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Digital Expungement

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INTRODUCTION

Criminal procedures usually carry collateral consequences.[1] Upon rejoining society, individuals with a criminal history often face governmental and social restrictions on housing, employment, and educational opportunities, along with a revocation of other civic rights.[2] Reintegration of individuals with criminal histories into society—in an effort to increase the chances of rehabilitation and reduce recidivism—necessitates granting them a fresh start. Individuals capable of being reformed need their criminal histories to be treated as though they never existed. To achieve such a purpose, many policymakers introduced the concept of expungement: a legal process by which criminal history records are later vacated, reversed, sealed, purged, or destroyed by the state.[3] While jurisdictional variations exist both in terminology and scope, expungement legislation is generally similar in effect: reformed individuals with certain types of criminal histories can file a request to seal or even destroy their criminal records, which in turn, usually remain available only to governmental agencies under limited circumstances.[4]

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1. Collateral consequences in criminal law usually refer to any indirect consequences from criminal convictions. For more on collateral consequences, see *infra* note 31.

2. *See infra* Part II.

3. *See infra* note 57.

4. *See* James A.R. Nafziger & Michael Yimesgen, *The Effect of Expungement on Removability of Non-Citizens*, 36 U. MICH. J.L. REFORM 915, 917 (2003). Notably, there is some differ-

Prior to the emergence of digital technology, expungement worked rather well. While an expunged criminal history could have lived on through "public memory, newspapers or the activities of private investigators,"[5] its impact was rather limited: if one's records were expunged, one would have largely been treated by the public as if one never had a record in the first place. However, digital technology changed the nature of expungement.[6] Digital technology enabled the gathering or purchasing of criminal records in bulk from governmental agencies, the assembling of databases of these records, and the reselling of them without differentiating between criminal history records that were expunged and those that were not.[7]

While such practices can be regulated, regulation could be insufficient in an age where information is widely available online. It has become highly difficult—if not virtually impossible—to conceal one's wrongdoing once it is accessible and searchable online. The fact that the internet is capable of remembering everything makes expungement statutes ineffective in the digital era.[8] For many individuals,[9] expunging official government records becomes meaningless as long as the individual's wrongdoing appears online via a simple search of his or her name. Expungement will not eliminate the visibility of criminal histories to potential employers, landlords, educational facilities, or any other interested party as long as they appear online.[10] In other words, these individuals are doomed to always wear a scarlet letter.

There are both legal and pragmatic barriers to expungement in the digital era. It might be technically impossible to effectively expunge information in the digital age, and expungement is legally challenging, as granting individuals a right to compel private companies to expunge their records is a constraint on freedom of speech, freedom of information, and the freedom of the press. Furthermore, as this Article shows, the risk to rehabilitation in the digital era is highly jurisdictional in nature and mainly

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ence between expunged records and sealed records. Unlike sealed records, expunged records must be physically destroyed by each entity or person in possession of the record. *See* Joshua Gaines, *Dissecting the REDEEM Act*, COLLATERAL CONSEQUENCES RES. CTR. (June 30, 2015), http://ccresourcecenter.org/2015/06/30/dissecting-the-redeem-act/#more-5132. For further explanation of these differences, see *infra* Part II.

5. *See* R. Paul Davis, *Records of Arrest and Conviction: A Comparative Study of Institutional Abuse*, 13 CREIGHTON L. REV. 863, 863–64 (1980) (footnote omitted) (citing V. PACKARD, THE NAKED SOCIETY (1964)).

6. Strikingly, back in 1980, Paul Davis argued that the "advent of computer storage" showed "the greatest potential for longevity" of criminal history records. *See id.* at 864.

7. *See infra* Part III.A.

8. *See infra* Part III.

9. The potential online availability of expunged records does not necessarily mean that every individual's wrongdoing will appear online via a simple search of their name. One reason is that using name identifiers could lead to many results, as some names are more often used than others (John Smith, for example).

10. *See infra* note 44.

impacts U.S. citizens. Many foreign jurisdictions do not treat criminal history records as public information, and even if information finds its way to the market or the internet, individuals possess the ability to remove expunged records. Are American expungement statutes obsolete in the digital age?[11] Does the digital era—or the "information age"—change the relevance of rehabilitation by expungement? Could and should U.S. policymakers acknowledge a property right in information or a right of reputation?[12] And finally, what are the legal, social, and technological challenges of ensuring digital expungement in the United States?

This Article examines these and other questions by scrutinizing the intersection of criminal law and digital technology in the context of rehabilitation. It proceeds as follows: Parts I and II examine rehabilitation and expungement in criminal law; Part III explores the challenges of digital technology to rehabilitation measures; and Part IV evaluates and discusses potential ex ante and ex post measures that could enable rehabilitation in the digital age. It argues that while most ex post measures are either unconstitutional or unrealistic for enabling digital expungement, ex ante measures—namely, changing the perception of criminal history records as public records—could become the only viable solution. Accordingly, this Part suggests implementing a graduated approach towards the public nature of criminal history records, which would be narrowly tailored to serve the interests of rehabilitation-by-expungement. Finally, Part V concludes the discussion and warns against the current reluctance to acknowledge the importance of digital rehabilitation.

I. REHABILITATION

In pre-modern times, criminal convictions carried very harsh penalties that would cause civil disabilities. One of the earliest examples is the Middle Ages' penalty of *outlawry*, which cast out offenders from civil society by depriving them of any civil rights and placed them outside of legal protection.[13] Offenders were no longer considered members of their household

11. *Cf.* Martin Kaste, *Digital Data Make for a Really Permanent Record*, NPR (Oct. 29, 2009), http://www.npr.org/templates/story/story.php?storyId=114276194&sc=emaf ("There's no such thing as privacy of criminal records anymore.").

12. For more on the right to be forgotten/right of erasure in the EU, see *infra* notes 152–153. For more on the future of reputation in the digital era, see DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET (2007).

13. For an in-depth inquiry into outlawry, see generally OUTLAWS IN MEDIEVAL AND EARLY MODERN ENGLAND: CRIME, GOVERNMENT AND SOCIETY, C. 1066–C. 1600 (John C. Appleby & Paul Dalton eds., 2009).

or society and lost all their possessions.[14] Their lives were considered so worthless that even murdering them carried impunity.[15]

Times have changed. Modern societies acknowledge the importance of rehabilitation, considering it one of the main objectives of penal policy and sentencing.[16] One of the primary rationales behind rehabilitation is to transform individuals with criminal history[17] into law-abiding citizens to aid them in reintegrating into society and to reduce recidivism.[18] To ensure rehabilitation, many policymakers have discussed at length ways to improve housing options, employment prospects, access to healthcare, and the potential for family reunification to ensure the social reintegration of criminal offenders after rejoining society.[19]

But sometime in the 1970s, the U.S. approach to criminal sanctioning shifted towards models emphasizing retribution and incapacitation.[20] Both Congress and state legislators criminalized more conduct and increased both monetary and nonmonetary criminal sanctions for existing offenses.[21] This so-called "tough on crime" approach resulted in near zero-tolerance

14. Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 350 (1968) (describing the history of outlawry).

15. *Id.*

16. The common five objectives of criminal law are retribution, deterrence, incapacitation, rehabilitation, and restoration. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 409, 414–15 (2000); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 6 (2003).

17. Criminal history records are defined by the U.S. Code as "information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, or release." 42 U.S.C. § 14616(b)(4)(A) (2012).

18. *See* PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 117 (2006); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 87–88 (2005) (describing challenges of prisoner reentry). For a study on recidivism, see PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), https://www.bjs.gov/content/pub/pdf/rpr94.pdf.

19. *See* H.R. REP. NO. 110-140, at 2 (2007), *reprinted in* 2008 U.S.C.C.A.N. 24, 25, 20070WL 1378789 ("'[P]rison after imprisonment'—a web of obstacles that limit their housing options, employment prospects, access to healthcare, and potential for family reunification. These obstacles have substantially contributed to the historically high rate of recidivism . . . .").

20. *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 10 (1981) ("[T]he rehabilitative ideal has declined in the United States; the decline has been substantial, and it has been precipitous."); Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1217 (2010) (describing the "Rehabilitation Era" in the United States and the move towards "tough on crime").

21. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3–54 (2008) (discussing the expansion of criminal law and the extraordinary rise in the use of punishment).

policing and mass rates of incarceration.[22] As a result, in the last four decades, a growing proportion of the population has been convicted of a state or federal criminal offense.[23] As of 2014, there were over a million and a half prisoners in both federal and state prisons.[24] According to one report, one-third of the adult population in the United States has a criminal record,[25] the highest rate in the world. The prisons in the "land of the free" eventually became overcrowded, placing financial burdens on the federal government and on states.[26]

Toward the end of the twentieth century, the United States began a transition from a "tough on crime" to a "smart on crime" approach.[27] One

22. *Id.* at 4–5.

23. *See Criminal Justice Facts*, SENTENCING PROJECT (last visited Dec. 21, 2017), http://www.sentencingproject.org/criminal-justice-facts (arguing that the United States is the world leader in incarceration rates, and noting a 500% increase in incarceration rates since the mid-1970s). For statistics on prisoners in state and federal correctional facilities, see E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014 (2015), http://www.bjs.gov/content/pub/pdf/p14.pdf; PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (2009), http://www.pewtrusts.org/~/media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf; PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA IN 2008 (2008), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf. For further information, see Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 466, 470 (2010).

24. *See* CARSON, *supra* note 23, at 1.

25. *See* Joe Palazzolo, *5 Things to Know About Background Checks and Expunged Records*, WALL ST. J. (May 7, 2015), http://blogs.wsj.com/briefly/2015/05/07/background. However, it is highly difficult to estimate the exact number of adults with criminal history because statistics depend on various estimations, and "a complete dataset of arrests and prosecutions" does not currently exist. Jo Craven McGinty, *How Many Americans Have a Police Record? Probably More Than You Think*, WALL ST. J. (Aug. 7, 2015), http://www.wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802.

