

NEWSPAPER EXPUNGEMENT

Brian M. Murray

ABSTRACT—Expungement law has made great strides over the past two decades, with state-level reforms broadening the types of criminal records eligible for expungement. Further, expungement has been extended beyond arrestees to those who have been convicted, thereby promising to alleviate some of the burdens of reentry. Nevertheless, expungement remedies only touch officially held information or public data possessed by different branches of government. This means that private actors, if they possess the information, are beyond the reach of expungement law. Such actors, whether individuals, background check companies, newspapers, or other firms, enjoy the ability to continue to hold and use such information. This results in a whack-a-mole problem for the successful expungement petitioner who has achieved the relief that the state allows, only to see its efficacy thwarted by private activity with the same information. Recently, one private actor, newspapers, has begun to set up processes that resemble formal expungement. Newspaper editors have responded to the limits of formal expungement by constructing their own procedures for evaluating whether to erase, seal, or alter information that is damaging to the reputation of those who have encountered the criminal justice system. This development has occurred on the heels of the right to be forgotten movement in Europe, which has gained little traction in the United States. This Essay contextualizes the phenomenon of newspaper expungement, situating it within a larger legal backdrop, before describing the stated activities and aspirations of some of the newspapers themselves. It concludes by charting how such practices relate to broader critiques and goals of criminal justice reform.

AUTHOR—Associate Professor of Law, Seton Hall University School of Law. I would like to thank the Honorable Stephanos Bibas for encouraging me to study expungement from various angles, my former colleagues at Community Legal Services of Philadelphia for introducing me to expungement law, and participants at CrimFest 2020 for providing feedback on the ideas that generated this article. Thank you to Hayley McLaughlin, my former student, for research assistance. I would also like to thank my wife, Katherine, for her continuous support, and my children, Elizabeth, Eleanor, George, John, and Lucy, for their inspiring curiosity, endless questions, sense of wonder, and zealous love for life.

INTRODUCTION	69
I. THE LIMITS OF EXPUNGEMENT IN THE DIGITAL AGE	73
II. THE RIGHT TO BE FORGOTTEN, NOT TO THE RESCUE	75
III. PRIVATE EXPUNGEMENT BY NEWSPAPERS.....	79
IV. QUESTIONS MOVING FORWARD.....	84
CONCLUSION	86

INTRODUCTION

For those who have been arrested or convicted, the stain of an interaction with the criminal justice system can rarely be fully erased, whether from national news or local police blotter.¹ While state-by-state expungement regimes offer some relief when it comes to official data created and held by police agencies and judicial records departments, the formal limits of expungement are well known.² As the late James Jacobs' book, *The Eternal Criminal Record*, forcefully demonstrated, even the best remedies allow criminal records to exist *somewhere*.³

This reality persists despite waves of expungement reform over the past decade or so.⁴ Although the range of individuals eligible for expungement has increased in recent years, access to relief remains elusive.⁵ For those who have been convicted, the gamut of offenses that are eligible for expungement also remains small.⁶ Even when an offense is eligible, an extended waiting period usually precedes expungement.⁷ Procedural hurdles such as filing

¹ See Sarah Esther Lageson, *Can a Criminal Record Ever Be Fully Expunged?*, PAC. STANDARD, (Jan. 11, 2019), <https://psmag.com/social-justice/can-a-criminal-record-ever-be-fully-expunged> [<https://perma.cc/F9K3-LA9N>] (explaining that even if criminal records are wiped clean, agencies and websites can still make them available online).

² See, e.g., MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., THE MANY ROADS TO REINTEGRATION: A 50-STATE REPORT ON LAWS RESTORING RIGHTS AND OPPORTUNITIES AFTER ARREST OR CONVICTION 36–52 (2020), <https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf> [<https://perma.cc/C6YC-P2DP>] (describing variations in expungement and reentry law by jurisdiction and documenting the limitations of relief in each state).

³ See generally JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015) (describing how formal expungement regimes do not reach privately held information held by background check companies or private individuals).

⁴ See, e.g., LOVE & SCHLUSSEL, *supra* note 2, at 36–52 (describing reforms over the past eight years in each state); see generally 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 (2016) (describing recent updates to several state laws that expanded expungement relief).

⁵ J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2486–2506 (2020) (noting an “uptake gap” in achieving expungement).

⁶ See LOVE & SCHLUSSEL, *supra* note 2, at 40–43.

⁷ See Brian M. Murray, *Retributive Expungement*, 169 U. PA. L. REV. 665, 695 (2021).

deadlines, costs, and fees deter otherwise eligible petitioners.⁸ Those most in need of expungement frequently cannot bear the short-term opportunity costs related to petitioning for such a remedy. After all, having to take a day off from work (and possibly lose pay) to track down agency records, get fingerprinted, and accurately fill out tedious paperwork is no small task.⁹

This state of affairs—when juxtaposed with the commendable desire to hasten reentry for those who have come into contact with the criminal justice system—has created a movement towards new solutions by the government. Governments have responded with “Clean Slate” initiatives that are designed to ease procedural barriers and quicken the pace of expungement.¹⁰ However, while these new laws initiate automatic expungement, they still only regulate *official* data.¹¹ Expungement rarely extends to criminal records that nonofficial sources like newspapers, background check companies, and websites all over the internet store in their archives.¹² Thus, just when an individual believes his past is truly behind him, an old newspaper story or stray official document reemerges during an internet search. Even if the expungement law permits a job applicant to lawfully omit the prior conviction on job applications, an informal internet search may reveal old news stories and raise eyebrows about the applicant’s truthfulness. For the arrestee who was never charged or was ultimately exonerated, the information’s perpetuity is devastating because it continues to wrongfully impugn one’s reputation. For the convicted individual who served her time, the existence of the information inhibits a fresh start, however deserved it is and regardless of whether the person was fully rehabilitated. In short, the internet, big tech realities, and the general thirst for informational knowledge will continue to undercut the promise of expungement. Thus, the continued existence of information already ordered expunged, but held by private

⁸ Prescott & Starr, *supra* note 5, at 2486. *But see* Noella Sudbury, *How Utah Got Automatic Expungement*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 15, 2021), <https://ccresourcecenter.org/2021/01/15/how-utah-got-automatic-expungement> [<https://perma.cc/YVU7-K6BZ>] (explaining Utah’s “Expungement Day” event to streamline expungements); Akil Roper, *New Jersey Launches Electronic Filing System for Expungements*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 28, 2021), <https://ccresourcecenter.org/2021/01/28/new-jersey-launches-electronic-filing-system-for-expungements> [<https://perma.cc/3EX5-9FY5>] (describing how e-filing systems can make the expungement process more efficient).

