissions).<sup>74</sup> 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 that 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 provided after the date of the order of expungement.<sup>75</sup>

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 Westlaw, Lexis *et al* are expected to take some action. Would they? Must they? <sup>76</sup> 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.

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<sup>74</sup> See *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); see also 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).

<sup>75</sup> IND. CODE ANN. § 35-38-9-6(c) (West 2016).

<sup>76</sup> 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); *Panel One: General Discussion on Privacy and Public Access to Court Files*, 79 FORDHAM L. REV. 1 (2010); Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307 (2004).

Maryland provides for expungement of some records, and shielding of others. According to the Maryland statute, expungement requires the information 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.”<sup>77</sup> 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.”<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup>

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.”<sup>81</sup> A shielded record is accessible to specific individuals, including law enforcement, and certain employers and licensing agencies required by law to do criminal background checks,<sup>82</sup> but those individuals are specifically prohibited from disclosing the shielded information to anyone other than those specifically identified by the statute.<sup>83</sup> In addition, the Maryland statute specifies that Maryland’s criminal records search engine must not “in any way refer to the [existence

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<sup>77</sup> MD. CODE ANN., CRIM. PROC. § 10-101(d)-(e) (West 2016).

<sup>78</sup> MD. RULE 4-512.

<sup>79</sup> *Id.*

<sup>80</sup> *See id.*

<sup>81</sup> MD. CODE ANN., CRIM. PROC. § 10-301(d) (West 2016).

<sup>82</sup> *See id.* § 10-302(b).

<sup>83</sup> *See id.* § 10-306(a).

of specific] records shielded” under the statute.<sup>84</sup> 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, is harder to accomplish, but may provide stronger protections.

Some states call for correction of the record, but not full expungement.<sup>85</sup> 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.”<sup>86</sup> The statute also provides for limiting 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.”<sup>87</sup> Ironically, this might actually undercut the effectiveness of the correction.

Of particular interest for our purposes, several states permit, in certain cases of expungement or sealing, the individual to deny both that the record ever existed, and perhaps even that the facts it memorializes ever happened. So, 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 the arrest is deemed never to have happened, and the individual “may so swear under oath.”<sup>88</sup> 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.”<sup>89</sup> Ohio also 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.”<sup>90</sup> Washington’s sentencing reform act provides for a broad range of offenders who satisfactorily complete their sentence to have them vacated. Once the sentence is vacated, the statute specifies that “[f]or all purposes . . . an offender whose

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<sup>84</sup> *Id.* § 10-304.

<sup>85</sup> *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)

<sup>86</sup> ARIZ. REV. STAT. ANN. § 13-4051(A) (West 2016).

<sup>87</sup> *Id.* § 13-4051(B).

<sup>88</sup> CONN. GEN. STAT. ANN. § 54-142a(e)(3) (West 2016).

<sup>89</sup> DEL. CODE ANN. tit. 10, § 1019(c) (West 2016).

<sup>90</sup> OHIO REV. CODE ANN. § 2151.358(F) (West 2016).

conviction has been vacated may state that the offender has never been convicted of that crime.”<sup>91</sup>

Related, 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). So, for example, Connecticut’s statute provides that when a charge that is not prosecuted is expunged and that the person “shall be deemed to have never been arrested,”<sup>92</sup> 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.”<sup>93</sup>

### *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.”<sup>94</sup> The record may remain in public repositories by virtue of 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 or not 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, in scholarly journals, or as Wallace Wade, observed, even in “a compulsive newspaper-clipper’s attic.”<sup>95</sup> 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

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<sup>91</sup> WASH. REV. CODE ANN. § 9.94A.640(3) (West 2016).

<sup>92</sup> CONN. GEN. STAT. ANN. § 54-142a(e)(3) (West 2016).

<sup>93</sup> 705 ILL. COMP. STAT. ANN. 405/5-915 (West 2016).

<sup>94</sup> See Wade, *supra* note 70, at 14-15; see also *supra* notes 5-8 and accompanying text.

<sup>95</sup> See Wade, *supra* note 70, at 10, 30, 35; Wayne, *supra* 8, at 255 (discussing how “expungement orders do not apply to non-government sources . . . at great cost to individuals with expunged records”).

the futility of recapturing the gossip, or in our case, the information, once let fly.<sup>96</sup>

Often the expungement statutes do attempt to address this issue. California’s statute makes an effort at recapturing 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.<sup>97</sup> 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.”<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> How effective such requirements are in getting actual compliance from the entities directed to delete the records remains to be seen. And further, such piecemeal efforts that address only certain sources leave so 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<sup>101</sup> observed:

<sup>96</sup> See Wade, *supra* note 70 at 23 n. 143.

<sup>97</sup> CAL. CIV. CODE § 1786.18(a)(7) (West 2010).

<sup>98</sup> CONN. GEN. STAT. ANN. § 54-142e(b) (West 2016).

<sup>99</sup> See *supra* text accompanying notes 79-82.

<sup>100</sup> See, 15 U.S. (§ 1861 c(a)(2) (2012) (*prohibiting credit reporting agencies’ use of arrest records that precede issuance of credit reports by more than seven years.*)

<sup>101</sup> See Jesse Wegman, *A Federal Judge’s New Model for Forgiveness*, N.Y. TIMES, March 3, 2016, [http://www.nytimes.com/2016/03/16/opinion/a-federal-judges-new-model-for-forgiveness.html?\\_r=0](http://www.nytimes.com/2016/03/16/opinion/a-federal-judges-new-model-for-forgiveness.html?_r=0). While the federal system does not statutorily provide such relief, many states do. According to one media report, 14 states have adopted some form of certificate of rehabilitation. See Eli Hager, *Forgiving vs Forgetting*, THE

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.<sup>102</sup>

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.<sup>103</sup> Relevant to our inquiry, Judge Gleeson noted that employers (and in the broader range of instances, those who do research on an individual's history for whatever reason) don't have the time to scour the entire record of a former offender. 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 . . . for 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.”<sup>104</sup> As Judge Gleeson recognized, it is unlikely those who rely upon or disseminate criminal records will have the resources (or the inclination) to undertake such a thorough analysis. Rather, the record typically will stand on its face and yield judgments about its meaning, usually damaging to the individual.