26. *See Criminal Justice Facts*, *supra* note 23.

27. One of these "smart on crime" approaches was adopted by the Department of Justice, striving to move towards "an approach that is not only more efficient, and not only more effective at deterring crime and reducing recidivism, but also more consistent with our nation's commitment to treating all Americans as equal under the law." U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 2 (2013), https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf.

There is also some congressional movement towards new penal models. One example is the Second Chance Act of 2007, where Congress sought to improve existing programs and establish new ones to improve offender reentry services. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008). These programs, *mainly*,

> "(1) provid[ed] offenders in prisons, jails, or juvenile facilities with educational, literacy, vocational, and job placement services to facilitate re-entry in the community; "(2) provid[ed] substance abuse treatment and services . . .; "(3) provid[ed] coordinated supervision and comprehensive services for offenders upon release . . ., including housing and mental and physical health care to facilitate re-entry . . .; "(4) provid[ed] programs that—"(A) encourag[ed] offenders to develop safe, healthy, and responsible family relationships and parent-child relationships . . .; "(5) encourag[ed] . . . facility mentors in

example of this new approach was the formation of reentry courts, designed to handle individuals rejoining the community after release from prison.[28] The "smart on crime" approach mainly traces back to the concept of rehabilitation and the acknowledgment of the need to reduce the potential collateral consequences of criminal history.

II. REDUCING COLLATERAL CONSEQUENCES BY EXPUNGEMENT

Rehabilitation necessitates enabling an individual to "rejoin that great bulk of the community from which he has been ostracized for his anti-social acts."[29] But merely rejoining society does not mean reintegrating into it.[30] The main barriers to reintegration are the potential collateral consequences of a criminal history. Sometimes referred to as "invisible punishment[s],"[31] collateral consequences generally refer to any additional penalties outside the criminal law realm that individuals with criminal history, and perhaps even their families, incur.[32] To name a few, individuals with a criminal his-

> the reentry process and enabl[ed] those mentors to remain in contact with offenders while in custody and after re-entry into the community; "(6) provid[ed] victim-appropriate services,encourag[ed] the timely . . . payment of restitution . . ., and provid[ed] services such as security and counseling to victims upon release of offenders; and "(7) protect[ed] communities against dangerous offenders by using validated assessment tools to assess the risk factors of returning inmates and develop[ed] or adopt[ed] procedures to ensure that dangerous felons are not released from prison prematurely.

Id. § 101, 122 Stat. at 661; Pinard, *supra* note 20, at 1219.

28. Pinard, *supra* note 20, at 1219.

29. Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 41 (Cal. 1971).

30. *See* JEREMY TRAVIS ET AL., URBAN INST. JUSTICE POLICY CTR., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 1 (2001), http://research.urban.org/UploadedPDF/from_prison_to_home.pdf (differentiating between reentry and reintegration).

31. 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, 1705 n.2 (2003). Collateral consequences of criminal history have even been referred to as civil disabilities, among other terms. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 16 (Marc Mauer & Meda Chesney-Lind eds., 2002). For more on collateral consequences of convictions see, for example, Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006); Pinard, *supra* note 20; Pinard, *supra* note 23.

32. This Article considers collateral consequences as penalties, disabilities, or disadvantages that occur due to criminal history, and not due to the sentence itself. *See* Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 255 (2002) (defining collateral sanctions); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699–701 (2002); Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*,

tory could be prevented from holding a professional license[33]; lose their voting rights (disenfranchisement)[34]; be denied healthcare benefits[35]; be deported (if they do not hold permanent resident status)[36]; face travel restrictions[37]; be denied the right to serve on a jury[38]; lose access to higher education[39]; be deprived of both private and public housing[40]; be denied employment[41]; and generally carry a social stigma for the rest of their

2015 WIS. L. REV. 321, 336–37; *see also* SOLOVE, *supra* note 12, at 70 (arguing that "[s]tigma can spread to family members, as when a child feels stigmatized by a parent's criminal past").

33. *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 113–14 (2003).

34. *See, e.g.*, ALA. CODE § 15-22-36.1(g) (2015). *See generally* CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 (2012), http://www.sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf.

35. *See, e.g.*, 42 U.S.C. § 1320a-7(a) (2012) (excluding certain individuals and entities from participation in Medicare and state health care programs).

36. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) (declaring aliens convicted of aggravated felonies as deportable).

37. *See, e.g.*, 23 U.S.C. § 159(a)(3)(A) (2012) (suspending drivers' licenses of individuals convicted of drug offenses).

38. *See, e.g.*, 28 U.S.C. § 1865(b)(5) (2012); *see also* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 186–89 (2003).

39. *See, e.g.*, Riya Shah, *"Future Interrupted": The Collateral Damage of Juvenile Adjudications*, COLLATERAL CONSEQUENCES RES. CTR. (Mar. 4, 2016), http://ccresourcecenter.org/2016/03/04/future-interrupted-the-collateral-damage-of-juvenile-adjudications/#more-8074 ("At least two-thirds of post-secondary institutions conduct background checks of prospective students.").

40. *See* PETERSILIA, *supra* note 33, at 121 ("[S]ome laws now require public housing agencies and providers to deny housing to certain felons (e.g., drug and sex offenders)." (emphasis omitted)); Heidi Lee Cain, Comment, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131, 149–50 (2003) (discussing private landlord behavior); Rebecca Oyama, Note, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 187–92 (2009) (describing the practice of tenant screening).

41. A felony conviction or time in prison can make individuals significantly less employable. While companies expose themselves to potential discrimination lawsuits, most employers in the United States request criminal history information for job candidates. *See* HELEN GAEBLER, CRIMINAL RECORDS IN THE DIGITAL AGE: A REVIEW OF CURRENT PRACTICES AND RECOMMENDATIONS FOR REFORM IN TEXAS 12 (2013), https://law.utexas.edu/wp-content/uploads/sites/27/Criminal-Records-in-the-Digital-Age-Report-by-Helen-Gaebler.pdf; DEVAH PAGER & BRUCE WESTERN, INVESTIGATING PRISONER REENTRY: THE IMPACT OF CONVICTION STATUS ON THE EMPLOYMENT PROSPECTS OF YOUNG MEN 4–5 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf (finding that "a criminal record has a significant negative impact on hiring outcomes, even for applicants with otherwise appealing characteristics"); JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 2 (2010), http://cepr.net/documents/publications/ex-offenders-2010-11.pdf. For more on the causation between incarceration and employment possibilities after release, see Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003).

lives.[42] Many of these collateral consequences could also apply to juvenile adjudication, and much like criminal records for adults, criminal records for juveniles could impose barriers to education and employment.[43]

Collateral consequences can be far reaching and may affect individuals with a criminal history, their families, and society. Collateral consequences may be generally divided into two sub-groups. The first sub-group is collateral consequences imposed by the state. These governmental collateral consequences include any restrictions on state-based services and rights such as holding a professional license, living and working in the country, voting, receiving state healthcare benefits, traveling, living in federal housing, and serving on a jury. The second sub-group consists of collateral consequences imposed by members of society.[44] These social collateral consequences are those imposed by private entities and include denial of admission to educational institutions, denial of housing, denial of employment, and the imposition of a social stigma.

The scope of collateral consequences resulting from a criminal history are always difficult to assess[45] and are not always accounted for by the legal system and by defendants.[46] Both types of collateral consequences might

42. For example, convicts could also be barred from carrying a firearm if "convicted in any court, of a crime punishable by imprisonment for a term exceeding one year[,]" 18 U.S.C. § 922(g)(1) (2012); be ineligible from receiving federal welfare benefits, Chin, *supra* note 32, at 259–62; and cannot enlist in the military, 10 U.S.C. § 504(a) (2012). For more on the stigma of criminal history records, see James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 390, 419–20 (2006) and Amy Shlosberg et al., *Expungement and Post-Exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353, 380–84 (2014).

43. When a child is arrested, a juvenile record is created, and the record remains even if the case is closed. *See Future Interrupted: The Collateral Damage Caused by Proliferation of Juvenile Records*, JUV. LAW CTR., http://www.jlc.org/future-interrupted (last visited Dec. 21, 2017). The impact of collateral consequences on juvenile offenders was recognized by policymakers in the past, and various suggestions and programs were formed to aid in juvenile offenders' reintegration into society. See, for example, the American Bar Association's ("ABA") formation of the "Juvenile Collateral Consequences Project." *See* T. Markus Funk & Daniel D. Polsby, *Distributional Consequences of Expunging Juvenile Delinquency Records: The Problem of Lemons*, 52 WASH. U. J. URB. & CONTEMP. L. 161, 162–65 (1997); Pinard, *supra* note 20, at 1221.

44. As further noted, there are various parties that could be interested in criminal history records. For example, both public and private employers sometimes seek access to criminal histories to screen potential candidates, for licensing, or before placing individuals in positions of trust. Non-profit organizations place employees and volunteers to work with vulnerable populations; landlords and educational facilities could refer to criminal history records when making their decisions; and people might just be curious about who lives in their neighborhood. *See* OFFICE OF THE ATTORNEY GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 1 (2006), http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf [hereinafter ATTORNEY GENERAL'S REPORT].

45. Chin, *supra* note 32, at 254.

46. *See* Robert H. Gorman, *Collateral Sanctions in Practice in Ohio*, 36 U. TOL. L. REV. 469, 469 (2005) (arguing that many defendants are unaware of collateral sanctions); Pinard, *supra* note 31, at 669.

lead to a civil death,[47] as they deprive individuals with a criminal history of the necessary tools for reintegrating into society.[48] They potentially increase chances of recidivism,[49] enhance unlawful discrimination,[50] and can negatively impact the labor market to the extent that employers refuse to hire the most skilled and experienced employees.[51] In recent years, the impact of collateral consequences in the United States is increasing due to the growing number of individuals with a criminal history.[52]

Rehabilitation necessitates the elimination, or at least the substantial reduction, of collateral consequences. If modern society acknowledges the need to allow the reintegration of reformed individuals into society, policymakers must provide them equal civil opportunities and reduce collateral consequences.[53] There are many methods that could be deployed to aid the reintegration of individuals into society—for instance, creating centers that aid in coordinating various services,[54] providing legal assistance, and establishing community-based advocacy groups that provide reentry-related services.[55]

47. Civil death often "refers to the condition in which a convicted offender loses all political, civil, and legal rights," and was imported to the United States from England during the colonial period. Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1049 n.13, 1061. *See generally* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

48. *See, e.g.*, Love, *supra* note 31, at 1705.