⁹ *See, e.g.*, LOVE & SCHLUSSEL, *supra* note 2, at 45 (describing how expungement petitions are “difficult, time-consuming, and expensive”).

¹⁰ *See, e.g.*, *Get a Clean Slate in Pennsylvania!*, CMTY. LEGAL SERVS., <https://mycleanslatepa.com> [<https://perma.cc/234D-8VE6>] (describing who is eligible for expungement under Pennsylvania’s new “Clean Slate” law).

¹¹ *Id.*

¹² Sarah Esther Lageson, *The Purgatory of Digital Punishment*, SLATE (June 24, 2020, 10:59 AM), <https://slate.com/technology/2020/06/criminal-justice-records-online-digital-punishment.html> [<https://perma.cc/28CT-AHQ6>].

entities, creates a whack-a-mole problem. That problem can cripple reentry efforts for those who have been convicted or even just arrested.

In other legal systems, some have made the case for a “right to be forgotten” (RTBF) to address this issue.¹³ These arguments have gained traction in continental Europe, resulting in the European Union recognizing a limited version of such right.¹⁴ Implementation is largely localized, however, and varies by country.¹⁵ Google, in a series of well-known cases, has fought this right tooth and nail.¹⁶ Nevertheless, the RTBF has found its way into the newly developed General Data Protection Regulation (GDPR)¹⁷ and appears to be here to stay, at least in places beyond the continental United States.

While formal expungement law permits the “forgetting” of officially held information or seriously restricts access to such data, the erasure of privately held information in the fashion that the RTBF contemplates has not yet gained traction in the United States and is unlikely to do so in the future. There seem to be a few core reasons why.¹⁸ First, the First Amendment has enshrined norms relating to free speech and access to official information.¹⁹ The Supreme Court has consistently upheld robust protections for press access to officially generated information, especially in the criminal justice arena.²⁰ These norms, coupled with generalized skepticism of governmental authority and a thirst for criminal justice transparency throughout history, create a formidable bulwark against a concept like the RTBF. There are good reasons for skepticism of the RTBF. After all, private access to government

¹³ Andres Guadamuz, *Developing a Right to Be Forgotten*, in EU INTERNET LAW: REGULATION AND ENFORCEMENT 59, 60 (Tatiana-Eleni Synodinou, Philippe Jougoux, Christiana Markou & Thalia Prastitou eds., 2017).

¹⁴ *Id.*

¹⁵ See, e.g., Leo Kelion, *Google Wins Landmark Right to Be Forgotten Case*, BBC (Sept. 24, 2019), <https://www.bbc.com/news/technology-49808208> [<https://perma.cc/KHN2-KK5L>] (describing how the right to be forgotten has been applied on search engines used in the European Union); Andrew Keane Woods, *Three Things to Remember from Europe’s ‘Right to Be Forgotten’ Decisions*, LAWFARE (Oct. 1, 2019, 10:11 AM), <https://www.lawfareblog.com/three-things-remember-europes-right-be-forgotten-decisions> [<https://perma.cc/SS7X-V3JH>] (pointing out that Europe and the United States have different internet regulations).

¹⁶ See Kelion, *supra* note 15.

¹⁷ *Everything You Need to Know About the “Right to Be Forgotten,”* GDPR.EU, <https://gdpr.eu/right-to-be-forgotten> [<https://perma.cc/B5ZJ-TDUB>].

¹⁸ Other legal scholars have questioned the legal and practical viability of an “American” right to be forgotten. See *infra* Part II.

¹⁹ See, e.g., *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978) (citations omitted) (pointing out the interest in “the citizen’s desire to keep a watchful eye on the workings of public agencies . . . and in a newspaper publisher’s intention to publish information concerning the operation of government”).

²⁰ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980) (“The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press . . .”).

information does help achieve accountability, and the ability of private actors to utilize such information seems reasonable. Most agree that it is reasonable for parents to want to know the histories of those they hire as babysitters, employers to worry about criminal activity on the job, and nursing homes to want to protect residents from potentially dangerous caretakers.

But the reality is that the persistent existence of already expunged information results in the extension of the punitive effects of public criminal recordkeeping,²¹ exacerbating existing inequities stemming from the administration of justice.²² Second chances, even when well-deserved and *officially granted*, never get off the ground. Recently, a slate of private actors who once held a privileged position in the world of information and its dissemination have begun to address the holes left by governmental expungement remedies and the stigma associated with criminal record information floating in private spaces on the internet. Newspapers (almost all of which maintain an online presence now) have begun to create informal expungement processes for their own archived records. For example, the *Boston Globe* calls its operation the “Fresh Start” initiative.²³ The *Cleveland Plain-Dealer* was one of the first to announce this effort²⁴ and even opened its decisional boardroom to a podcast.²⁵ These newspapers and others like them accept applications and requests from individuals to have damaging information—whether of a criminal or other nature—removed.²⁶ They have created processes, with varying degrees of transparency, for handling such applications.²⁷ “Newspaper expungement” is a response to the limits of

²¹ Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 *How. L.J.* 1, 42–49 (2016).

²² ZACHARY HOSKINS, *BEYOND PUNISHMENT?: A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION* 3–10 (2019).

²³ Zoe Greenberg, *Boston Globe Launches ‘Fresh Start’ Initiative: People Can Apply to Have Past Coverage About Them Reviewed*, *BOS. GLOBE* (Jan. 22, 2021, 12:01 AM), https://www.bostonglobe.com/2021/01/22/metro/boston-globe-launches-fresh-start-initiative-people-can-apply-update-or-anonymize-coverage-them-thats-online/?et rid=1742013097&_campaign=metroheadlines:newsletter [<https://perma.cc/7P63-WBWW>] (archived copy on file with journal).

²⁴ Sydney Smith, *Cleveland.com’s New ‘Right to Be Forgotten’ Program Removes Names from Some Expunged Crime Stories*, *IMEDIAETHICS* (Oct. 12, 2018, 5:00 AM), <https://www.imediaethics.org/cleveland-coms-new-right-to-be-forgotten-program-removes-names-from-some-expunged-crime-stories> [<https://perma.cc/MV6M-UAUU>].

²⁵ Mary Kilpatrick, *Radiolab Podcast Features Cleveland.com’s Right to Be Forgotten*, *CLEVELAND.COM* (Aug. 23, 2019), <https://www.cleveland.com/metro/2019/08/radiolab-podcast-features-clevelandcoms-right-to-be-forgotten.html> [<https://perma.cc/25JE-367C>].