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.” To illustrate, he quotes Gawker's CEO as saying:

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MARSHALL PROJECT (March 17, 2015, 5:53PM),  
<https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting#.6wOWmwn5D>.

<sup>102</sup> Doe v. United States, 168 F.Supp.3d 427, 442 (E.D.N.Y. 2016) (citing David J. Norman, *Stymied by the Stigma of a Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences*, 31 QUINNIPIAC L. REV. 985, 1006 (2013)).

<sup>103</sup> See *id.* at 442, 445-46. Judge Gleeson patterned both his inquiry and his certificate on similar state remedies. *Id.* at 444-45. The actual certificate, with fancy borders and a seal, is attached to the opinion.

<sup>104</sup> *Id.* at 442.

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.<sup>105</sup>

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.<sup>106</sup>

In light of this, the forgiveness argument is persuasive for a number of reasons, both principled and pragmatic.<sup>107</sup> For our purposes, the pragmatic arguments are most significant, *to wit*, the futility of efforts to force “forgetting” in an age of modern technology and in light of First Amendment constraints. But can we force real forgiveness? Even assuming a good faith effort, does the idea of knowing about a criminal record yet not having it influence one’s thinking and judgments sound 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.”<sup>108</sup> Against this background, we will use Ms. Martin’s case as a hypothetical to explore possible solutions. .

#### PREVENTING THE HARM BEFORE IT HAPPENS

*“If people are constantly falling off a cliff, you could place ambulances*

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<sup>105</sup> Frank Pasquale, *Reforming the Law of Reputation*, 47 LOY. U. CHI. L.J. 515, 519–20 (2015) (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>).

<sup>106</sup> *See id.* at 536-37.

<sup>107</sup> *See* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 759 (2011). 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*, OXFORD JOURNAL OF LEGAL STUDIES, April 2015, <http://ojls.oxfordjournals.org/content/early/2015/04/02/ojls.gqv012.full>.

<sup>108</sup> Lea Winerman, *Suppressing the “White Bears”*, MONITOR ON PSYCHOLOGY, October 2011, at 44, *available at* <http://www.apa.org/monitor/2011/10/unwanted-thoughts.aspx> (citing Fyodor Dostoevsky “Winter Notes on Summer Impressions,” (1863)) (internal quotation marks omitted). Winerman notes that research by psychologist Daniel Wegner confirmed Dostoevsky’s impressions.

*under the cliff, or build a fence at the top of the cliff.”*<sup>109</sup>

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.<sup>110</sup> 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.<sup>111</sup>

#### *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 important steps involved in the criminal proceedings.<sup>112</sup> 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.<sup>113</sup> Under modern application of the

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<sup>109</sup> John McDougall, *Denis Burkitt, MD Opened McDougall’s Eyes to Diet and Disease*, THE MCDUGALL NEWSLETTER (January 2013), <https://www.drmcDougall.com/misc/2013nl/jan/burkitt.pdf> (quoting Dr. Denis Burkitt).

<sup>110</sup> See generally *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

<sup>111</sup> 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*]; see also *Richmond Newspapers*, 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)).

<sup>112</sup> See generally *Richmond Newspapers*, 448 U.S. 555 (considering fourth retrial of accused murder); see also *Press-Enter. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1 (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”); *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596 (1982) (examining whether state can exclude press from testimony of minor rape victims during trial).

<sup>113</sup> In a case decided before *Richmond Newspapers*, (never expressly overruled but limited in its application by subsequent cases) the Supreme Court did find closing a suppression hearing was appropriate under the particular circumstances of that case. See generally *Gannett Co. v. DePasquale*, 443 U.S. 368 (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

*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.’”<sup>114</sup> 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.’”<sup>115</sup> 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.”<sup>116</sup> 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.<sup>117</sup> Nonetheless, the Court did note, “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.”<sup>118</sup> Many circuit courts have recognized in addition to the common law right, a qualified constitutionally protected right to access court documents, including plea agreements, sentencing motions, and even docketing systems, basing this in the *Richmond Newspapers* line of cases, decided after *Nixon*. These courts

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of the public not the individual. *See Privacy and Access to Court Records, supra* note 101, at 950.

<sup>114</sup> John Gerhart, *Access to Court Proceedings and Records*, COMM. LAW., Summer 2000, at 11, 12.

<sup>115</sup> *Press-Enter. Co.*, 478 U.S. at 13–14. *See also Privacy and Access to Court Records, supra*, note 1171, at 948.

<sup>116</sup> *Privacy and Access to Court Records, supra* note 117, at 948.

<sup>117</sup> *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 608-09 (1978). Ultimately, the Court denied access to 22 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.

typically apply the two-part test and the strict scrutiny standard described above to challenges to access.<sup>119</sup>

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.”<sup>120</sup> The federal courts’ Internet search engine provides access to federal court records and includes a search-by-name index.<sup>121</sup>

One Supreme Court case that must be distinguished is, *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*.<sup>122</sup> 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.<sup>123</sup> 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. The rap sheets being sought were a compilation of information submitted by a variety of sources, and as such were an agency record and *not* a record of “what the government was up to.”<sup>124</sup> The Court reasoned that in the case of FOIA, 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. The Court found that Exemption 7(C) protected these particular agency records.<sup>125</sup>

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<sup>118</sup> *Id.* at 597.

<sup>119</sup> See Gerhart, *supra* note 117, at 14; see also *Privacy and Access to Court Records*, *supra* note 101, at 948-49.

<sup>120</sup> Roberts, *supra* note 5, at 328.

<sup>121</sup> *Privacy and Access to Court Records*, *supra* note 111, at 922.

<sup>122</sup> 489 U.S. 749 (1989).

<sup>123</sup> *See id.* at 780.

<sup>124</sup> *See id.* at 751-52. 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 than the person whose record it is supposed to be.

<sup>125</sup> *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)).