49. *See* Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 148 (arguing that the more heavily an ex-offender bears the mark of his former offense, the more likely he is to reoffend); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOC. REV. 529, 542–44 (2000) (arguing that having stable work reduces recidivism).

50. For an extensive discussion of racial discrimination in the United States, see generally KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS (1998).

51. *See* GAEBLER, *supra* note 41, at 4.

52. *See* PETERSILIA, *supra* note 33, at 136; Pinard, *supra* note 20, at 1214–15.

53. The Supreme Court acknowledged the importance of reducing collateral consequences back in 1984. *See* Strickland v. Washington, 466 U.S. 668, 697 (1984) (encouraging consideration of collateral consequences regarding ineffective assistance of counsel in a criminal proceeding). It is notable that several appellate courts opined that collateral consequences are detached from the criminal process. *See* Pinard, *supra* note 31, at 671. For more on collateral consequences, see *supra* note 31.

54. *See* Pinard, *supra* note 31, at 626; AMY L. SOLOMON ET AL., URB. INST., OUTSIDE THE WALLS: A NATIONAL SNAPSHOT OF COMMUNITY-BASED PRISONER REENTRY PROGRAMS (2004), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410911-Outside-the-Walls.PDF.

55. Pinard, *supra* note 31, at 626, 664. Congress also sought to aid in such reintegration by proposing various bills relating to reentry. *See, e.g.*, Second Chance Act of 2005: Community Safety Through Recidivism Prevention, S. 1934, 109th Cong. (2005); Second Chance Act of 2005: Community Safety Through Recidivism Prevention, H.R. 1704, 109th Cong. (2005).

Perhaps the most crucial measure for ensuring rehabilitation came when policymakers acknowledged the importance of restoring most civic rights by crafting expungement statutes.[56] Expungement is the process by which a criminal history could later be vacated, reversed, sealed, purged, or destroyed by the state.[57] The rationale behind expungement is that if an individual is reformed, and thus capable of reintegrating into society—and, notably, reintegration is not necessarily possible in many instances[58]—then it is socially preferable to enable, encourage, and facilitate such reintegration.[59] Expungement statutes generally have four goals: (1) reducing recidivism and thereby enhancing public safety; (2) enabling rehabilitation; (3) reducing illegal discrimination against presumptively rehabilitated individuals; and (4) rewarding those who prove they have been rehabilitated.[60] While the use of expungement statutes for rehabilitation was widely criticized both on moral and practical grounds,[61] even critics agree that such statutes must be carefully tailored to create a balance between the goal of helping rehabilitate offenders and aiding in ensuring public safety.[62]

Expungement statutes in the United States were rather limited at first.[63] But by the late 1970s, most states provided procedures for restoration of

56. Love, *supra* note 31, at 1714.

57. It should be noted the term *expungement* usually means that the record has been erased as though the event never occurred, while other terms like *sealed*, mean that a record or proceeding is simply sealed, rather than destroyed. This Article uses the term *expungement* to describe an act in which criminal history records can be vacated, reversed, sealed, purged, or destroyed by the state. For more on this distinction, see Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer's Need to Know About Juvenile Misdeeds and an Employee's Need to Keep Them Secret*, 41 WASH. U. J. URB. & CONTEMP. L. 3, 22–24 (1992). *See also* Nafziger & Yimesgen, *supra* note 4, at 916; Andrew Hacker, Comment, *The Use of Expunged Records to Impeach Credibility in Arizona*, 42 ARIZ. ST. L.J. 467, 468 (2010).

58. 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, 1335 (2005); Logan Danielle Wayne, Comment, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253, 258 (2012) (arguing "expungement is granted only to those who deserve it most.").

59. *See, e.g.*, Geffen & Letze, *supra* note 58, at 1340 ("Expungement relieves society of the burden of supporting certain individuals with criminal records. As previously explained, an expungement can allow an individual to obtain employment and eliminate the individual's reliance on government benefits."). However, expungement is not always beneficial for society. Some felons, even after a completion of their sentence, should still be criminally labeled because society—or at least vulnerable segments of it, like juveniles—might be in need of protection from them. Therefore, even if expungement exists, it would usually be limited to certain types of offenses and offenders.

60. *See* Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 744 (1981).

61. For a summary of such criticism, see Michael D. Mayfield, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1066–72.

62. *Id.* at 1061–62.

63. Expungement statutes could be traced back in the United States to the 1940s. Back then, these statutes were rather limited and related mostly to rehabilitation possibilities for youthful of-

civil rights for individuals with a criminal history.[64] As part of a transition to a so-called "smart on crime" approach,[65] many states in recent years created or expanded expungement statutes mainly for individuals whose arrest did not lead to conviction, and also for those convicted of certain crimes.[66] While many have criticized expungement statutes,[67] most jurisdictions currently have some form of expungement statute,[68] and their use seems to be growing.[69]

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fenders. *See* Love, *supra* note 31, at 1709; Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 480 n.15, 482–83.

64. Currently, expungement is very limited on the federal level. The only federal expungement provision relates to offenses under Section 404 of the Controlled Substances Act, 21 U.S.C. § 844 (2012), when the person was less than twenty-one years old at the time of the offense. *See* 18 U.S.C. § 3607(c) (2012). For an example of a federal court expungement order, see Doe v. United States, 110 F. Supp. 3d 448, 458 (E.D.N.Y. 2015), *vacated*, 833 F.3d 192 (2d Cir. 2016); Doe v. United States, 2015 WL 2452613 (E.D.N.Y. May 21, 2015), 129 HARV. L. REV. 582 (2015). However, there have been several proposed bills regarding expungement at the federal level. For example, the Second Chance for Ex-Offenders Act aimed to "[a]mend[] the federal criminal code to allow an individual to file a petition for expungement of a record of conviction for a nonviolent criminal offense." Summary, Second Chance for Ex-Offenders Act of 2009, H.R. 1529, 111th Cong. (1st Sess. 2009), https://www.congress.gov/bill/111th-congress/house-bill/1529; *see also* Second Chance for Ex-Offenders Act of 2009, H.R. 1529, 111th Cong. (1st Sess. 2009); Second Chance for Ex-Offenders Act of 2011, H.R. 2065, 112th Cong. (2011); Love, *supra* note 31, at 1709 n.16. The Fresh Start Act of 2011 proposed to allow expungement for several non-violent offenders. H.R. 2449, 112th Cong. (2011). The Record Expungement Designed to Enhance Employment (REDEEM) Act of 2015 was aimed to allow for the expungement of federal criminal records for one time, non-violent offenses. S. 675, 114th Cong. (2015). For more on the need for federal expungement legislation, see Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1 (2008); Wayne, *supra* note 58.

65. Jenny Roberts attributes the new movement for strengthening and expanding expungement laws to: "(1) mass criminalization, (2) mass collateral consequences of criminal records, (3) technological advances that make criminal records easily accessible, and (4) a national obsession with viewing all aspects of people's pasts." Roberts, *supra* note 32, at 325.

66. RESTORATION OF RIGHTS PROJECT, COLLATERAL CONSEQUENCES RES. CTR., JUDICIAL EXPUNGEMENT, SEALING, AND SET-ASIDE (2017), http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparisonjudicial-expungement-sealing-and-set-aside (last updated Nov. 2017).

67. Beyond criticism of their effectiveness, expungement statutes "constrain[] the public's ability to speak or publish information about the judiciary." Meliah Thomas, Comment, *The First Amendment Right of Access to Docket Sheets*, 94 CALIF. L. REV. 1537, 1566 (2006); *see also* Matthew D. Callanan, Note, *Protecting the Unconvicted: Limiting Iowa's Rights to Public Access in Search of Greater Protection for Criminal Defendants Whose Charges Do Not End in Convictions*, 98 IOWA L. REV. 1275, 1304 (2013) (summarizing arguments against undermining public access to the judiciary); John P. Sellers, III, *Sealed with an Acquittal: When Not Guilty Means Never Having to Say You Were Tried*, 32 CAP. U. L. REV. 1, 12–18 (2003) (questioning the existence of a right to privacy in a public trial).

68. *See* RESTORATION OF RIGHTS PROJECT, *supra* note 66.

69. For example, in 2016, the State of Kentucky expanded the scope of expungement beyond misdemeanor offenders, granting individuals convicted of certain non-violent felonies, or who had received a full pardon, the opportunity to petition to have their convictions vacated, charges dismissed, and records expunged. Joshua Gaines, *Expungement Expansion Round-Up (2016 Edi-*

As previously mentioned, expungement statutes vary, in both terminology and scope,[70] from one U.S. state to another.[71] In some states, expungement refers to the sealing of a record, while in others it means that the conviction is legally treated as though it never occurred.[72] Some industries have been regulated beyond expungement legislation. For example, in some instances, employment discrimination against persons with criminal records was prohibited in the United States in the mid-1960s.[73] A few states have gone a step further, and made it illegal for all employers to turn away job applicants with a criminal history.[74]

But perhaps the biggest threat to expungement in recent years arises from an aspect that could not have been accounted for when expungement legislation first emerged. Initially, rehabilitation by expungement worked well in the kinetic world. The process of expungement made criminal his-

tion), COLLATERAL CONSEQUENCES RES. CTR. (May 23, 2016), http://ccresourcecenter.org/2016/05/23/expungement-expansion-round-up-2016-edition/#more-9973. The State of New Jersey approved P.L. 2015, c. 261, effective in April 2016. *Id.* This legislation made expungement of non-conviction records automatic and immediate. *Id.* It "author-iz[ed] immediate expungement following successful completion of drug court or court-ordered rehabilitation, . . . allow[ed] for early expungement of youthful drug offenses, reduc[ed] the waiting period for expungement, . . . and allow[ed] felonies and misdemeanors to be expunged at the same time." *Id.* Another example is that of Maryland, which passed the Justice Reinvestment Act, authorizing courts to expunge misdemeanor offenses "after ten crime-free years." *Id.*; *see also* RAM SUBRAMANIAN ET AL., VERA INST. FOR JUSTICE, RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009–2014, at 11 (2014), http://archive.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v4.pdf ("41 states and the District of Columbia enacted 155 pieces of legislation between 2009 and 2014 to mitigate the burden of collateral consequences for individuals with certain criminal convictions."). For updated information on expungement legislation in the United States, see Gaines, *supra*.