²⁶ See, e.g., Zack Kucharski, *Gazette Policy Guides Removing Minor Crime Stories from Website*, *GAZETTE* (Oct. 29, 2019, 8:43 AM), <https://www.thegazette.com/subject/news/public-safety/article-removal-crime-nonviolent-no-felony-20191029> [<https://perma.cc/J9CR-X6KE>] (announcing *The Gazette*’s policy of removing minor crime stories from its website).

²⁷ See *infra* Part III.

formal expungement law and the RTBF's failure to launch under American law.

This Essay hopes to generate discussion about this novel phenomenon and its apparent motivations and contours. It situates newspaper expungement as a reaction to the formal limits of expungement law and the lack of viability of a legal solution like the RTBF in the United States. Part I sketches the limits of expungement law as they pertain to this development, highlighting in particular two realities: formal expungement laws (1) only touch officially held information and (2) rarely seek to prohibit private actors from sharing such information. Part II explains how the RTBF operates in continental Europe, where the right originated, and why the RTBF is not viable in American law. Taken together, Parts I and II indicate *why* news agencies might respond with their own informal expungement processes. Part III describes newspaper expungement as it has been presented by the entities themselves and aims to identify this new world of *private* expungement. This represents the Essay's descriptive contribution, diving deeper into the operations the papers have projected to the public. Finally, Part IV concludes with some observations and questions about the processes these newspapers created and whether they can fully address the problem they seek to resolve.

I. THE LIMITS OF EXPUNGEMENT IN THE DIGITAL AGE

The limits of expungement law plague those who wish to reenter society after encountering the criminal justice system. Those limits are both substantive and procedural. Non-conviction information—and, in particular, arrest information—is mostly eligible for expungement. The range of convictions eligible for expungement, however, remains relatively narrow despite a decade of state-by-state expansion.²⁸ Petitioners are also rendered ineligible to request expungement based on prior contacts with the system, whether those contacts were minor or serious.²⁹ Thus, while substantive expungement law has generally broadened to allow for more relief, widespread relief for large categories of petitioners is the exception rather than the norm.

Further, expungement regimes have procedural limits. Fines and fees inhibit eligibility, and waiting periods that are supposed to be tethered to rehabilitative ideals delay relief,³⁰ if not prevent it entirely. These fines and

²⁸ See LOVE & SCHLUSSEL, *supra* note 2, at 44 (bringing to attention that state expungement laws exclude categories of offenses like “higher classes of offenses, DUI, violence, sex, weapons” from eligibility and cataloguing the varying availability of remedies by state).

²⁹ *Id.*

³⁰ See Murray, *supra* note 7, at 693–95.

fees are ultimately counterproductive to the point that they undermine any theoretical promise of expungement. While we know that expungement can theoretically help reduce recidivism,³¹ existing expungement regimes do not seem designed to pursue that goal.³²

There are two particular realities of existing expungement regimes that specifically inform why *private* newspapers have entered into this business of expunging information that lingers in publicly accessible spheres after courts order it purged from the official records. First, expungement law only reaches *official* data. Second, expungement regimes have rarely, if ever, allowed for robust enforcement against *private use* of data otherwise ordered expunged.³³ Thus, not only does a private firm get to possess the information, but also dissemination of that information, even after it has been expunged, is practically beyond the reach of the law.³⁴

To make that more concrete, expungement law only involves the sealing or erasure of information maintained by police and executive agencies, as well as court records generated by the judicial branch.³⁵ At best, the existing state expungement laws resemble some provisions of the Fair Credit Reporting Act (FCRA), which still prohibits the reporting of older arrest and nonconviction records.³⁶ FCRA requires consumer reporting agencies to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”³⁷ Thus, a background check company that purchases data from an official governmental actor might receive and upload an updated file to make sure records are accurate. However, the Act is mostly ineffective in its ability to remediate inaccuracies should the company disseminate older information that has been expunged.³⁸ FCRA also does not regulate all of the online industries disseminating such information.³⁹ Likewise, a private company, like a newspaper, that scrapes such information from an unofficial source

³¹ Ericka B. Adams, Elsa Y. Chen & Rosella Chapman, *Erasing the Mark of a Criminal Past: Ex-Offenders’ Expectations and Experiences with Record Clearance*, 19 PUNISHMENT & SOC’Y 23, 46–47 (2017).

³² See Murray, *supra* note 7, at 688–702 (noting how expungement law exists within a privacy/rehabilitation paradigm that contains obstacles to relief).

³³ SARAH ESTHER LAGESON, DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE 173 (2020) (describing that laws designed to combat mugshot extortion have few teeth and that they do not regulate dissemination).

³⁴ *Id.*

³⁵ Murray, *supra* note 4, at 367–76.

³⁶ 15 U.S.C. § 1681c(a)(5).

³⁷ 15 U.S.C. § 1681e(b).

³⁸ Eldar Haber, *Digital Expungement*, 77 MD. L. REV. 337, 355–56 (2018).

³⁹ LAGESON, *supra* note 33, at 178.

and publishes it is beyond the reach of expungement law.⁴⁰ Under existing law, companies and individuals cannot be coerced to destroy the information and face little repercussion for disseminating it, even if official expungement has been achieved.⁴¹ These cases show that if the formally expunged criminal record is true, it is likely to follow the previously arrested or convicted person forever. However, whether the record is true or not, the effect of such a lingering record is devastating for reentry.

The internet and the free flow of information across various technological platforms have made the effects of this reality especially difficult for arrestees and those who have been convicted. Scholars like Professors Eldar Habar,⁴² Frank Pasquale,⁴³ and Sarah Lageson⁴⁴ have discussed this problem at great length, pointing to how this current reality might completely upend any promise that expungement once offered. After all, moving on from an experience with the criminal system is much more difficult when data exists in perpetuity on the internet and is controlled by actors who are not democratically accountable but choose to share such information online. This has led some to argue for digital expungement or an RTBF.⁴⁵ But these arguments have gained little traction in American law. Part II briefly sketches why.

II. THE RIGHT TO BE FORGOTTEN, NOT TO THE RESCUE

The RTBF, which would permit individuals to request the erasure of privately held data, has been lauded as a potential solution to expungement's waning efficacy throughout the rise of the Information/Digital Age.⁴⁶ The idea originated in continental Europe after multiple individuals sought to remove from websites and databases available through search engines like

⁴⁰ *Martin v. Hearst Corp.*, 777 F.3d 546, 553 (2d Cir. 2015) (ruling that news stories about the plaintiff's arrest were not defamatory because it was true that she had been arrested).

⁴¹ *See, e.g., G.D. v. Kenny*, 15 A.3d 300, 321 (N.J. 2011); *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995).

⁴² *See generally* Habar, *supra* note 38 (arguing for "digital expungement" for information existing online in perpetuity).