Illuminating for our purposes, the Court in reaching its conclusion that important privacy concerns were involved, 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<sup>126</sup>

### *C. Restricting Publication of Criminal Records and Proceedings*

Given constitutionally-protected access to criminal proceedings and 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 rightfully obtained materials have been struck down consistently by the Supreme Court. As the Court reasoned in *Cox Broadcasting v. Cohn*, “We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication.”<sup>127</sup> While the Court insists that there is no absolute prohibition, in a line of cases beginning with *Cox*, the Court 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 minor rape and murder victim while present in the courtroom at the time the defendants pleaded guilty to the crime. He then reported the victim’s name in his later broadcast report about the proceedings. The victim’s 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 to allow a privacy claim based on the accurate publication of judicial records such as this would violate the First and Fourteenth Amendments.<sup>128</sup> Important for our purposes, the Court explained that, “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

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<sup>126</sup> 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.”<sup>126</sup>

<sup>127</sup> *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975).

<sup>128</sup> See *id.* at 491, 496-97.

within the responsibility of the press to report the operations of government.”<sup>129</sup> 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 v. Sullivan* and its progeny.<sup>130</sup>

The Court next decided *Nebraska Press Association v. Stuart*.<sup>131</sup> 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.<sup>132</sup> Because of the posture of *Nebraska Press Association* (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 so imposed what amounts to an insurmountable hurdle.<sup>133</sup> 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 . . . .”<sup>134</sup> Despite what the Court admitted were the trial judge’s responsible efforts to ensure the defendants a fair trial in a sensational atmosphere, the Court struck down the order as violating the Constitution.<sup>135</sup> Only 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 detention hearing in open court.<sup>136</sup>

In *Landmark Communications, Inc. v. Virginia*, decided a year after *Oklahoma Publishing*, a newspaper publisher was criminally prosecuted for reporting the fact 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.<sup>137</sup>

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<sup>129</sup> *Id.* at 492.

<sup>130</sup> *See generally* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) discussed in detail below at notes 158-164, *infra*.

<sup>131</sup> 427 U.S. 539 (1976).

<sup>132</sup> *See id.* at 570.

<sup>133</sup> *See id.* at 558.

<sup>134</sup> *Id.*

<sup>135</sup> *See id.* at 569-70.

<sup>136</sup> *See Okla. Publ’g Co. v. Dist. Court*, 430 U.S. 308, 308, 312 (1977). 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). *See id.* at 311.

<sup>137</sup> 435 U.S. 829, 831-32 (1978).

Again, the Court held that this proceeding was a matter of public interest.<sup>138</sup> 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.<sup>139</sup>

*Smith v. Daily Mail* is the next in this line of what became virtually annual forays into this area. In *Smith*, the Court considered whether a statute that prohibited publication of a minor 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 really didn’t matter whether it viewed the statute as a prior restraint or a sanction for publishing truthful information because either “requires the highest form of state interest to sustain its validity.”<sup>140</sup> *Smith* presented slightly different facts than the earlier cases in that the reporters in *Smith* did not obtain their information from court records or even from just being in the courtroom. Rather, they interviewed people at the crime scene, engaging in what the Court called “routine newspaper reporting techniques.”<sup>141</sup> This fact is interesting, and on one hand 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 demonstrates vividly 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.”<sup>142</sup>

In *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 and including the victim’s name in a bin in the pressroom.<sup>143</sup> As in *Smith*, the information the reporter published

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<sup>138</sup> See *id.* at 839.

<sup>139</sup> *Id.* at 840, 842.

<sup>140</sup> *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 in *Nebraska Press Association* had dubbed prior restraints “the most serious and the least tolerable infringement on First Amendment rights. See, *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 559 (1976).

<sup>141</sup> *Smith*, 443 U.S. at 103.

<sup>142</sup> *The X-Files*, “Opening Credits” (20th Century Fox Television 1993-2002). The attorney-client privilege reflects this same lesson; it protects communication but cannot somehow cloak the facts as they exist in the real world. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

<sup>143</sup> 491 U.S. 524 (1989).

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.”<sup>144</sup> Nonetheless, consistent with *Smith*, the Court held that publication of information legally obtained that related to a matter of public interest could not be punished or expose the publisher to legal sanctions.<sup>145</sup> But again, the Court explicitly refused to state a broad rule saying: “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.”<sup>146</sup> 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.

We glean from this that efforts to restrict access to information or to prohibit publication of information once lawfully obtained, will not survive constitutional challenges.

And these cases also close the door to privacy-based actions for damages flowing from the publication of such 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. 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.

#### 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.”<sup>147</sup>*

In the case that inspired this article, Ms. Martin alleged that the publication, actually the continued availability of the report of her arrest,

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<sup>144</sup> *Id.* at 536.

<sup>145</sup> *See id.* at 540-41.

<sup>146</sup> *Id.* at 541.

<sup>147</sup> Patrick Rothfuss, *THE WISE MAN’S FEAR* (2011).

was false as a result of the erasure of that record. Can expungement give rise to a falsity-based cause of action by transforming once-true reports into false reports? To answer this question we 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.<sup>148</sup> Given the subject matter involved, the easiest of these elements for the expungee to prove is defamatory meaning. The Restatement 2<sup>nd</sup> 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.”<sup>149</sup> Stating that someone is guilty of a crime easily clears the threshold of defamatory meaning. And in light of the collateral impacts of simply having a criminal record, reporting even the charge also clears this hurdle.<sup>150</sup> The real issues arise with the requirement of falsity, especially in light of the constitutionalization of the tort of defamation.

The early common law did not typically 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. The defendant could rebut this by carrying the burden of proving truth as an absolute defense.<sup>151</sup> But beginning with *New York Times 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 *New York Times v. Sullivan*, the Court carved out protection for even false speech in order to provide breathing room that the Court held was critical to ensure the robust debate essential for a functioning democracy and a free society.<sup>152</sup> The Court held that in order to recover damages for a false and

<sup>148</sup> See RESTATEMENT (SECOND) OF TORTS § 558 (1977).

<sup>149</sup> *Id.* § 559.

<sup>150</sup> See, e.g., *Armstrong v. Shirvell*, 596 F. App'x 433, 442 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 403, (2015); *Hatfill v. New York Times Co.*, 416 F.3d 320, 333 (4th Cir. 2005), *Clancy v. New Times Publ'g Co.*, 639 F.2d 54, 61 (2d Cir. 1980).