70. *See* Snow, *supra* note 57, at 21.

71. For a full list of expungement statutes in the United States, see RESTORATION OF RIGHTS PROJECT, *supra* note 66. *See also* Shlosberg et al., *supra* note 42, at 355–62 (conducting a survey on the varieties of expungement laws).

72. Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMMLAW CONSPECTUS J. COMM. L. & POL'Y 123, 131–32 (2010); Snow, *supra* note 57, at 46–73.

73. Employment discrimination could violate the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a) (2012) (prohibiting employment discrimination based on individual's race, color, religion, sex, or national origin). Denying employment to individuals based on an arrest or conviction record could, to a great extent, lead to discriminating against groups in society that are more likely to be arrested or convicted than others, for example, African Americans and Latinos. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SERIAL # 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 9–10 (2012), https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf; Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-offender Status and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 920–24 (2014).

74. *See* Walter Olson, *How Employers Are Forced to Hire Murderers and Other Felons*, WALL ST. J. (June 18, 1997), http://www.wsj.com/articles/SB866589021936288500.

tory records invisible to the public,[75] as the records were only visible to public officials under limited circumstances. These records were no longer conceived of as public records. While it was not illegal for the private sector to disseminate the criminal histories of individuals even after expungement, it was practically impossible: Those records were obtained from governmental entities that no longer maintained them. To obtain all criminal history records, including those that were expunged, would have required private parties to assemble a database of all criminal records prior to expungement—something that was impractical. Even if the media published anything related to an individual's criminal history prior to expungement, and the publication was accessible through their archives, it was not easy for individuals to gather this information.[76] Thus, in a purely kinetic world, it was sufficient for policymakers to confine the process of expungement to obscuring previously public records and making them available only to public officials. The digital era changed this form of practical obscurity.

III. REHABILITATION IN THE DIGITAL AGE

Digital technology could play an important role in criminal law. It could enhance enforcement capabilities and improve intelligence. For one thing, digital technology makes information storage and sharing easier, cheaper, and broader in scope.[77] It has, for example, enabled the first-ever national criminal record information sharing program in the United States.[78] Technological advances also led to the integration of a nationwide criminal justice information system and the creation of the Federal Bureau of Investigation's ("FBI") Interstate Identification Index ("III") in the 1970s.[79] In 1998, Congress established and funded a program that incentivizes states to

75. Pre-digital technologies, even without expungement, made criminal records functionally invisible. *See* Elizabeth D. De Armond, *Frothy Chaos: Modern Data Warehousing and Old-Fashioned Defamation*, 41 VAL. U. L. REV. 1061, 1068 (2007).

76. Media coverage could take various forms, for example, TVs, radios and newspapers. There is even a practice of tabloids/pamphlets that print mugshots alongside names and charges. *See* Stephanie Fox, *"Busted Paper" and Other Mugshot Magazines: Why They Are—and Will Likely Remain—Legal*, DAILY PLANET (Apr. 7, 2013), https://www.tcdailyplanet.net/busted-paper-and-other-mugshot-magazines-why-they-are-and-will-likely-remain-legal.

77. For a general review of the technological changes to justice information systems, see Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet*, 79 WASH. L. REV. 175 (2004).

78. *See* PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 266–69, 279 (1967) (describing the need for a national directory); James B. Jacobs & Dimitra Blitsa, *Sharing Criminal Records: The United States, the European Union and Interpol Compared*, 30 LOY. L.A. INT'L & COMP. L. REV. 125, 130 (2008) (noting development of state and federal database integration).

79. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, REPORT OF THE NATIONAL TASK FORCE ON COURT AUTOMATION AND INTEGRATION 2–3 (1999); Jacobs & Blitsa, *supra* note 78, at 130–32.

improve the quality, timeliness, and immediate accessibility of criminal history records and related information with the formation of the Criminal History Records Improvement Program ("CHRI")—succeeded by the National Criminal History Improvement Program ("NCHIP").[80] Many states have centralized court records and made them accessible to anyone who seeks such information.[81] Likewise, Congress mandated electronic accessibility of records held by federal agencies and federal courts, either by remote access or by onsite computer terminals.[82]

Naturally, digital technology could aid in promoting the rehabilitative rationales behind expungement, as it could potentially increase the accuracy of criminal histories. In turn, it would make only non-expunged records publicly available, lower the costs and bureaucracy of updating information on expunged records, and generally make updated criminal histories much more accessible and affordable.[83]

In an age of mass-incarceration and over-criminalization, rehabilitation becomes even more important. Currently, nearly one out of every three American adults has a criminal record.[84] Somewhere between 10,000 and 12,000 new names are added each day to the FBI's master criminal database.[85] With such a dramatic increase in the amount of individuals who exit society, policymakers must also ensure the reintegration of those who rejoin society to reduce recidivism.

As previously noted, expungement statutes are limited in application to the public sector. With some exceptions,[86] criminal history records that

80. Jacobs & Blitsa, *supra* note 78, at 133–34; James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 180–81 (2008); *National Criminal History Improvement Program*, BUREAU OF JUST. STAT., http://www.bjs.gov/index.cfm?ty=tp&tid=47 (last visited Dec. 21, 2017).

81. *See* Jacobs & Crepet, *supra* note 80, at 183–85.

82. *See* E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913–14 (2002); Jacobs & Crepet, *supra* note 80, at 185.

83. Davis, *supra* note 5, at 874; Jacobs, *supra* note 42, at 388 ("Information technology has increased the capacity and reduced the cost of collecting, storing, and searching criminal records."). For a general review of the impact of data accessibility on public records, see De Armond, *supra* note 75, at 1068–71.

84. *See* Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402 ("[T]he FBI currently has 77.7 million individuals on file in its master criminal database—or nearly one out of every three American adults.").

85. *Id.*

86. In Minnesota, for example, courts have limited the expungement remedy under the separation of powers doctrine and ruled that district courts' authority to seal records does not apply to executive branch records, which in turn would remain available to the public. *See* State v. Schultz, 676 N.W.2d 337, 343 (Minn. Ct. App. 2004). For an analysis of Minnesota's expungement treatment, see Geffen & Letze, *supra* note 58 and Robert C. Whipps, Note, *Retaining the*

were expunged are visible only to public officials under specific circumstances. Prior to the digital era, policymakers were not generally concerned about the private use of expunged criminal histories, as it was unlikely that individuals would be able to obtain and retain such information. Interested parties were able to receive updated information only from the public sector, which, in its optimal mode, did not contain expunged records.[87] Thus, the regulation of "real space" had the effect of confining (or zoning) the collateral consequences of expunged records.[88]

But digital data practices have proven to be a game changer in the realm of criminal history records.[89] Instead of aiding in rehabilitating individuals with criminal history records, digital data practices make expungement statutes almost inapplicable, and even potentially facilitate a market for expunged criminal histories. These practices effectively increase the social *collateral consequences* for individuals with a criminal history, as non-updated information is made highly accessible through existing private background check companies (data brokers) and by the internet.

A. Expungement via Data Brokers

Criminal history records exist in various governmental databases, both state and federal. They could exist independently at government agencies, courts, enforcement agencies, and corrections departments,[90] and they are generally considered public information.[91] The wide availability of criminal history records through governmental agencies created a demand for a more efficient method of searching the various agencies' records even prior to the digital age. Employers, landlords, and educational institutions were in need of a service that would enable them to check the criminal history of potential employment candidates, renters, or students. Presumably, crimi-

Scarlet Letter: The Tension Between Branch Powers, Law, and Equity with Inherent Authority Expungement–State v. M.D.T., 7 WM. MITCHELL J.L. & PRAC. 1 (2014).

87. *See, e.g.*, Amitai Etzioni, *A Liberal Communitarian Conception of Privacy*, 29 J. MARSHALL J. COMPUTER & INFO. L. 419, 432 (2012).

88. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 501–02 (1999). Lawrence Lessig identified "zoning speech" as one problem raised by the distinction between real space and cyberspace. *See id.* at 510.

89. *See* Anna Kessler, Comment, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403, 411 (2015) ("The modern era of rapidly expanding technology has thwarted attempts of reentry and rehabilitation.").

90. Palazzolo, *supra* note 25.

91. The reasons behind making criminal records public information could be diverse. Beyond freedom of information, the justification from a criminal law perspective could rely on grounds of deterrence, protecting the general public, and retribution, among other reasons. For some of this reasoning, see Jacobs, *supra* note 42, at 396.

nal background checks for some purposes could provide vital red flags:[92] They could lower liability for negligent hiring or retention;[93] reduce risk of theft, fraud, and workplace violence;[94] and could be generally perceived as important for public safety measures, protecting employees, customers, vulnerable persons, and business assets.[95] More generally, there was a great demand for companies that could provide a service for end-users to obtain criminal history records that could potentially be more accurate and nationwide in scope.[96]

The demand for aggregated, nationwide criminal history records was met with the emergence of commercial vendors (data brokers) that sell such information.[97] Under their initial business model, the threat to the efficacy of expungement statutes was not significant. Upon receiving a request for a criminal history, the vendors would prepare a report by sending personnel ("runners") to courts, police departments, and other governmental agen-

92. *See* Steven Raphael, *Should Criminal History Records Be Universally Available?*, 5 CRIMINOLOGY & PUB. POL'Y 515, 516–17 (2006) (listing reasons why some employers are in need of criminal background checks).