⁴³ *See generally* Frank Pasquale, *Reforming the Law of Reputation*, 47 *LOY. U. CHI. L.J.* 515 (2015) (discussing the insufficiency of existing law of reputation to handle harms suffered by those who have encountered the criminal justice system).

⁴⁴ *See generally* LAGESON, *supra* note 33 (describing how existing law leaves room for "digital punishment"); Sarah Esther Lageson, *Crime Data, the Internet, and Free Speech: An Evolving Legal Consciousness*, 51 *LAW & SOC'Y REV.* 8 (2017) (emphasizing the exacerbation of existing social inequalities by existing criminal justice data); Sarah Esther Lageson, *Digital Punishment's Tangled Web*, 15 *CONTEXTS* 22 (2016) (describing the tangible impact of "digital punishment").

⁴⁵ *See* Guadamuz, *supra* note 13, at 74–75 (arguing that RTBF does not pose threats to freedom of expression as some who oppose RTBF claim, but rather that it restores the power balance between players of mass surveillance and private individuals).

⁴⁶ *Id.* at 60.

Google harmful information about prior run-ins with the criminal justice system.⁴⁷

While a detailed intellectual history of the RTBF is beyond the scope of this Essay, its roots are fairly traceable to Article 8 of the European Convention of Human Rights (ECHR), which acknowledged a “right to respect for . . . private and family life.”⁴⁸ In 1995, the European Data Protection Directive (DPD) constrained the usage and processing of data created by using the internet.⁴⁹ Article 12 of the DPD gave individuals the right to ask that personal data be deleted once it was “no longer necessary.”⁵⁰ This document was updated by the General Data Protection Regulation (GDPR), which outlined the “right to be forgotten.”⁵¹

Despite its promises, the RTBF has its own flaws. The RTBF has been interpreted to mean different things by different national courts within the European Union, and its implementation has differed as a result.⁵² While that historical story would require much more attention than this Essay can devote, those differing stories are reflected in the terms of the GDPR. While the GDPR establishes the right, its terms are somewhat vague, rendering its scope debatable. Article 17 of the GDPR states, “[t]he data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay.”⁵³

Additionally, the RTBF is not absolute and only applies in some circumstances. Many of the limitations pertain to the original rationale behind the creation of the data.⁵⁴ For instance, organizational rights trump individual rights when the data is being used to “exercis[e] the right of

⁴⁷ *Id.* at 60; see also Gerrit Hornung & Christoph Schnabel, *Data Protection in Germany I: The Population Census Decision and the Right to Informational Self-Determination*, 25 COMPUT. L. & SEC. REP. 84, 86–87 (2009) (discussing the German constitutional right to self-determination of information); EUR. CONSUMERS’ ORG., ‘A COMPREHENSIVE APPROACH ON PERSONAL DATA PROTECTION IN THE EUROPEAN UNION’: EUROPEAN COMMISSION’S COMMUNICATION 8–9 (2011) (urging the European Commission to implement the RTBF).

⁴⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Mar. 9, 1953, E.T.S. No. 005.

⁴⁹ Guadamuz, *supra* note 13, at 61.

⁵⁰ Nicolae Dragoş Costescu, *Google Spain Decision – an Analysis of the Right to Be Forgotten – A Regression from Past Interpretations of ECJ*, 2016 ANALELE UNIVERSITĂȚII DIN BUCUREȘTI: SERIA DREPT 64, 65.

⁵¹ *Everything You Need to Know About the “Right to Be Forgotten,”* *supra* note 17.

⁵² See generally Bruno Zeller, Leon Trakman, Robert Walters & Sinta Dewl Rosadi, *The Right to Be Forgotten—the EU and Asia Pacific Experience (Australia, Indonesia, Japan and Singapore)*, 1 EUR. HUM. RTS. L. REV. 23 (2019), <https://papers.ssrn.com/a=3320860> [<https://perma.cc/5CU9-LUF6>] (exploring applications of the right to be forgotten in various European and East Pacific countries).

⁵³ Regulation 2016/679 (General Data Protection Regulation), art. 17 § 1, 2016 O.J. (L 119) 1, 113.

⁵⁴ *Id.*

freedom of expression and information,” if the data is originally created for organizational use, not private use.⁵⁵ Although there have been some noteworthy judicial victories in European countries that have forced companies like Google to deindex negative information about individuals, the contours of the right remain a work in progress.⁵⁶

But even that is more than can be said for the viability of such a right in the United States. Although some states have sought to pass statutes comparable to the GDPR,⁵⁷ little has been achieved.⁵⁸ Further, the idea of an RTBF has been received with skepticism in the public square. Media organizations, tech platforms, scholars, and journalists have all expressed doubts.⁵⁹ Reporting agencies and possessors of online criminal record information have cited legal norms (or the absence of law itself) as rationales against the construction of such a right.⁶⁰ Newspapers consider themselves the first repositories of history. More fundamentally, American law in this area is built on certain premises that cut directly against the right to be forgotten. A general commitment to and enthusiasm for transparency; skepticism of governmental secrecy and whitewashing; and a core commitment to free speech, expression, and access to public data make the idea of requiring that private individuals or entities delete information upon

⁵⁵ *Id.* at § 3.

⁵⁶ For example, the European Court of Justice could force Google to remove links to damaging or false information only in Europe, not anywhere else in the world. Kelion, *supra* note 15; see also Andrew Keane Woods, *Three Things to Remember from Europe’s ‘Right to Be Forgotten’ Decisions*, LAWFARE (Oct. 1, 2019, 10:11 AM), <https://www.lawfareblog.com/three-things-remember-europes-right-be-forgotten-decisions> [<https://perma.cc/SS7X-V3JH>] (positing that even though Google may have won this battle, the future global impact of the GDPR is still not completely a lost battle).

⁵⁷ See, e.g., California Consumer Privacy Act of 2018 (CCPA), CAL. CIV. CODE §§ 1798.100–199 (West 2018); *California Consumer Privacy Act (CCPA)*, STATE OF CAL. DOJ, <https://oag.ca.gov/privacy/ccpa> [<https://perma.cc/ZW57-453G>] (allowing consumers of certain-sized firms to request the erasure of data held by those firms).

⁵⁸ Several bills have stalled in state legislatures. See, e.g., S. 2351, 88th Gen. Assemb. (Iowa 2020), <https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=SF%202351> [<https://perma.cc/B4YT-LCYF>]; S. 5376, 66th Leg., Reg. Sess. (Wash. 2019), <http://lawfilesexet.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5376-S2.pdf?q=20200720194042> [<https://perma.cc/M6EC-GNEW>]; H.R. 1356, 189th Gen. Ct. (Mass. 2016), <https://malegislature.gov/Bills/189/H1356> [<https://perma.cc/T59L-UL6Q>].