<sup>151</sup> See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 770 (1986) (noting common law rule holds that “[s]tatements defaming [a] person are . . . presumptively false” but defendant may prove “truth of statements” which provides “absolute defense”).

<sup>152</sup> See *generally* 376 U.S. 254 (1964).

defamatory statement, a public official must show, by clear and convincing proof, that the publisher knew that the information communicated was false, or acted with reckless disregard for the truth or falsity of the information.<sup>153</sup>

The *New York Times* standard was later extended to public figures engaged in matters of public interest.<sup>154</sup> 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 a private matter)<sup>155</sup> would not be held to the *New York Times* standard, the Constitution did impose thresholds on certain elements. 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.<sup>156</sup>

Finally, the last piece critical to our analysis came with *Philadelphia Newspapers 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.<sup>157</sup>

The *New York Times* 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 amount to impossibly high barriers to recovery. In doing so, the Court created cottage industry surrounding the questions of who is a public figure, what is a matter of public interest and how the status (public official, public figure, general purpose public figure, limited purpose public figure, private figure) intersected with the nature of the communication (matter of public interest or newsworthy material).<sup>158</sup>

Are our expungees limited purpose public figures, private figures involved in matters of public interest, or simply private figures? Some

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<sup>153</sup> See *id.* at 279-80; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

<sup>154</sup> 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, 162-165 (1967) (Warren, C.J., concurring in result)).

<sup>155</sup> In the case of *Gertz*, the matter involved Elmer Gertz, a lawyer, representing the family of an accused criminal in a civil rights action against law enforcement. See 418 U.S. 323, 325 (1974).

<sup>156</sup> See *id.* at 349-50.

<sup>157</sup> See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

<sup>158</sup> See, e.g., Victoria C. Duke, *Calumnious News Reporting: Defamatory Law Is More Than Sticks and Stones for Civic-Duty Participants*, 93 NEB. L. REV. 690, 705-721 (2015).

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 so subject to *New York Times* case’s imposition of almost impossible hurdles; others have found them to be private figures involved in a matter of public interest and so subject to the more forgiving *Gertz* standards.<sup>159</sup> Either interpretation requires the plaintiff to prove falsity.

The Supreme Court has never faced categorizing criminal defendants head on, but one Supreme Court decision involving a witness, potentially implicated in espionage, does provide guidance. In *Wolston v. Reader’s Digest*, Ilya Wolston sued Reader’s Digest for defamation. Wolston was the nephew of two people who had pleaded guilty to espionage. He had been subpoenaed and interviewed several times regarding this matter. 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.<sup>160</sup> Nonetheless, the court ordered him to appear. He refused. He then faced a hearing to show cause why he should not be found in contempt. 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. 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.”<sup>161</sup> He was never indicted for espionage or accused of being a spy. Many years later, Reader’s Digest published a book entitled *KGB, the Secret Work of Soviet Agents* which identified Wolston as a KGB agent and a Soviet spy—information Wolston alleged was false.<sup>162</sup>

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.<sup>163</sup> The Court continued, a “court must focus on the ‘nature and

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<sup>159</sup> *See id.* at 717.

<sup>160</sup> *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 160-62 (1979).

<sup>161</sup> *See id.* at 163.

<sup>162</sup> *See id.*

<sup>163</sup> *See id.* at 166-67. In fact, the language from *Gertz* cited by Wolston was not quite so focused on voluntary action by the individual: “More commonly, an individual

extent of an individual's participation in the particular controversy giving rise to the defamation.”<sup>164</sup> 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. 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.”<sup>165</sup> The Court would seem to be instructing 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[,]” and so attained “special prominence in the resolution of public questions . . . .”<sup>166</sup>

Courts take differing approaches to applying this analysis, specifically in the context of criminal defendants. Is the individual’s action in thrusting him 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.”<sup>167</sup> 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, and concluded that the nature of the crime had to be considered.<sup>168</sup> Thus, while the US 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),<sup>169</sup> the Kansas court in *Ruebke* considered the sensational nature of the triple murder involved and the intense media coverage to find the defendant a limited purpose public figure.<sup>170</sup> Similarly,

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

<sup>164</sup> *Wolston*, 443 U.S. at 167.

<sup>165</sup> *Id.* at 168.

<sup>166</sup> *Id.*

<sup>167</sup> *See* 418 U.S. at 345.

<sup>168</sup> *See* *Ruebke v. Globe Commc'ns Corp.*, 241 Kan. 595 (1987).

<sup>169</sup> *Wolston*, 443 U.S. at 166-67.

<sup>170</sup> *See* *Ruebke*, 241 Kan. at 600–02. In a somewhat puzzling part of its reasoning, the Kansas court also considered the defendant’s decision to turn himself in as constituting

in *Marcone v. Penthouse International Magazine for Men*, the Third Circuit found an attorney, who was indicted for drug related activities he was alleged to have been engaged in with his clients, to be a public figure.<sup>171</sup> 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.<sup>172</sup> 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.<sup>173</sup>

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. Recall, a limited purpose public figure is a public figure only with respect to the matter of public interest. 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.<sup>174</sup> With this as background, we turn to the viability of an expungee’s cause of action for defamation—a cause of action the must rise or fall on whether the expungee can carry the burden of proving falsity.

### 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

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voluntarily thrusting himself into the controversy. *See id.* at 601.

<sup>171</sup> 754 F.2d 1072,1084-86 (3d Cir. 1985).

<sup>172</sup> *See id.*

<sup>173</sup> *Id.* (quoting *Rosanova v. Playboy Enter. Inc.*, 411 F. Supp. 440, 445 (S.D. Ga. 1976)).

<sup>174</sup> *See supra* notes 133-152 and accompanying text.

published the defamatory information with knowledge that it was false or with reckless disregard for its truth or falsity. 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. 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.<sup>175</sup> Nat Stern described this as making falsity part of the intrinsic character of a defamation claim.<sup>176</sup> Stern has it absolutely right. His illumination of the import of this constitutionally driven requirement correctly grasps falsity as essential to a defamation claim, and so informs our analysis.