93. Employers could be subject to liability under negligent hiring doctrines when the job applicant has a criminal history that is relevant to the responsibilities of a job, and the employer failed to determine that his or her placement in the position would create an unreasonable risk to other employees or the public. *See* SEARCH, THE NAT'L CONSORTIUM FOR JUSTICE INFO. & STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 65–68 (2005), http://www.search.org/files/pdf/RNTFCSCJRI.pdf [hereinafter THE COMMERCIAL SALE REPORT]; Stephen F. Befort, *Pre-Employment Screening and Investigation: Navigating Between a Rock and a Hard Place*, 14 HOFSTRA LAB. L.J. 365, 366 (1997); Robert L. Levin, *Workplace Violence: Navigating Through the Minefield of Legal Liability*, 11 LAB. LAW. 171, 175 (1995); Kristen A. Williams, Comment, *Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521, 523–24 (2007); Douglas Belkin, *More Job Seekers Scramble to Erase Their Criminal Past*, WALL ST. J. (Nov. 11, 2009), http://online.wsj.com/article/SB125789494126242343.html; *cf.* GAEBLER, *supra* note 41, at 17 (arguing that "[f]ear of negligent hiring liability is greatly exaggerated"). For an example of negligent hiring (failure to conduct a criminal background check prior to hiring) and its legal consequences, see *Harrington v. La. State Bd. of Elementary & Secondary Educ.*, 714 So. 2d 845 (La. Ct. App. 1998).

94. SOC'Y FOR HUMAN RES. MGMT., *Background Checking: Conducting Criminal Background Checks*, SLIDESHARE (Jan. 22, 2010), http://www.slideshare.net/shrm/background-check-criminal (providing statistics for the primary reasons that organizations conduct criminal background checks on job candidates); *cf.* Williams, *supra* note 93, at 534 ("[T]here appears to be no research suggesting that a high percentage of workplace violence is committed by employed ex-offenders.").

95. *See* ATTORNEY GENERAL'S REPORT, *supra* note 44, at 20. *But see* GAEBLER, *supra* note 41, at 16–17 (criticizing the "public safety" argument).

96. *See* ATTORNEY GENERAL'S REPORT, *supra* note 44, at 39 (listing benefits and drawbacks of data brokers).

97. *See generally* JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 70–73 (2015) (describing privatization of criminal records by commercial information vendors).

cies.[98] As long as the database of the public office was updated, these reports would exclude expunged criminal history records.

To a great extent, digital technology changed the practices and business models of data brokers. There was no longer a need—and it was economically inefficient—to send runners to, or file multiple requests with, governmental agencies across the country. Data brokers moved towards digital data models, which reduced and even eliminated the need for runners,[99] and enabled them to build and maintain their own databases by purchasing criminal records in bulk from governmental agencies and other data holders.[100] Under this new business model, data brokers maintained datasets, and upon a specific request for criminal history, they search their own database.[101] It made the provision of a background report almost instantaneous, more available, and perhaps more affordable for companies.[102]

But instead of making relevant criminal history records (only those records that were not expunged) more accessible, this model eventually led to new risks caused by a flawed system. The main risk arose from inaccuracy in databases of both governmental agencies,[103] and perhaps mostly of data brokers, which were not frequently updated.[104] These inaccuracies could lead to difficulties in interpreting reports,[105] false positives, and false negatives,[106] among others.[107] In the context of this Article, inaccuracy es-

98. *See* THE COMMERCIAL SALE REPORT, *supra* note 93, at 9.

99. *Id.* at 10.

100. *Id.*

101. For more information on the practices of data brokers, see, for example, FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY (2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.

102. *See* Ryan D. Watstein, Note, *Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects*, 61 FLA. L. REV. 581, 592–93 (2009).

103. Fields & Emshwiller, *supra* note 84 ("Only half of the records with the FBI have fully up-to-date information.").

104. JACOBS, *supra* note 97, at 133–39; Michael H. Jagunic, Note, *The Unified "Sealed" Theory: Updating Ohio's Record-Sealing Statute for the Twenty-First Century*, 59 CLEV. ST. L. REV. 161, 171 (2011).

105. Criminal history records could be sometimes confusing and difficult to interpret to non-experts, especially with differences in states' criminal codes. *See* GAEBLER, *supra* note 41, at 14.

106. In 1999, the Department of Justice found that a name-based check of 6,300,000 individuals without records produced 5.5% false positives, and a name-based check of 600,000 persons with records produced 11.7% false negatives. *See* NAT'L TASK FORCE TO THE U.S. ATTORNEY GEN., NCJ-179358, INTERSTATE IDENTIFICATION INDEX NAME CHECK EFFICACY 48–49 (1999), http://permanent.access.gpo.gov/lps65765/III_Name_Check.pdf.

107. There are many problems that arise from the practices of at least some background check companies. For example, they do not use unique identifiers—such as Social Security numbers—but rather only a first and last name, and consumers might be harmed even if they do not have a criminal record. *See 7 Shocking Quotes from the National Association of Professional Background Screeners Conference*, THE EXPUNGED RECORD,

sentially means that using data brokers could often lead to a false—or rather non-updated—criminal history caused, inter alia, by not excluding expunged records. This risk would vitiate any efforts to reduce the social collateral consequences resulting from a criminal record.[108] While in many instances inaccuracy could be caused by both the volume of updates[109] and the architecture of large databases—which might make them difficult or costly to update frequently[110]—it might also be intentional, resulting from a rather unique market demand for incorrect data. Under this argument, many users of criminal histories, like employers, landlords, and educational institutions, would prefer databases contain expunged records to be fully exposed to the complete criminal history of a prospect.[111]

Regardless of the reasons behind these practices, their risk to rehabilitation is evident. Policymakers have acknowledged some of the potential risks posed by the practices of data brokers and attempted to mitigate them through regulation, especially regarding the use of criminal history records for employment or housing purposes. On the state level, policymakers attempted to regulate the practices of data brokers by imposing various forms of legal restrictions on both data brokers and their consumers.[112] On the federal level, Congress regulated background check reports produced by data brokers through the Fair Credit Reporting Act ("FCRA").[113] The FCRA

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http://www.theexpungedrecord.com/blog/7-shocking-quotes-from-the-annual-national-association-of-professional-background-screeners-conference (last visited Dec. 21, 2017). It should be noted that even Social Security numbers might not be accurate as an identifier. Other measures, biometric identifiers for example, should be considered.

108. Some employers might not even mind the criminal record, but rather the fact that a candidate was untruthful. That could occur when candidates have denied having a criminal record, as the record was sealed or expunged and therefore they are entitled to say that they do not have a criminal record, and are perceived as lying to the employer. *See* Belkin, *supra* note 93 (quoting Cardinal Services' manager and general counsel Mike Lehman saying, "If someone has a criminal history, we can work with them. . . . But if they have one and lie to us, that's pretty ominous."); GAEBLER, *supra* note 41, at 14.

109. *See* GAEBLER, *supra* note 41, at 13 ("[T]he aggregators themselves may not update information as frequently as needed given the fluid nature of criminal justice proceedings.").

110. While technology should presumably aid in reducing these costs and eliminating difficulties to update, periodically purchasing datasets in bulk from various sources makes this practice more difficult.

111. *See* THE COMMERCIAL SALE REPORT, *supra* note 93, at 83–84. This argument, however, is rather intuitive and relies on this Author's assumption that at least some users of criminal history records might care less about aiding in rehabilitation and care more about their needs. Accordingly, this argument should be treated carefully without empirical studies to support it.

112. *See* Paul-Emile, *supra* note 73, at 918 n.21 ("[E]very state has different laws relating to what information can be obtained and/or used by consumer reporting agencies and end-users with permissible purposes.").

113. 15 U.S.C. § 1681 (2012). It should be noted that while the Privacy Act of 1974 established a Code of Fair Information Practice that governs the collection and retention of data, it only applies to systems of records held by governmental agencies. *See* Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (1974).

requires all consumer reporting agencies—which, since 1998, includes agencies conducting criminal background checks[114]—to adopt "reasonable procedures to assure maximum possible accuracy"[115] "in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information."[116] Upon investigation of a consumer dispute, data that is "found to be inaccurate or incomplete or cannot be verified" must be "promptly delete[d]" by the consumer reporting agency.[117] Also, while reporting convictions has no time limit, consumer reporting agencies are generally prohibited from reporting arrest records that are more than seven years old (or beyond the governing statute of limitations) if they did not result in the entry of a judgment of conviction.[118] In exchange, those companies receive immunity from defamation, invasion of privacy, or negligence claims.[119] Finally, while the FCRA grants a private right of action to file suit under the constitutional standing doctrine,[120] litigants will be required to demonstrate that due to these companies' practices they suffered an injury in fact—not an easy task even if the data will be proven as inaccurate.[121]

Regarding the use of criminal history records by employers, the FCRA imposed a few obligations and restrictions.[122] Data brokers must notify the consumer and "maintain strict procedures" to ensure that information they give employers reflects the most current public records if the information might adversely affect a job applicant.[123] Employers are required to notify job applicants prior to obtaining a criminal history report, to obtain their consent, and to inform them if an adverse action was taken based on the report.[124]

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114. Criminal background checks were included under the FCRA under the Federal Trade Commission's instructions. *See* Fed. Trade Comm'n, Opinion Letter on Sections 603, 607, and 609 of the Fair Credit Reporting Act (June 9, 1998), http://www.ftc.gov/os/statutes/fcra/leblanc.shtm; Paul-Emile, *supra* note 73, at 916–17.