⁵⁹ See, e.g., Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE (SYMP. ISSUE) 88, 90–91 (2012) (pointing out the chilling effect the RTBF causes on media platforms); Jason Lawrence Cagle, Note, *Protecting Privacy on the Front Page: Why Restrictions on Commercial Use of Law Enforcement Records Violate the First Amendment*, 52 VAND. L. REV. 1421, 1448 (1999) (proposing that states restrict the solicitation of information instead of the information available to solicitors).

⁶⁰ SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 109 (2019) (referencing firms’ use of the First Amendment as a sword against request for deletion of information).

request a nonstarter. In short, the RTBF seems to be legally unviable under existing American law.

More specifically, the right of the public to access public records and of the press to cover the activities of government is supported by a slew of Supreme Court decisions. In *Nixon v. Warner Communications, Inc.*, the Supreme Court grounded the right to access public records in “the citizen’s desire to keep a watchful eye on the workings of public agencies . . . and in a newspaper publisher’s intention to publish information concerning the operation of government.”⁶¹ In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court held that a state statute restricting publication of public records relating to certain crimes was unconstitutional when disseminating such criminal information serves the public interest.⁶² Put simply, accessing public data is a norm, and it finds expression in access laws like the federal Freedom of Information Act,⁶³ which has been mirrored in every single state.⁶⁴ Transparency is thus legally enshrined when it comes to the happenings of criminal justice. Coupled with the digitization and online sharing of tons of data at every level of government, the idea of stripping access to or regulating such information seems unlikely.

The public’s thirst for transparency especially in the criminal justice field is also entrenched in everyday life, regardless of its effect on reputations. Americans have long read the local newspaper to see the police blotter, catch up on public court cases, and learn about the surrounding neighborhoods.⁶⁵ Those everyday practices have only increased with widespread internet use, where Facebook News Feeds, tweets, and Google Alerts keep us in touch with all that goes on in our area.⁶⁶ The Supreme Court has refused to recognize a right to reputation anywhere in the Constitution,⁶⁷ leaving enforcement of reputational interests to state law tort regimes.⁶⁸ Further, recent events relating to criminal law administration have only heightened the thirst for awareness of how the criminal justice system

⁶¹ 435 U.S. 589, 598 (1978) (citations omitted).

⁶² 420 U.S. 469, 495–97 (1975).

⁶³ 5 U.S.C. § 552.

⁶⁴ Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 65–66 (1996).

⁶⁵ JACOBS, *supra* note 3, at 5.

⁶⁶ *Id.*; see also Melanie Weir, *What Is Citizen? The Controversial App for Safety Alerts and Crime Tracking, Explained*, INSIDER (Jan. 20, 2021, 3:10 PM), <https://www.businessinsider.com/what-is-citizen-app> [https://perma.cc/6WJD-8SXX].

⁶⁷ *Paul v. Davis*, 424 U.S. 693, 713 (1976).

⁶⁸ DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 109–10 (2007).

operates.⁶⁹ Although that desire relates to holding accountable agencies like the police, without significant changes to how records are produced and constructed, information about government activity (e.g., police, arrest rates, etc.) that is available to the public will likely be coupled with identifying information about arrestees and convicted persons.⁷⁰ Disaggregation of this data is not the norm, and disentangling the harmful information from the nonharmful will require significant time and attention.

In sum, actualizing something akin to the RTBF in the United States would require an erosion of transparency and access norms that are currently propped up by Supreme Court decisions and federal and state laws. Further, it would require a degree of coercion regarding privately held information that stands in deep tension with a surveillance-based economy built on the accumulation of knowledge and monetizing access.⁷¹ These forces establish a formidable bulwark against the development of the RTBF in American law.

III. PRIVATE EXPUNGEMENT BY NEWSPAPERS

Given the inefficacy of formal expungement law in addressing the problem of privately held criminal records, newspapers and media organizations have begun to step into the breach. The first step towards private expungement involved internal reform by news agencies and websites to stop the practice of automatically publishing mugshots.⁷² This occurred at roughly the same time that litigation arose challenging the mugshot-publishing practices of some pernicious sites that demanded significant fees when individuals requested the removal of their faces from the sites.⁷³ The practice of removing or altering stigmatizing news stories has been developing for a few years now.⁷⁴

⁶⁹ See Aaron Morrison, *Floyd Spurred Broad Push for Change Globally, Activists Say*, WASH. POST (Mar. 27, 2021, 2:33 PM), https://www.washingtonpost.com/national/floyd-spurred-broad-push-for-change-globally-activists-say/2021/03/27/e587abfe-8f02-11eb-a33e-da28941cb9ac_story.html [<https://perma.cc/5JWS-P77D>] (discussing the renewed focus on criminal justice reforms spurred by the death of George Floyd).

⁷⁰ LAGESON, *supra* note 33, at 6–7 (detailing ways in which existing laws permit aggregation of all information relating to activities of the criminal system, entangling different types of identifying information).

⁷¹ ZUBOFF, *supra* note 60, at 8.

⁷² Laura Hazard Owen, *Fewer Mugshots, Less Naming and Shaming: How Editors in Cleveland Are Trying to Build a More Compassionate Newsroom*, NIEMANLAB (Oct. 18, 2018, 9:29 AM), <https://www.niemanlab.org/2018/10/fewer-mugshots-less-naming-and-shaming-how-editors-in-cleveland-are-trying-to-build-a-more-compassionate-newsroom> [<https://perma.cc/8QNW-YACD>].

⁷³ LAGESON, *supra* note 33, at 173 (describing mugshot litigation).

⁷⁴ Shan Wang, *No Mugshot Exploitation Here: The New Haven Independent Aims to Respect the Reputations of Those Arrested in the Community It Covers*, NIEMANLAB (Feb. 14, 2017, 10:57 AM), <https://www.niemanlab.org/2017/02/no-mugshot-exploitation-here-the-new-haven-independent-aims-to-respect-the-reputations-of-those-arrested-in-the-community-it-covers> [<https://perma.cc/7A5E-7Q27>].