In order for an expungee to prevail in a defamation claim under the scenarios we 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 (or 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 we establish something that is *not* and deem 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.<sup>177</sup> The thing acquires that character--that identity “in consequence of the way in which it is regarded by a rule or policy of law . . . implied [or] made out by legal interpretation.”<sup>178</sup> Expungement takes something that happened, and decrees that it did not, or at least that any record of its happening

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<sup>175</sup> See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

<sup>176</sup> 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).

<sup>177</sup> BLACK’S LAW DICTIONARY 386 (Revised 4th ed. 1968) (emphasis removed); see also Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, (“[C]ommon 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 that 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.

<sup>178</sup> BLACK’S LAW DICTIONARY 386 (Revised 4th ed. 1968).

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,”<sup>179</sup> refuting it with Orwellian logic<sup>180</sup>

This surely represents good policy in the context of expungement’s criminal justice goals. And for these goals to be achieved fully, the effects of expungement must be applied beyond the narrow confines of the criminal record itself in order 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.<sup>181</sup> But, as Judge Gleeson, and so many commentators have noted, while in a perfect world, we would both forgive and forget the criminal history of a rehabilitated individual, we cannot achieve perfection.

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.<sup>182</sup> 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 criminal record, while simultaneously understanding full well that the presumption of falsity is simply not fact.<sup>183</sup> 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

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<sup>179</sup> See *supra* note 1 and accompanying text.

<sup>180</sup> Orwell, *supra* note 3, at 213. “[T]he past is whatever the Party chooses to make it . . . [W]hen it has been recreated in whatever shape is needed at the moment, then this new version [I]S the past, and no different past can ever have existed.”

<sup>181</sup> See *Doe v. United States*, 168 F. Supp. 3d 427, 445-47 (E.D.N.Y. 2016). See *id.* at 447; see also Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715 (2012) (stating that collateral consequences “can be more punitive and permanent than a person’s actual criminal sentence”) (citing Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 154 (1999)).

<sup>182</sup> See *supra* note 100-106 and accompanying text.

<sup>183</sup> 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*.’”).

rejecting the common law presumption of falsity applied to defamatory speech, and imposing the requirement that a private-party/public-matter plaintiff must plead, prove and persuade on the element of falsity, the Court understood full well that this decision could work significant unfairness on 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.<sup>184</sup> 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.<sup>185</sup> 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 liability.<sup>186</sup>

Related, the Court’s application of its *New York Times* 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.<sup>187</sup> The Court reasoned that parody cannot be shown to involve facts, and therefore cannot be shown demonstrably false. Outrageous, harmful and untrue. But not false. Therefore, the Court reasoned, the Constitution will not permit the imposition of damages, even in the face of outrageous conduct and verifiable harm.<sup>188</sup>

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<sup>184</sup> See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986). The Court acknowledged:

[t]here 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 777.

<sup>185</sup> See *id.* at 778-79.

<sup>186</sup> See *id.*

<sup>187</sup> See *Falwell*, 485 U.S. at 48 (determining parody “could not reasonably have been interpreted as stating actual facts about the public figure involved”).

<sup>188</sup> See, e.g., *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 14 (1970) (noting that 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

Against this background, we must conclude that the Court will not destabilize its holding in *Hepps*, and indeed the entire *New York Times* 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.”<sup>189</sup> *Hepps* itself rejected 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.<sup>190</sup> The fiction of constructive falsity would be rooted in a presumption even more constitutionally unsound. It would, as noted, 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 fudge in 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

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defamation); *see also* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

<sup>189</sup> Griffin, *supra* note 183, 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. *See 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. *See id.* at 778-81.

<sup>190</sup> *See Hepps*, 475 U.S. at 776-77.

become false.<sup>191</sup> 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. This, so the reasoning goes, is especially so in the context of online publications, primarily because they are easily searchable and arguably are republished each time a reader searches and pulls up the article. 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 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.<sup>192</sup> The single publication rule most often arises when courts must determine when the statute of limitations begins to run. Functionally, it means that a defamatory publication must be judged at the moment of its first publication.<sup>193</sup> 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.

As with any emerging technology, the advent online publications raised the question of whether or not the single publication rule would apply to online media. The majority of courts considering the question have held that the single publication rule does apply to online publications, and the fact that each view “reloads” the article does not make each view a new publication.<sup>194</sup> The New York case of *Firth v. State* has been cited as the

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<sup>191</sup> This was not directly addressed by the Martin court, but the issue was raised in the Defendant’s brief. See Brief for the Defendants-Appellees at 10-21, *Martin v. Hearst Corp.*, 777 F.3d 546 (2d Cir. 2015) (No. 13-3315-cv), 2014 WL 1100531; see also Brief for the Reporters Committee 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), 2014 WL 1100532.

<sup>192</sup> RESTATEMENT (SECOND) OF TORTS § 577A(2)-(4) (1977).

<sup>193</sup> See, e.g., *Firth v. State*, 775 N.E.2d 463, 465 (N.Y. 2002); see also Lori A. Wood, *Cyber-Defamation and the Single Publication Rule*, 81 B.U. L. REV. 895, 897-99 (2001).

<sup>194</sup> *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 193, at 895-96, 899.

most influential of these rulings.<sup>195</sup> *Firth* and the other cases finding that the single publication rule does apply 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. 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.”<sup>196</sup>

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.

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<sup>195</sup>See *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 144 (5th Cir. 2007) (noting that most courts considering 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 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 single publication rule did apply to online publications generally, but fact that publication drew comments from readers and publishers responded constituted republication); *Swafford v. Memphis Individual Prac. Assoc.*, 1998 WL 281935, at \*8-\*11 (Tenn. Ct. Ap. June 2, 1998) (finding 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”).

<sup>196</sup>*Firth*, 775 N.E.2d at 466. The court observed:  
 that many 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.

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.

### *B. False Light*

Before moving on, we should 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.<sup>197</sup> That false light must be “highly offensive to a reasonable person.”<sup>198</sup> 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. Defamatory falsity focuses hard on verifiable and serious injury to reputation. The definitions 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.<sup>199</sup> 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 . . . .”<sup>200</sup> 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.”<sup>201</sup> Many commentators criticize false light because, as noted above, it is duplicative of defamation, and, to the extent an independent cause of action *does* exist, 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 *New*

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<sup>197</sup> See RESTATEMENT (SECOND) OF TORTS § 652E (1977).