115. 15 U.S.C. § 1681e(b).

116. *Id.* § 1681(b).

117. *Id.* § 1681i(a)(5)(A).

118. *Id.* § 1681c(a)(2), (5).

119. Liability for invasion of privacy, defamation, and negligence claims for reporting false information about applicants is limited to instances where it is furnished with malice or willful intent to injure the consumer. *See id.* § 1681h(e).

120. *See* U.S. CONST. art. III; Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

121. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1545 (2016) (holding that a plaintiff does not satisfy Article III standing without identifying a concrete harm).

122. Congress explicitly allowed some industries and businesses to obtain the criminal history of a job applicant from the FBI. Examples are nuclear power, securities, banking, nursing homes, and critical infrastructure. *See* Jacobs & Blitsa, *supra* note 78, at 192. For more on mandatory background checks for some industries, see *infra* note 220.

123. 15 U.S.C. § 1681k(a)(2).

124. *Id.* § 1681b(b); Paul-Emile, *supra* note 73, at 917.

While important, these forms of regulation insufficiently address expungement in the digital age. Data brokers can easily bypass the obligations of the FCRA by avoiding categorization as consumer reporting agencies[125]; employers can conduct background checks on their own without data brokers[126]; the accuracy requirements in the FCRA have proven a vague and loose burden on data brokers[127]; and finally, the FCRA and other forms of current regulation do not prohibit disclosure and circulation of expunged conviction records.[128]

Essentially, the use of data analysis, combined with the low regulatory burden and a market demand for criminal records, threatens expungement. But while the threat of data brokers in the digital age was widely acknowledged by policymakers who attempted to regulate them, this practice does not even pose the highest risk to rehabilitation in the digital age.

B. Online Expungement

The internet poses a huge threat to expungement. This mega-database allows for the free dissemination of information along with an easy method of searching it via search engines and other online intermediaries. It contains vast amounts of information that could be legally prohibited to share kinetically—like health and credit data—but would nevertheless appear and remain online.[129] Criminal history records in the United States are part of this mega-database.

How does criminal history find its way to the internet? In various ways.[130] In some instances, federal and state courthouses in the United States offer online records relating to criminal charges and convictions.[131] An individual's arrest or conviction could be easily reported online and remain there via digital archives or services like LexisNexis, Westlaw, or Jus-

125. One method to avoid being considered a consumer reporting agency would be simply to not provide the information in the form of a "consumer report." *See* Wayne, *supra* note 58, at 269 n.88.

126. Paul-Emile, *supra* note 73, at 918.

127. *Id.*; Wayne, *supra* note 58, at 270; De Armond, *supra* note 75, at 1102.

128. *See* Paul-Emile, *supra* note 73, at 918.

129. *See* Frank Pasquale, *Reforming the Law of Reputation*, 47 LOY. U. CHI. L.J. 515, 516 (2015).

130. *See* Calvert & Bruno, *supra* note 72, at 135–38 (describing the effectiveness of expungement on the internet).

131. HOLLY ANDERSON ET AL., AM. ASS'N OF COLLS. OF PHARMACY, REPORT OF THE AACP CRIMINAL BACKGROUND CHECK ADVISORY PANEL 5–7 (2006), http://www.aacp.org/sites/default/files/2017-11/AACPBackgroundChkRpt.pdf; *Privacy/Public Access to Court Records: State Links*, NAT'L CTR. FOR STATE COURTS, http://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-links.aspx (last visited Dec. 21, 2017).

tia.[132] Another method is via for-profit websites ("mugshot websites"), such as Mugshots.com, which post booking photographs taken during an investigation (mugshots), along with information on the arrest.[133] These mugshots generally remain online regardless of the outcome of the investigation or expungement.[134] Jailbase.com currently even offers users the ability to "get notified if someone [they] know gets arrested."[135] Media reports, mainly local ones, could publish information on the alleged criminal conduct of individuals.[136] Finally, criminal histories could be posted online via end-users, blogs, social media,[137] or any other website with user-generated content.

Current legislation—namely the FCRA—generally does not regulate employers or end-users when they access criminal justice information via the internet.[138] Regardless of whether they are expunged, publishing criminal history records online is considered lawful. Such publication, however, poses a huge threat to the social collateral consequences of individuals with expunged criminal records. Employers, landlords, educational institutions, and any other interested party can easily and freely use search engines and even mobile apps to screen individuals.[139] As long as the details of an individual's criminal history remain online, expungement statutes will not likely advance the rationales behind rehabilitation. These individuals will be

132. *See* LEXISNEXIS, www.lexisnexis.com (last visited Dec. 21, 2017); WESTLAW, www.westlaw.com (last visited Dec. 21, 2017); JUSTIA, www.justia.com (last visited Dec. 21, 2017).

133. *See, e.g.*, *FAQ*, MUGSHOTS, http://mugshots.com/faq.html (last visited Dec. 21, 2017); ARRESTS, https://www.arrests.org (last visited Dec. 21, 2017) (providing searches for arrest records by state); BUSTED! MUGSHOTS, http://www.bustedmugshots.com (last visited Dec. 21, 2017); JUST MUGSHOTS, https://justmugshots.us (last visited Dec. 21, 2017).

134. Some of these websites used to offer unpublished information for a fee. This practice, however, seemed to cease recently, probably due to its questioned lawfulness. *See* David Kravets, *Judge Spanks Mugshots.com Hard for Charging for Photo Removal*, ARS TECHNICA (Sept. 27, 2017), https://arstechnica.com/tech-policy/2017/09/mugshot-website-must-face-class-action-for-charging-to-remove-photos.

135. *See* JAILBASE, http://www.jailbase.com (last visited Dec. 21, 2017).

136. Consider an incident that occurred in 2010 in Connecticut. Lorraine Martin and her two sons were arrested at their home on drug charges, and the incident was widely reported in local media. CCRC Staff, *Publishers Not Liable for Internet Posting of "Erased" Arrest Records*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 30, 2015), http://ccresourcecenter.org/2015/01/30/publishers-not-liable-internet-posting-erased-arrest-records. After a year, the state decided to drop all charges, and consequently erased her record. *Id.* The contemporaneous news accounts remained available online. *Id.* In turn, a federal court dismissed any claims against the publishers, and the content remained actionable online. *Id.*; Martin v. Hearst Corp., 77 F.3d 546, 548 (2d Cir. 2015).

137. To emphasize this phenomenon, Mugshots.com offers to "like" or "tweet" their posts. MUGSHOTS, http://mugshots.com (last visited Dec. 21, 2017).

138. *See* Paul-Emile, *supra* note 73, at 918.

139. *See, e.g.*, GOOGLE PLAY, *JailBase*, https://play.google.com/store/apps/details?id=com.jailbase.mobile_app (last visited Dec. 21 2017).

unable to reintegrate into society as their criminal history will remain widely available to anyone who wishes to search for them online.

Paradoxically, the wide availability of information could even make the mere existence of expungement requests more harmful. If the mere fact that one sought an expungement is available online, such requests could enhance the negative effects of an individual's criminal history, as they would make the criminal record more visible.[140] Thus, not only will the kinetic world's zoning of expungement be ineffective in the digital era, it could be more harmful than ever before.

Criminal rehabilitation in the digital era requires policymakers to acknowledge the differences between expungement in the kinetic world and the digital world and seek proper solutions. The lack of a digital expungement right increases the possibility of recidivism, broadens the scope of unlawful discrimination based on race,[141] gender, and national origin[142] (all of which would be unlawful for employment purposes),[143] reinforces socioeconomic inequity, negatively impacts the labor market and the development of knowledge,[144] and generally inflicts unnecessary harm on individuals—most importantly juveniles,[145] their families and society. If we do not enable a real possibility of reintegration into society, we risk recidivism, which in turn will lead to even greater incarceration in already overcrowded pris-

140. Pasquale, *supra* note 129, at 516 ("[I]t is not much good for an ex-convict to expunge his juvenile record, if the fact of his conviction is the top Google result for searches on his name for the rest of his life.").

141. *See* Lewis Maltby, *How to Fairly Hire Applicants with Criminal Records*, DIVERSITYINC (Aug. 24, 2011), http://www.diversityinc.com/legal-issues/how-to-fairly-hire-applicants-with-criminal-records (arguing that more than fifty percent of Black males in the United States have a criminal record). For statistics on the racial impact in mass incarceration, see, for example, *Criminal Justice Facts*, *supra* note 23. For more on racial disparities in the American criminal system, see Roberts, *supra* note 32, at 331.

142. *See* THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 5 (2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf.

143. See Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 703, 78 Stat. 241, 253–66 (1964).

144. Under this argument, the labor market suffers a negative impact when we disqualify many qualified members of society, and the development of knowledge suffers as worthy applicants for education will be rejected due to their expunged criminal history.

145. Another major concern regarding the internet involves juvenile records. The internet could make juvenile expungement irrelevant even if some policymakers decided to specifically ban access to records of juvenile adjudications. A single post on social media about a classmate's wrongdoing could stay online forever, and it could be accessible to any future educator, employer or landlord. Without digital expungement of these records, those individuals will have little chance of reintegrating into society, and chances of recidivism will increase.

ons and increased financial expenses.[146] Ultimately, it would be taxpayers who would bear the financial costs of recidivism.

Arguably, the lack of a digital expungement right could undermine the pillars of criminal law. The increase in the social collateral consequences from the use of digital technology could effectively impose a punishment beyond the sentence prescribed by law, which could be perceived as illegal[147] or even unconstitutional.[148] But mainly, the absence of this right reduces the effectiveness of rehabilitation and leads to undesired results which could be harmful from a social perspective. Intervention is, therefore, much needed.