Media organizations have created initiatives to (1) publish mugshots and arrest-based information less frequently and (2) parallel formal expungement regimes—processes by which individuals can request the removal of negative information from archived sources. For examples of the former initiative, Gannett stopped publishing galleries of mugshots after being bought by GateHouse Media (now renamed Gannett), which is the largest newspaper company in the United States and owner of almost twenty percent of daily newspapers in the entire country.⁷⁵ Some other papers, like the *Houston Chronicle*, went the same route.⁷⁶ Others took a middle-of-the-road approach, like *The Orlando Sentinel*, which generally does not publish mugshots but continues to do so in major crime stories.⁷⁷ And in 2018, the *Biloxi Sun Herald* stopped reporting crimes that did not present an imminent safety concern, were not part of a trend, and were not serious in the community such that the community needed to know about them.⁷⁸

But for the purposes of this Essay, the measures adopted by media outlets to allow removal of *already-published* negative information are more interesting. For example, WCRBtv in Chattanooga, Tennessee, established a procedure that allows individuals to request removal of names and photos from old stories associated with nonfelony and nonviolent offenses.⁷⁹ In 2016, the Poynter Institute published a story describing a massive uptick in requests for removal of information from news websites.⁸⁰ In the article, the editor of the *Houston Chronicle* stated how the paper was “besieged” by such

⁷⁵ Kristen Hare, *Gannett Took Mugshot Galleries Off Former GateHouse Sites Yesterday*, POYNTER (June 10, 2020), <https://www.poynter.org/reporting-editing/2020/gannett-took-mugshot-galleries-off-former-gatehouse-sites-yesterday> [<https://perma.cc/M25R-Y5NB>]; Marc Tracy, *Gannett, Now Largest U.S. Newspaper Chain, Targets ‘Inefficiencies,’* N.Y. TIMES (Nov. 19, 2019), <https://www.nytimes.com/2019/11/19/business/media/gannett-gatehouse-merger.html> [<https://perma.cc/URH7-GSUJ>]; Clara Hendrickson, *How the Gannett/GateHouse Merger Could Deepen America’s Local News Crisis*, BROOKINGS (Nov. 18, 2019), <https://www.brookings.edu/blog/fixgov/2019/11/18/how-the-gannett-gatehouse-merger-could-deepen-americas-local-news-crisis> [<https://perma.cc/YE7Y-X9K5>].

⁷⁶ Keri Blakinger, *Newsrooms Are Rethinking Their Use of Mugshots in Crime Reporting*, POYNTER (Feb. 11, 2020), <https://www.poynter.org/ethics-trust/2020/newsrooms-are-rethinking-their-use-of-mugshots-in-crime-reporting> [<https://perma.cc/DPR3-ZVV5>].

⁷⁷ *Orlando Sentinel Discontinues Arrest Mugshots Database*, ORLANDO SENTINEL (June 12, 2020, 9:43 AM), <https://www.orlandosentinel.com/about/os-ne-arrest-mugshots-database-ended-20200612-p4hitez2i2fbzxnvz2cpgheuxoe-story.html> [<https://perma.cc/7F72-9VEG>].

⁷⁸ Blake Kaplan, *Why the Sun Herald Is Changing How It Covers Crime*, SUNHERALD (Dec. 17, 2018, 9:51 AM), <https://www.sunherald.com/news/local/article223016770.html> [<https://perma.cc/LQ98-2894>].

⁷⁹ Callie Starnes, *WRCB to Limit the Use of Mugshots*, WRCBTV (June 19, 2020, 11:18 AM), <https://www.wrcbtv.com/story/42268515/wrcb-to-limit-the-use-of-mugshots> [<https://perma.cc/8YFG-47V3>].

⁸⁰ Rick Edmonds, *Newspapers Hit with a Wave of Requests to Take Down Embarrassing Archived Stories*, POYNTER (Sept. 30, 2016), <https://www.poynter.org/ethics-trust/2016/newspapers-hit-with-a-wave-of-requests-to-take-down-embarrassing-archived-stories> [<https://perma.cc/3LNE-WV6S>].

requests, leading to a case-by-case evaluation akin to judicial determinations in the expungement space.⁸¹ The *Tampa Bay Times* established a meeting group that met quarterly for this purpose.⁸² The ethics editor for the *USA Today Network* stated that “[t]ake-down requests are weighed on a case-by-case basis with senior editors, and some situations may require legal guidance.”⁸³

Perhaps the most well-known initiative belongs to the *Cleveland Plain-Dealer*, which launched its own RTBF experiment in 2018.⁸⁴ The initiative allows people to request that their identities be removed from stories on the website about minor crimes they committed.⁸⁵ The paper created a committee to consider these requests for removing names from stories that are searchable on search engines.⁸⁶ Chris Quinn, the editor of the *Cleveland Plain-Dealer* asked people who he thought “would come in with open minds and not be tied to dogmatic tradition” to join the committee.⁸⁷ By October 2019, the committee reported receiving ten to fifteen requests per month, resulting in monthly meetings for discussion—a time-consuming endeavor.⁸⁸ The paper reports approving over fifty percent of the requests.⁸⁹

More recently, the *Boston Globe* created a “Fresh Start” initiative that resembles the work being done at the *Cleveland Plain-Dealer*.⁹⁰ Launched in 2021, the paper brands its initiative as “revisiting the past for a better future” especially in light of the “nationwide reckoning on racial justice.”⁹¹ In particular, the *Globe* wishes to examine its internal practices in reporting crime and how those practices affect “communities of color.”⁹² The paper

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Chris Quinn, *We’re Expanding Our Right-to-Be-Forgotten Experiment*, CLEVELAND.COM (Jan. 30, 2019), https://www.cleveland.com/metro/2018/09/were_expanding_our_right-to-be.html [<https://perma.cc/6F64-DTUD>].

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Owen, *supra* note 72.

⁸⁸ Chris Quinn, *Journalists Are Key to a Right to Be Forgotten in the United States, and Cleveland.com Is Helping Spur the Conversation*, CLEVELAND.COM (Mar. 11, 2020), <https://www.cleveland.com/news/2019/10/journalists-are-key-to-a-right-to-be-forgotten-in-the-united-states-and-clevelandcom-is-helping-spur-the-conversation.html> [<https://perma.cc/LXG8-XFU5>].

⁸⁹ *Id.*

⁹⁰ *The Globe’s Fresh Start Initiative: Submit Your Appeal*, BOS. GLOBE (Jan. 22, 2021, 6:35 AM), <https://www.bostonglobe.com/2021/01/22/metro/globes-fresh-start-initiative-submit-your-appeal> [<https://perma.cc/MR7E-TBDF>].