<sup>198</sup> *Id.* § 652E(a).

<sup>199</sup> Dan B. Dobbs, THE LAW OF TORTS 1127 (2000). Dobbs indicates these terms “refer to the same general idea.”

<sup>200</sup> RESTATEMENT (SECOND) OF TORTS §559 (1977). While most definitions of defamatory meaning focus on injury to reputation, in *Time v. Firestone*, the Supreme Court held that harm to reputation was not constitutionally required, and permitted recovery under Florida law that permitted recovery for personal humiliation, and mental anguish and suffering. 424 U.S. 448, 460 (1976).

<sup>201</sup> Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 396 (1989).

*York Times* line of cases seeks to protect.<sup>202</sup> 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. Diane Zimmerman warned of the danger 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.”<sup>203</sup>

Despite scholarly hostility toward false light claims, a good number of jurisdictions do recognize the cause of action.<sup>204</sup> 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 *New York Times* constitutional mandates to false light claims, requiring, at least in the context of matters of public interest, that the defendant must have published the material with “knowledge that the statement was false or with reckless disregard for” its truth or falsity.<sup>205</sup> While the Supreme Court has not said so specifically, the logic of its jurisprudence in this area drives the conclusion that as in defamation, the plaintiff bears the burden of proof with respect to falsity.<sup>206</sup>

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.<sup>207</sup> Again, the expungee cannot prove falsity when what is published is truthful information obtained from a public record.

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<sup>202</sup> See, e.g., Sandra Chance and Christina 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); James Lake, *Restraining False Light: Constitutional and Common Law Limits on a “Troublesome Tort,”* 61 FED. COMM. L.J. 625, 626; 639-40 (2009); J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783, 785, 883, 886-87 (1992); Zimmerman, *supra* note 195, at, 397-402.

<sup>203</sup> Zimmerman, *supra* note 195, at 416.

<sup>204</sup> See RESTATEMENT (SECOND) OF TORTS § 652E: Case Citations (1977).

<sup>205</sup> 385 U.S. 374, 387-88 (1967).

<sup>206</sup> 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* will apply to false light causes of action, 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.*; see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

<sup>207</sup> See Stern, *supra* note 182, at 17-18.

Constructive falsity would not work any better here than in the context of defamation to satisfy the requirement of falsity. As noted, the Supreme Court has applied its *New York Times* jurisprudence to false light. 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 doesn’t 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.<sup>208</sup>

#### 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.<sup>209</sup> When the state did not prosecute the charges against Ms. 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

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<sup>208</sup> See *Graboff v. Am. Ass’n of Orthopaedic Surgeons*, 559 F. App’x 191, 194-95 (3d Cir. 2014) (applying to single publication rule to false light, which court found very similar to defamation, and finding that Internet posting does 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); *Parnigoni v. St. Columba’s Nursery Sch.*, 681 F. Supp. 2d 1, 19 (D.D.C. 2010) (stating single publication rule applies to false light claims).

<sup>209</sup> See *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, 8:06 PM), <http://www.greenwichtime.com/local/article/Mother-and-sons-charged-with-drug-offenses-633280.php>.

publications remove the story of her arrest and charge. They refused.<sup>210</sup> The report remained available online, and can be accessed even now.<sup>211</sup> Suppose instead of asking them 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 avoid the possibility of punitive damages, by preemptively retracting the defamatory statements.<sup>212</sup> Other jurisdictions require the plaintiff to request a retraction and give the publisher the opportunity to do so before seeking certain types of damages.<sup>213</sup> Can we build on these retraction statutes 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 that the communications in question are arguably false and defamatory. Despite the broad-reaching impact of its *New York Times* 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 room, and

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<sup>210</sup> See Martin, 777 F.3d at 549.

<sup>211</sup> For example, as of the time this article was published, the *Greenwich Time* article could be accessed online. See Debra Friedman, *Mother and Son Charged with Drug Offenses*, GREENWICH TIME (Aug. 26, 2010, 8:06 PM), <http://www.greenwichtime.com/local/article/Mother-and-sons-charged-with-drug-offenses-633280.php>.

<sup>212</sup> See, e.g., FLA. STAT. ANN. § 770.02 (West 2016) (barring plaintiff from recovering punitive damages if defendant publishes retraction); GA. CODE ANN. § 51-5-11 (West 2016) (prohibiting plaintiff from recovering punitive damages if defendant publishes retraction or if plaintiff fails to request retraction); MASS. GEN. LAWS 231 § 93 (West 2016) (allowing defendant to use retraction as way to mitigate damages recoverable by plaintiff); WIS. STAT. ANN. § 895.05 (West 2016) (barring plaintiff from recovering punitive damages if defendant publishes timely correction).

<sup>213</sup> See, e.g., ALA. CODE 1975 § 6-5-186 (West 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 2017) (allowing plaintiff to only recover special damages unless he or she demands retraction and is refused); OR. REV. STAT. § 31.210 (West 2016) (requiring plaintiff to either demand retraction or show that defendant “intended to defame the plaintiff” to be able to recover general damages); WIS. STAT. ANN. § 895.05 (West 2016) (requiring plaintiff to ask for retraction before filing suit).

free and robust debate requires some margin of error to avoid a chilling effect.<sup>214</sup> So, the false and defamatory statement itself is not worthy of protection. Rather, in order to avoid chilling robust debate, courts don't permit the law to cut too close to the bone in imposing damages. In short, to avoid making speakers timorous and so risk stifling truthful speech, we must let some false speech slip through. But that false speech itself does not have constitutional value. The cases hold that under the proper circumstances (that is, clearing the *New York Times* bar), courts can impose penalties (or in this case, burdens) on false and defamatory speech.<sup>215</sup> This forms the foundation for the retraction statutes—they impose a burden, but only on publishers of defamatory speech. In the expungees' cases, we are dealing with truthful speech whose publication is constitutionally protected.<sup>216</sup> This represents an important distinction.

Second, the retraction statutes do not *require* that a retraction or correction be printed. 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. 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.