IV. ENABLING DIGITAL EXPUNGEMENT

The regulation of expunged criminal histories would be difficult under the U.S. legal system due mostly to constitutional constraints on impeding free speech and freedom of the press. The firmly rooted perception that criminal histories are public records would also be problematic. Any such form of regulation would, therefore, require acknowledging the potential legal, social, and technological barriers, understanding their consequences, and examining whether intervention could both be legally feasible and pragmatically aid in rehabilitation.

146. The Pew Center stated in 2008 that spending on corrections eclipsed $49 billion. ONE IN 100: BEHIND BARS IN AMERICA IN 2008, *supra* note 23, at 11. In 2012, slowdown and incarceration costs continued to rise. According to another report, state spending for corrections reached $52.4 billion. NAT'L ASS'N OF STATE BUDGET OFFICES, STATE SPENDING FOR CORRECTIONS: LONG-TERM TRENDS AND RECENT CRIMINAL JUSTICE POLICY REFORMS 1 (Sept. 11, 2013), https://higherlogicdownload.s3.amazonaws.com/NASBO/0f09ced0-449d-4c11-b787-10505cd90bb9/UploadedImages/Issue%20Briefs%20/State%20Spending%20for%20Corrections.pdf.

147. However, collateral consequences could also be considered a form of civil regulation that operates outside the criminal justice system. *See* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT 3 (2010), http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf; Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1686 n.10 (2003).

148. Arguably, such punishment could be considered a violation of the Eighth Amendment as a cruel and unusual punishment under a retributive justice's proportionality principle. *See* Chin, *supra* note 47, at 1792, 1826. However, collateral consequences were held not to constitute a punishment. Smith v. Doe, 538 U.S. 84, 95–96 (2003). Furthermore, failure to acknowledge or to be informed on them was held not to violate the Sixth Amendment right to the effective assistance of a counsel and the Fifth or Fourteenth Amendment due process standards. *See, e.g.*, Steele v. Murphy, 365 F.3d 14, 17 (1st Cir. 2004); State v. Paredez, 101 P.3d 799, 803 (N.M. 2004); Chin & Holmes, *supra* note 32, at 699–701 (discussing the constitutional debate regarding collateral consequences); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 672–82 (2008) (summarizing the constitutional debate regarding collateral consequences surrounding a guilty plea and proposing a "reasonableness standard" for the duty to warn and the due process right).

In essence, digital expungement could be achieved by either ex-ante or ex-post measures. Using the law, technology, the market, or social forces,[149] either separately or combined, could make expunged criminal histories either initially unavailable (ex-ante), or make them inaccessible or unusable once expunged (ex-post). Notably, other foreign jurisdictions, like many member states of the EU, incorporated both ex-ante and ex-post measures into their legal system.

From an ex-ante perspective, criminal history records, usually including convictions, are considered by many EU member states as personal information not available to the public. While court records must generally be "fair and public," and any judgments must be pronounced publicly, the EU permits placing restrictions on reporting cases by the press and, in some instances, even affording anonymity to defendants prior to or after conviction.[150] The EU also generally restricts the practices of data brokers providing criminal histories.[151] Thus, there is no general need for digital expungement in many EU member states as criminal history records are rarely made publicly available.

From an ex-post perspective, the EU went a step further by granting individuals the right to control their personal data, which potentially ensured digital expungement. It is not clear whether the EU intended to include criminal history records within the scope of this right when it originated in 1995.[152] However, the recent expansion of control over personal

149. *See infra* note 154.

150. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221. While Article 6 of the Convention of Human Rights requires that "everyone is entitled to a fair and public hearing," it does not necessarily rule out the possibility of placing limits on the media or the use of anonymity to defendants. *Id.*

151. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 prohibits the creation of private criminal record databases. *See* Council Directive 95/46 of Oct. 24, 1995, Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 8.5, 1995 O.J. (L 281) 31 (EC) (repealed 2016).

152. The right to control personal information is rooted within Article 6 of EU Data Protection Directive from 1995. *Id.* art. 6. The Directive obliges member states to guarantee that every data subject has the right to obtain from the controller "the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data." *Id.* art. 12. Specifically, Article 6 ensures that personal data must be:

> (a) processed fairly and lawfully; (b) collected for specified, explicit and legitimate purposes . . . . Further processing of data for historical, statistical, or scientific purposes shall not be considered as incompatable provided that Member States provide appropriate safeguards; (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed; (d) accurate and, where necessary, kept up to date . . . ; [and] (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed . . . .

Id. art. 6.

data online within the so-called "right to be forgotten" or "right of erasure," would likely apply to expunged criminal history records.[153]

The EU ex-post approach would be highly problematic, however, under the current U.S. legal regime. As this Article further suggests, any attempt to regulate expunged criminal history ex-post is doomed to fail in the United States. Only ex-ante measures—which would necessitate a conceptual change in the categorization of criminal history as public records—can aid in enabling digital (and kinetic) expungement. This Part scrutinizes the efficacy of both ex-post and ex-ante measures in enabling digital expungement. It begins by examining the almost impossible ex-post solution, partially implemented in the United States, followed by an analysis of potential ex-ante solutions, which may be the only pragmatic solutions for digital expungement in the United States.

A. Ex-Post *Expungement: Removing Expunged Data*

An ex-post approach to digital expungement would generally mean that a criminal history record, once expunged, would either become inaccessible by any non-governmental entity, or that the dissemination or use of expunged records by non-governmental entities would be illegal. An ex-post approach does not necessarily require legal intervention, and it could potentially also be achieved via other modalities of regulation like social, market, and code (technology).[154] However, as this Section further shows, implementing an ex-post approach would be difficult or ineffective for achieving the goals of digital expungement mainly because it is not legally possible.

153. Eldar Haber, *Privatization of the Judiciary*, 40 SEATTLE U. L. REV. 115, 118 (2016). The right to be forgotten—also known as a right to be delisted or right of erasure—is designed to enable "a data subject (an individual) 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.'" *Id.* at 123 (quoting Council Regulation 2016/679, art. 17, 2016 O.J. (L 119) 1 (EU)). In a 2014 case interpreting the EU Data Protection Directive, the European Court of Justice granted the right to be forgotten to EU data subjects. *See* Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2014 E.C.R. 317. In 2016, the EU passed the General Data Protection Regulation ("GDPR"), which grants its citizens or residents a right to delete information from the internet upon meeting these criteria, and it will go into effect in 2018. Council Regulation 2016/679, *supra*, at art. 28.3(a). For more on the right to be forgotten, see Haber, *supra*.

154. *See* LAWRENCE LESSIG, CODE: VERSION 2.0 120–37 (2006); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 116–73 (2004). Michael Birnhack suggested that social norms and the market could be addressed as one because crediting importance to the free market makes it a social value. *See* Michael O. Birnhack, *Lex Machina: Data Security and the Computer Act*, 4 SHA'AREY MISHPAT 315, 320 n.13 (2006) [Hebrew].

1. Market and Social Norms

Market and social norms cannot solve the problem of expunged records being held or made available by non-governmental entities or online sources.[155] One of the main obstacles is the demand for criminal histories, which was met (with or without a causative link) by a substantial growth in the last few years in the market of data brokers and online platforms that offer such information.[156] As long as employers, landlords, educational institutions, and other interested parties are in need of such information, and in many instances, are willing to pay for it, market forces are unlikely to push against the supply. Potentially, consumers could push back against the high costs of these services, thereby decreasing demand.[157] Practice, however, indicates that these businesses still thrive despite relatively high prices, and as long as there is a willingness to pay, it will be generally insufficient to rely on the market to solve this problem. At best, consumer demand will merely affect the pricing of criminal history records. It will fail to affect the wide availability of information, which will not be regulated by these market forces as long as much of this information remains free of charge online.

While consumers are not likely to push against the availability of criminal history records, presumably they could demand that the market provide only information that is up-to-date, that is, demand that the market remove any expunged records. However, it seems that in this context, a relatively unusual market for inaccurate, incomplete, or more precisely, non-updated data, was created. Market players—including both data brokers and online services—were simply not incentivized to exclude expunged records from their databases.

Indeed, there was much incentive to include them. Beyond the financial cost of updating databases, many employers, landlords, and educational institutions would prefer to obtain a criminal history record that contains expunged conduct to know the complete criminal history of a prospect, regardless of the state's rationale for expunging it.[158] Thus, market players not only lack incentives for updating their databases, but they are rather in-

155. *See* CRIMNET PROGRAM OFFICE ET AL., COMMERCIAL DATA MINING OF CRIMINAL JUSTICE SYSTEM RECORDS: DELIVERY TEAM REPORT TO THE CRIMINAL AND JUVENILE JUSTICE INFORMATION TASK FORCE 14 (Aug. 2008), https://www.leg.state.mn.us/docs/2009/mandated/090200.pdf [hereinafter COMMERCIAL DATA MINING] (discussing the benefits and drawbacks of imposing no regulation on data mining entities and allowing the market to self-regulate).

156. Wayne, *supra* note 58, at 262–63.

157. One data broker, for example, charges $29.95 for every "National Criminal Background Check." It also offers up to a 50% discount for consumers who purchase over twenty-five searches. *See* BACKGROUNDCHECKS, http://www.backgroundchecks.com/volumepricing (last visited Dec. 21, 2017). For price examples in 2005, see THE COMMERCIAL SALE REPORT, *supra* note 93, at 14–15.

158. *Id.* at 83–84.

centivized to supply services specifically targeted at learning about the expunged records of individuals. Therefore, while there is a plausible demand for updated databases—which could incentivize market players to improve their practices, and thereby increase chances of success for digital expungement—such demand is improbable.

The availability of free online information seems to produce similar outcomes from a market perspective. Online sources and other intermediaries (like search engines), which grant access to criminal history records, are also unlikely to change their behavior through market forces. Without a shift in the perception of the proper use and retention of personal data online,[159] these providers are unlikely to grant individuals the ability to remove information about themselves, including records that were expunged. In addition, whether self-deployed or through a third party, individuals could try to reduce accessibility to harmful online content by manipulating search results so that the harmful results will appear much lower in the search engine's output.[160] While this demand has already created websites offering so-called "reputation management services,"[161] such services are generally limited to affecting search results, and their efficacy depends on the financial resources and knowledge of the service.