⁹¹ *Id.*

⁹² *Id.*

concedes that it is learning how past stories can have a “lasting negative impact on someone’s ability to move forward with their lives.”⁹³

While the standards utilized by the media entities involved in these determinations are neither uniform nor particularly transparent, the *Plain-Dealer*’s editor has stated that for the more difficult cases, they ask whether the value to the public of maintaining the stories with names is greater than the value to the subjects of the stories in having their names removed.⁹⁴ The *Globe*’s standard of review is similar. It states, “we think the value of giving someone a fresh start often outweighs the historic value of keeping a story widely accessible long after an incident occurred.”⁹⁵ During its review, the *Globe* first checks the applicant’s background.⁹⁶ The FAQ section of its website identifies several other factors the committee considers when reviewing applications:

The severity of a crime or incident; whether there is a pattern of incidents; how long ago the story was published; how old the person was at the time of the incident; whether the person involved was in a position of public trust; and the value of keeping the information public.⁹⁷

The *Globe* justifies its case-by-case approach by pointing to its consultation with groups in the fields of “criminal justice, victims’ rights, and recidivism.”⁹⁸ Ironically, some of these considerations look very similar to the balancing that occurs under many formal expungement regimes, although the newspaper’s processes also focus on privacy and media rights in addition to criminal justice.⁹⁹

In terms of procedure and eligibility, the *Globe*’s Fresh Start Initiative is open to all, regardless of whether the requestor was merely charged or ultimately convicted, and even if the information is noncriminal but only damaging.¹⁰⁰ The paper promises consideration of “all” cases—but action only on “some”—and notes that it will apply a particularly high standard for cases “involving public figures or serious crimes.”¹⁰¹ Lawyers are not required to submit an application, and the committee meets to discuss cases

⁹³ *Id.*

⁹⁴ Quinn, *supra* note 84.

⁹⁵ *The Globe’s Fresh Start Initiative: Frequently Asked Questions*, BOS. GLOBE (Jan. 22, 2021, 6:48 AM), <https://www.bostonglobe.com/2021/01/22/metro/globes-fresh-start-initiative-frequently-asked-questions> [https://perma.cc/C7TX-YS7H].

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Quinn describes the two competing forces as “tradition” (relating to newspapers as recorders of history) and “suffering” (felt by those with damaged reputations). Owen, *supra* note 72.

¹⁰⁰ See *The Globe’s Fresh Start Initiative: Frequently Asked Questions*, *supra* note 95.

¹⁰¹ *Id.*

once a month.¹⁰² The application itself requires basic identifying and demographic information, a link to the story in the *Globe*, and any documents that the requestor deems relevant.¹⁰³ These might include official judicial records or other official records about the disposition of the case, although submitting official court records is “not required.”¹⁰⁴ Finally, the requestor can submit a personal narrative about why modification of the original story is warranted.¹⁰⁵ The *Plain-Dealer*’s request process is similar, with an online application and contact email provided.¹⁰⁶

Why are media entities adopting these initiatives? One reason offered is that legislation is off the table and the continued existence of reputation-damaging stories is a social issue tied to one’s ability to reenter into the community.¹⁰⁷ Similarly, the *Globe* points to the current criminal justice moment, plus the easy accessibility to people’s past that is facilitated by the internet, as its justification.¹⁰⁸ The *Globe* adopts the philosophy that journalism, however well-intentioned, is not meant to permanently disrupt personal advancement.¹⁰⁹ Reporting can have that unintended consequence, but precise reporting on the front end, especially about the nuanced distinctions in criminal matters, can alleviate downstream effects.¹¹⁰ Additionally, following up on older news stories to update them—say, if a person was ultimately exonerated by a jury after serious charges, no matter how minor the alleged crime was—can go a long way towards helping someone who has emerged from a difficult chapter in his life.¹¹¹ In sum, the *Globe*’s initiative is designed to respond to the reality that “a few keystrokes” can lead to the discovery of the worst parts of one’s life for a lifetime and that “updating past coverage with new information and changing how

¹⁰² *Id.*

¹⁰³ *The Globe’s Fresh Start Initiative: Submit Your Appeal*, *supra* note 90.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See Quinn, *supra* note 84 (including a process similar to the *Boston Globe*’s involving case-by-case consideration of appeal application, consultation with a committee, and a wide range of applicable and removable stories).

¹⁰⁷ See Claire Miller & David Folkenflik, *From Cleveland to Boston, Newsrooms Revisit Old Stories to Offer a ‘Fresh Start,’* NPR (Feb. 23, 2021, 4:45 PM), <https://www.npr.org/2021/02/23/970239121/from-cleveland-to-boston-newsrooms-revisit-old-stories-to-offer-a-fresh-start> [<https://perma.cc/K5CP-ZP7T>].

¹⁰⁸ *The Globe’s Fresh Start Initiative: Frequently Asked Questions*, *supra* note 95; see *The Globe’s Fresh Start Initiative: Submit Your Appeal*, *supra* note 90 (mentioning the option of republishing the story or removing it from Google).

¹⁰⁹ *The Globe’s Fresh Start Initiative: Frequently Asked Questions*, *supra* note 95.

¹¹⁰ See Owen, *supra* note 72.

¹¹¹ See *The Globe’s Fresh Start Initiative: Frequently Asked Questions*, *supra* note 95.

accessible stories are in search engines” can foster success for those who have contacted the criminal system.¹¹²

IV. QUESTIONS MOVING FORWARD

The developing phenomenon of newspaper expungement raises many questions given the current criminal justice movement. They resemble the same issues concerning reforms of formal expungement regimes themselves. These issues draw attention to both the potential growth and drawbacks of newspaper expungement.

The first set of issues relates to the concept of access to justice. Put simply, will interested parties have equal access to these initiatives? While newspapers allow relatively informal application processes, the primary vehicle is the internet itself. Accessing the website or the online application is a de facto requirement for a smooth process. Many people who have been arrested or incarcerated are indigent;¹¹³ for these individuals, seamlessly accessing the internet to accomplish such a task can be difficult. Thus, for instance, the *Globe*’s assurance that lawyers do not have to be hired to submit a request might be true in theory but meaningless in practice, just like New Jersey’s new expungement application,¹¹⁴ theoretically facilitating online filing via mobile devices, could be inaccessible in practice. Like formal expungement procedures, time will tell whether informal “procedural” thickets will arise, rendering access to privately initiated expungement by newspapers akin to the procedural limits in existing expungement laws.¹¹⁵

A second issue to consider is the composition of the decision-making body in the newsroom. With formal expungement, a perpetual question is, “Who decides?” Traditionally, trial judges make expungement determinations after the filing process.¹¹⁶ But we know that prosecutors may also have an outsized role that operates, to some degree, in the shadows, whether for good or bad.¹¹⁷ Both the *Cleveland Plain-Dealer* and the *Globe*

¹¹² *Id.*

¹¹³ See generally Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483 (2016) (presenting the serious problem of criminal justice debt that results from fees and fines for incarcerated individuals).

¹¹⁴ Akil Roper, *New Jersey Launches Electronic Filing System for Expungements*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 28, 2021), <https://ccresourcecenter.org/2021/01/28/new-jersey-launches-electronic-filing-system-for-expungements/> [<https://perma.cc/WJJ5-QT6K>].