As we have seen with the constitutionalization of defamation law, 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 . . . .”<sup>217</sup> The Court did not hesitate to read “abridging” to include compelling speech when it comes to government interference with speech.

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<sup>214</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341, 348 (1974) (recognizing “strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation”).

<sup>215</sup> The *New York Times* line of cases, discussed above, set out the circumstances. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964) (stating 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.”).

<sup>216</sup> See *supra* notes 100-140 and accompanying text.

<sup>217</sup> US CONST. amend. 1; see also *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256–57 (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

While some commentators have observed that the entirety of the Court’s compelled speech jurisprudence can be hard to reconcile, that critique really applies to only 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).<sup>218</sup> In cases of true compelled speech, where a speaker is forced to express content that is not its own, such as our proposal to force media outlets to add information about expungements to published reports of criminal records, the Court’s 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.<sup>219</sup> 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.”<sup>220</sup> 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 (column inches) to the reply instead of other content.<sup>221</sup> The Court added an important concern with intrusion into the editorial process:

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.<sup>222</sup>

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be subject to constitutional limitations on governmental powers.”); *supra* notes 141-167 and accompanying text.

<sup>218</sup> 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).

<sup>219</sup> 418 U.S. 241, 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). Whether this rationale will continue to justify the distinction in light of the extraordinary expansion of broadcast capacity remains to be seen.

<sup>220</sup> *Tornillo*, 418 U.S. at 256.

<sup>221</sup> See *id.* at 256-57.

<sup>222</sup> *Id.* at 258.

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 as conceptually comparable to traditional publications. 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 such imposing a modest burden to correct the report. Is this permissible, and if it is, would it do any good? 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. 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. Related, 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.<sup>223</sup> So, while the expense, or commitment of resources for on an online publisher required to publish a correction or clarification of its report might be minimal, 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* foreshadows this possibility and notes its concern: “. . . The choice of material to go into a newspaper . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”<sup>224</sup> The Court concludes that it could not see “how governmental regulation of this crucial process can be exercised consistent with First Amendment . . . .”<sup>225</sup>

#### 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

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<sup>223</sup> See *id.* at 257.

<sup>224</sup> *Id.* at 258.

<sup>225</sup> *Id.* at 258.

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.<sup>226</sup> 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.”<sup>227</sup> Further, most news outlets publish their own codes of ethics and hold their reporters accountable to these codes.<sup>228</sup>

Despite popular disdain for the media, journalists have traditionally aspired to high standards, while wrestling with how to get to the news, get it right, get it out, and survive in an increasingly competitive atmosphere.<sup>229</sup>

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<sup>226</sup> See generally *Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISM (Sept. 6, 2014, 4:49PM), <http://www.spj.org/ethicscode.asp> [hereinafter “*SPJ Code of Ethics*”].

<sup>227</sup> *Id.*

<sup>228</sup> See, e.g., N.Y. TIMES, *Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments* (2004), available at [http://www.nytc.com/wp-content/uploads/NYT\\_Ethical\\_Journalism\\_0904-1.pdf](http://www.nytc.com/wp-content/uploads/NYT_Ethical_Journalism_0904-1.pdf); REUTERS, *Standards and Values*, REUTERS: HANDBOOK OF JOURNALISM, [http://handbook.reuters.com/index.php?title=Standards\\_and\\_Values](http://handbook.reuters.com/index.php?title=Standards_and_Values) (last visited Mar. 8, 2017) (listing ten absolutes required of all Reuters reporters); *The Washington Post Standards and Ethics*, AMERICAN SOCIETY OF NEWS EDITORS, <http://asne.org/content.asp?contentid=335> (last visited Mar. 8, 2017).

<sup>229</sup> See *Why Doesn't SPJ Enforce its Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISM, <http://www.spj.org/ethicsfaq.asp> (last visited Mar. 8, 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 REVIEW (Sept. 18 2014), [http://archives.cjr.org/behind\\_the\\_news/ethics\\_hotlines.php](http://archives.cjr.org/behind_the_news/ethics_hotlines.php) (discussing how “Online News Association is developing crowd sourced Build Your Own Ethics Code project,” with “rationale . . . that, when it comes to ethics codes, “one size does not fit all.”). Compare Carl Bernstein & Bob Woodward, *ALL THE PRESIDENT'S MEN* 79 (1974) (describing Washington Post's Watergate reporting: “Gradually an unwritten rule was evolving:

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.”<sup>230</sup>

Journalists also understand the implications of both longevity and ready accessibility in the context of on-line 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.<sup>231</sup> Her paper focused on the rapidly increasing phenomena (invoked by Ms. Martin in her case) of requests to “unpublish” articles,<sup>232</sup> and editors’ efforts to handle these requests.<sup>233</sup> According to English’s research, reports of criminal records, especially reports involving minor crimes, represent “a significant source” of requests to unpublish.<sup>234</sup> Editors correctly resist such requests as a form of coercive, content-based censorship. “[T]oday’s newspaper has always been tomorrow’s historical record,” she writes.<sup>235</sup> One publisher challenged even the word “unpublishing,” arguing that these requests are actually “asking to censor or

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unless two sources confirmed a charge involving activity likely to be considered criminal, the specific allegation was not used in the paper.”) and Tom Goldstein, *JOURNALISM AND TRUTH: STRANGE BEDFELLOWS* 16 (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” (internal citation omitted)). 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.*, Steven Perlberg, *Media Looks Inward After Donald Trump Surprise*, *WALL ST. J.* (Nov. 9, 2016), <https://www.wsj.com/articles/media-looks-inward-after-donald-trump-surprise-1478720405>; Kyle Pope, *An Open Letter to Trump from the US Press Corps*, *COLUMBIA JOURNALISM REVIEW* (Jan. 17, 2017), [http://www.cjr.org/covering\\_trump/trump\\_white\\_house\\_press\\_corps.php](http://www.cjr.org/covering_trump/trump_white_house_press_corps.php); 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](https://www.nytimes.com/2016/11/09/arts/television/after-this-election-can-the-media-recover.html?_r=0).

<sup>230</sup>*SPJ Code of Ethics*, *supra* note 221.

<sup>231</sup> *See generally* Kathy English, *The Longtail of News: To Unpublish or Not to Publish*, ASSOCIATED PRESS MANAGING EDITORS ONLINE CREDIBILITY PROJECT (2009), available at

[www.apme.com/resource/resmgr/online\\_journalism\\_credibility/long\\_tail\\_report.pdf](http://www.apme.com/resource/resmgr/online_journalism_credibility/long_tail_report.pdf).

<sup>232</sup> Unpublish “is a word media organizations have coined to describe public requests to remove content from news Websites.” *Id.* at 1.

<sup>233</sup> *See id.* at 1, 3-5.

<sup>234</sup> *See id.* at 5.

<sup>235</sup> *Id.* at 1.

rewrite history.”<sup>236</sup>

The SPJ’s Code of Ethics specifically addresses the issue of corrections and updates, suggesting that journalists “consider the long-term implication of the extended reach and permanence of publication,” and “[p]rovide updated and more complete information as appropriate.”<sup>237</sup> 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.”<sup>238</sup> 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.”<sup>239</sup>

Other editors have responded, recognizing that even an addendum might not be enough, and favoring the publication of follow-up stories. As one editor explained, the correction or addendum needs to be as prominent as the original story. “Publishing a follow-up that puts the correct information on the record and links to the previous article is also a means of ensuring ongoing accuracy[.]”<sup>240</sup>

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 on-line outlets to have police blotter reports “fall off” the websites after six months.<sup>241</sup> Such a practice, a voluntary and automatic purging of certain types of sensitive records, offers

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<sup>236</sup> *Id.* at 4 (internal quotation marks omitted).

<sup>237</sup> *SPJ Code of Ethics*, *supra* note 221.

<sup>238</sup> Mallory Jean Tenore, *Five Ways News Organizations Respond to “Unpublishing” Requests*, POYNTER (July 10, 2010), <http://www.poynter.org/2010/5-ways-news-organizations-respond-to-unpublishing-requests/104414/>.

<sup>239</sup> *Id.* (internal quotation marks omitted).

<sup>240</sup> *Id.* 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.*

<sup>241</sup> *See* English, *supra* note 237, at 5. GateHouse Media “publish[es] 125 daily newspapers, more than 600 community publications and 535 websites . . . .” *About Us*, GATEHOUSE MEDIA, <http://www.gatehousemedia.com/about-us/> (last visited Mar. 8, 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.

one solution. But if this practice were applied broadly, as would be necessary to really solve the problems raised here, we would lose—or at least gut— what many recognize as a valuable resource for historical research—comprehensive media archives.<sup>242</sup>

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 or 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, on-line 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 less than 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 the news outlet of the burden of independently verifying the information provided.<sup>243</sup> 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

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<sup>242</sup> See *supra* notes 240-42 and accompanying text.

<sup>243</sup> 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.

seek to amend the report or let it stand.<sup>244</sup>

Requiring acknowledgement in the publication of the fact that the article has been amended advances the interest of media transparency.<sup>245</sup>

Finally, I propose only an addendum, not a fully developed follow-up story. Developing and reporting a follow-up story would involve significant time and resources.<sup>246</sup> 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 a brief—easy to find, easy to read, therefore making it quite likely that the reader will find and read the correction. A full-blown story might be harder to place near the original story. And, because of its length, it might not be read, undermining the effectiveness of the remedy.

As noted, publishers recognize that especially online content has a long life and is easy to access; they appear willing to entertain realistic policies to address this fairly and are wrestling with the options.<sup>247</sup> 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 individual has rehabilitated his life.<sup>248</sup> Bernard Kogon and Donald Loughery argue that expungement, which they refer to as the big lie, does more harm than

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<sup>244</sup> 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.

<sup>245</sup> See English, *supra* note 237, at 16 (“Transparency with our readers demands that we indicate that an article has been edited to correct or update.”).

<sup>246</sup> See Tenore, *supra* note 244.

<sup>247</sup> See English, *supra* note 237, at 10-13 (discussing results of survey of newsrooms regarding unpublishing practices); *see also* Tenore, *supra* note 233 (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)).

<sup>248</sup> See, e.g., 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); Bernard Kogon, Donald L. Loughery, Jr. Sealing and Expungement of Criminal Records—The Big Lie, 61 J. Crim. L. Criminology & Police Sci. 378 (1970); Doe v United States, *supra* note 92 at 442 (forgiveness model gaining favor in reentry community for philosophical and practical reasons).

good, and that the better approach is to leave the record alone and work at changing societal attitudes about offenders.<sup>249</sup> 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 of some sort will do much to destigmatize 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 I am confident will 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.<sup>250</sup> Margaret Love argues that “providing relief from collateral sanctions is very much the business of courts on a continuing basis.” 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.”<sup>251</sup> 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.<sup>252</sup> Such formal acknowledgement of rehabilitation also works hand in hand with the media policy proposed above.

A number of states do provide for certificates of rehabilitation, although the federal system has no formal process for this.<sup>253</sup> While this remedy

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<sup>249</sup> Bernard Kogon, Donald L. Loughery, Jr. Sealing and Expungement of Criminal Records—The Big Lie, 61 J. Crim. L. Criminology & Police Sci. 378, 388 (1970).

<sup>250</sup> See Doe v. United States, *supra* note 92 at 442-445. Margaret Colgate Love, Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act, 54 How. L.J. 753, 792 (2011).

<sup>251</sup> *Id.* at 445.

<sup>252</sup> 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 (2016) (empirical study suggests that certificates of relief may be an effective avenue for reducing the stigma of a criminal record for ex-offenders seeking employment).

<sup>253</sup> See Doe, 168 F. Supp. 3d at 442 (citing David J. Norman, *Stymied by the Stigma of a Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences*, 31 QUINNIPIAC L. REV. 985, 1014 (2013)); *id.* at 445 (discussing how “federal system has

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.<sup>254</sup> And 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.

Which of course, brings us back to the problem of over-criminalization and its devastating consequences, consequences that once unleashed, defy our efforts to constrain their 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 we ignore at our peril.

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much to gain from adopting a certification system” and that “[t]he federal system already contemplates certificates of rehabilitation”).

<sup>254</sup> 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 reenter society)..