¹¹⁵ See Murray, *supra* note 7, at 668–71 (surveying the several procedural hurdles that previously convicted people have to go through to take advantage of expungement).

¹¹⁶ See, e.g., D.C. CODE §§ 16-803(h)(1) (2021) (discussing considerations for trial judge); N.M. STAT. ANN. § 29-3A-5(C) (2020) (noting necessary judicial findings before expungement).

¹¹⁷ See Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2846–59 (2018) (discussing the role that prosecutors have in determining when and how to execute the power to expunge records).

nod to a diverse set of individuals in the room making the decision. But as far as what can be told from public coverage of the processes, those in the room are almost exclusively journalists,¹¹⁸ although the *Cleveland Plain-Dealer* did open its committee to members from the community and received significant interest.¹¹⁹

Of course, private entities like newspapers have the discretion to determine who makes this decision. They can decide how to handle their own published information. The *Globe* referenced consultation with advocacy groups for those related to crime.¹²⁰ But is consultation with criminal justice groups sufficient to ensure that the decision-making process is representative of the broader public's understanding of what should happen to this information? After all, it *is* the public whose information is getting expunged and the public who is *using* this information. Is there a place for lay involvement in the process, which has been sorely absent from the formal world of expungement despite the fact that initiatives designed to give second chances garner public support in local communities?¹²¹ Are the parties at the table—who do not serve a particular constituency and were not elected or appointed as government officials like an expungement judge or parole board—going to be held accountable for decisions? If so, by whom? Will the newspapers have ombudsmen who occasionally drop in to ensure that the committee is following its own internally stated principles and that special treatment is not given to certain groups such as the wealthy, well-known, or politically connected? Will the decision-makers rotate from time to time, and will that result in different values expressed by their decisions? Will they follow prior precedents, creating a sort of private *stare decisis* guiding future decisions? All these questions need answers if this activity becomes normalized.

Third, the standard of review is an important tool to provide some form of consistency throughout the decision-making process and to hold decision-makers accountable in a uniform fashion.¹²² Will the standards of review become fully transparent to the public or only after someone applies? And will they be revised over time as social conditions relating to the criminal

¹¹⁸ See *The Globe's Fresh Start Initiative: Frequently Asked Questions*, *supra* note 95.

¹¹⁹ See Owen, *supra* note 72 (citing Quinn's decision to open the committee to members of the community).

¹²⁰ See *The Globe's Fresh Start Initiative: Frequently Asked Questions*, *supra* note 95.

¹²¹ Alexander L. Burton, Francis T. Cullen, Justin T. Pickett, Velmer S. Burton, Jr. & Angela J. Thielo, *Beyond the Eternal Criminal Record: Public Support for Expungement*, 20 CRIMINOLOGY & PUB. POL'Y 123, 129–30 (2021), <https://onlinelibrary.wiley.com/doi/full/10.1111/1745-9133.12531> [<https://perma.cc/CAA8-ADH4>].

¹²² See Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 238 (2009).

justice system evolve? And does it make sense for the standards of review to operate almost exclusively within a privacy- and reputation-based paradigm, or are other normative interests on the table, such as the purposes of punishment and associational duties on the part of the local community and private actors within it? If the latter are in play, who will voice those concerns?

Fourth, do the newspapers plan to publicly encourage other private entities, even if not in the news making business, that this is the *right thing to do*, or is this solely an internal operation? Some journalists apparently are more receptive, whereas others remain convinced that there are collateral costs that will affect the ability of historians and social scientists to accurately study criminal justice issues.¹²³ Additionally, how scalable is this effort, how scalable should it be, and should it marshal a national conversation or remain localized? Given the realities of how information travels on the internet, and the fact that the *Globe's* audience is international rather than purely Bostonian, *which community of readers* does the *Globe* serve when making these decisions?

Finally, and perhaps most importantly, are private initiatives like this actually a viable solution to the problem presented by the persistent existence of public criminal records? The editorial decision to revise or limit access to old stories might not lead to permanent erasure. And it is unclear that the newspapers even want that themselves. For instance, even if the *Globe* or *Plain-Dealer* modifies or erases its archived stories, don't the limits already undercutting expungement law merely apply to this private action? The whack-a-mole problem will always persist, even if newspapers take action to reduce the number of holes or turn off the faucet connected to their own operations. In short, formal expungement law has limits and so does this private initiative, absent some strong rationale that inspires others to *use* the information that remains differently.

CONCLUSION

The limits of existing formal expungement law, the unviability of the RTBF under American law (at least at present), and limited effectiveness of mitigation efforts of third parties like newspapers to limit access to harmful information indicate that the instruments for remediating this problem are altogether blunt. Erasure efforts in the digital age can only do so much to affect downstream use of the information. Is there a more precise response—one that meets the unique demands for transparency in criminal justice and the general public's desire to let those who deserve it truly get a second

¹²³ Owen, *supra* note 72.

chance? Professor Lageson has pointed to potential reforms on the front end in the generation and creation of criminal record history information,¹²⁴ but we are far from the necessary level of government agreement to enact such reforms.

Further, initiating widespread action—both by the government in the construction of the records and by private actors for the use of records that remain—raises a larger question: whether local communities, politicians, other public officials, and private actors will ever find privacy and reputational harms sufficiently egregious to motivate action in this space. Perhaps it is time to consider alternative solutions for giving second chances, even if they do not carry the force of law in this space and even if they require a serious change in perspective. The newspaper expungement initiatives of papers like the *Globe* and *Plain-Dealer* begin that conversation and certainly advance the ball.

But it does seem like the real solution must come from a deeper place—beyond the social reality of stigma—connected to the very purpose of the criminal justice process itself, and how it relates with private actors and entities. For it is the continued *use* of the privately stored information—records and news stories that were already stored in private individuals' own computers or tablets before the stories were expunged—that poses the real problem. The ways participants in civil society use the information implicate relationships between the participants of the democratic society and communities as well as the justifications for criminal processes and punishment. It is those relationships, which underlie the understanding of criminal law, that might hold the key to not only opening, but keeping open, the doors for those deserving of second chances.¹²⁵

¹²⁴ Sarah Esther Lageson, Elizabeth Webster & Juan R. Sandoval, *Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet*, L. & SOC. INQUIRY (forthcoming 2021) (manuscript at 27–29) (on file with journal).

¹²⁵ In a future article, my goal is to sketch an alternative rationale to address this problem that builds from the ethical roots underlying the criminal justice system. Because the ability of existing American law to force widespread erasure of *privately* held information is doubtful, the solution to the persistent existence and usage of public criminal records demands an *ethical* solution connected to the punitive theories underlying the project of criminal justice in a democratic society. Law can incentivize such action rather than coerce it.