In addition to the market, or combined with it, social norms are also fairly limited in their ability to aid digital expungement efforts. While at-

159. *See* Chris Conley, *The Right to Delete*, AAAI SPRING SYMP.: INTELLIGENT INFO. PRIVACY MGMT. 53, 58 (2010), https://www.aaai.org/ocs/index.php/SSS/SSS10/paper/viewFile/1158/1482 ("If members of society can agree that individuals deserve the right to own their own digital persona, including records that are held by third parties, then a right to delete can be established absent any legal change. Private individuals will find a negotiated means of complying with requests to delete information (assuming that they even retain information in searchable form), and market actors will adapt to changing consumer expectations.").

160. The market or social norms could potentially lead search engines to offer services that could aid in digital expungement. One such service could remove links upon request or make them practically invisible in a search query. A strong demand for this kind of service could lead consumers to use search engines that offer the service and abstain from using search engines that do not. But these potential mechanisms would be highly controversial and unlikely, as they would allow for the censorship of large swaths of information. Mainly, they require search engines to act against their business models, which rely on information. For a review on the market and social norms as potentially regulating the availability of online information, see Haber, *supra* note 153, at 162–63.

161. For example, Webcide.com "employs advanced techniques and patented technologies to help push the content you want to see higher up the search engine pages, whilst effectively pushing the detrimental content beyond page 1." *Online Reputation Management Services by Webcide.com Now in Abuja, Nigeria*, WEBCIDE, https://www.webcide.com/online-reputation-management-nigeria (last visited Dec. 21, 2017); *see also* BRANDYOURSELF, https://brandyourself.com/about (last visited Dec. 21, 2017) (offering its subscribers the chance to "clean up, protect and improve your online reputation"). RemoveSlander offers reputation management services and website suppression. *See* REMOVESLANDER, http://www.removeslander.com (last visited Dec. 21, 2017).

tempts have been made to raise awareness and improve the ability to erase expunged records from databases,[162] such efforts will be insufficient to solve the problem as long as there is high demand for criminal background checks, and especially when many users of this information would most likely prefer the inclusion of criminal history that was expunged. Generally, change in the market would require the acknowledgment of a proprietary right in personal information, and only then could market actors adapt to changing consumer expectations. This change, however, is unrealistic under the American view of personal data. While online intermediaries sometimes include the possibility of data removal in their policies, without any visible or direct form of regulation obliging them to do so, such removal is usually reserved for content around which a strong negative consensus has formed, like child pornography and revenge porn.[163] The nature of expungement—which varies from state to state—will not likely lead to such consensus. Thus, unless users of criminal history records acknowledge and mutually agree on the importance of expungement, social norms will not likely aid.

In a more limited context, social norms might reduce the practice of publishing mugshots. Even prior to legal proceedings against the practice of requesting payment for removal of mugshots—of which outcomes are currently unknown[164]—some payment companies found this practice activity repugnant and decided to drop mugshot websites as customers.[165] Currently, even though this practice is limited to one form of online criminal history—that of mugshot websites—this strategy will not likely succeed in the long run since other methods of payment could replace the traditional, currency based, payment companies (for example, e-currency). Potentially, social norms could drive search engines to restrict linking to these websites in their policies without regulation.[166] However, aside from the fact that

162. Projects like The Expunged Record attempt to aid individuals with expunged records to reintegrate into society by raising awareness to the practices of data brokers; listing active data brokers with verified mailing addresses and contact information; providing a case-by-case advice, referrals, and recommendations; or even managing the enforcement process for individuals. EXPUNGED RECORD, https://www.theexpungedrecord.com (last visited Dec. 21, 2017).

163. Google, for example, will remove links to "sensitive personal information" like child sexual abuse imagery and revenge porn. *Removal Policies*, GOOGLE, https://support.google.com/websearch/answer/2744324 (last visited Dec. 21, 2017); *see also* Joanna Walters, *Google to Exclude 'Revenge Porn' from Internet Searches*, GUARDIAN (June 21, 2015), http://www.theguardian.com/technology/2015/jun/20/google-excludes-revenge-porn-internet-searches. For more on legal mechanisms to deal with revenge porn, see Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

164. *See* Class Action Complaint at Law and Equity, Babiola v. Keesee, No. 1:16-cv-02076 (N.D. Ill. Feb. 9, 2016).

165. David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html.

166. *Id.*

this solution requires a change in the social norms followed by these websites, search engines, which rely on the wide availability of information online, will not likely remove content wholesale without regulation, even if they operate in a monopolistic or an oligopolistic market.

2. Technology

Technology has created the need for digital expungement and could also play a role in aiding it. The use of technology greatly influenced the market for criminal history records with the shift to digital data practices. The government could try to turn the tables by ceasing the practice of selling data sets of criminal histories. Instead, the government could sell each record separately (and charge per-record fees) or simply allow only direct access to updated databases run and overseen by the government.[167] Then, the efficacy of digital expungement should improve as the data mining industry will be forced to go back to a case-by-case request paradigm.[168] However, this would require a change in practice by the government, which would be difficult to achieve absent some substantial incentive other than legal intervention. Moreover, it would not affect the data sets that were already sold.

Other potential technological solutions (with or without the use of law) will generally require a pragmatic solution for automatically updating criminal records gathered by third parties. Such solutions could be in the form of setting expiration dates on data;[169] offering individuals a "reputation bankruptcy,"[170] which would give them the ability to de-emphasize, anonymize, or entirely delete online information about themselves from time to time; or shaping search engine algorithms to de-emphasize certain websites

167. While not applying to court records, the Privacy Act of 1974 grants individuals a right to access and correct information about themselves held by federal agencies and restricts federal agencies' collection, use, and disclosure of personal information. Subsequently, individuals are entitled to review their records upon request and ask to correct inaccurate data, and they could bring civil actions against the agency for failure to comply. *See* 5 U.S.C. § 552a(b)–(g) (2012); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1161 (2002).

168. *See* COMMERCIAL DATA MINING, *supra* note 155, at 29 (discussing the advantages and disadvantages of this proposal).

169. For this potential solution in the context of privacy and data control, see VIKTOR MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE 171–95, 198 (2009); Haber, *supra* note 153, at 160; Jeffrey Rosen, *The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google*, 80 FORDHAM L. REV. 1525, 1535 (2012); Michael L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to Be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J.L. & TECH. 349, 382–84 (2015).

170. *See* JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 228–29 (2008).

that offer criminal history records. Google has already attempted to do the latter,[171] but the change is fairly limited to mugshot websites.

Other than search engine changes, these technological solutions are problematic in the context of criminal history records. For instance, expiration dates are not ideal because expungement is ex-post in nature, and it occurs mostly under discretion of courts. Other propositions would not advance digital expungement enough, would be highly difficult (if not almost impossible to conduct), would be time-consuming, and would most likely require legal intervention, which would be difficult to achieve. Technology is therefore insufficient, on its own, to aid in digital expungement ex-post, especially without concomitant changes in market forces, changes in social norms, or legal intervention. As mentioned, due to the uniqueness of the market for non-updated information, even practical technological solutions are unlikely to be implemented by commercial entities.

3. Law

Both Congress and state legislatures have acknowledged the need to use legislation to reduce the consequences of expungement in the digital era. These ex-post legal measures could improve the chances of digital rehabilitation, as they target both data brokers and some online platforms such as mugshot websites. However, while important, current legal measures are still limited in their scope, as this Section further analyzes, and are therefore insufficient to properly address the need for digital expungement.

One of the legal methods deployed was based on deterrence. At both the federal and state levels, policymakers imposed liability on data brokers that stored and divulged criminal history records if they were not kept up-to-date. On the federal level,[172] the FCRA imposed various obligations on data brokers. Federal legislation, however, was limited in its ability to deal with criminal history records.[173] Moreover, it seems that it was insufficient, as data brokers were not deterred by potential sanctions and liability for

171. *See* Fields & Emshwiller, *supra* note 84 ("In the past year Google Inc. has changed its search algorithm to de-emphasize many so called 'mug-shot' websites, giving them less prominence when someone's name is searched.").

172. *See supra* Part III.A.

173. The inter-jurisdictional nature of the U.S. penal system could make uniformity problematic. Any attempt to legislate federal laws that will supposedly unify digital rehabilitation will most likely exclude criminal conduct regulated differently across the United States—some states do not have expungement statutes or have relatively limited ones. *See* Wayne, *supra* note 58, at 278 (excluding "variations in state laws with respect to felony, juvenile, and sex-related convictions").

breaking the law.[174] On the state level, a few states prohibited data brokers from producing reports containing, inter alia, arrests, indictments, or convictions, usually after some time period has elapsed.[175] Some states attempted to ensure that criminal history information is kept up-to-date by setting deadlines for updates.[176]

From a consumer perspective, the FCRA and state legislation do not provide adequate protection from the harms caused by the use of digital data.[177] Individuals are unlikely to succeed in bringing private suits based on privacy violations.[178] The publication of truthful information on their criminal history—even if it was expunged—is unlikely to violate their right to privacy.[179] A potential legal solution would be to grant them a cause of ac-

174. While not by a formal statement, it is interesting to note that a staff attorney at the Federal Trade Commission even warned data brokers that "[e]xpunged records may not be reported because legally they don't exist," but that warning did not lead to changing their practices. Palazzolo, *supra* note 25.

175. Take Montana, Nevada, and Washington as examples. Montana prohibits consumer reporting agencies to make any consumer report containing, inter alia, arrests, indictments, or convictions more than seven years old. MONT. CODE ANN. § 31-3-112 (West 2015). Also, all records and data relating to a criminal charge, after dismissal following deferred imposition of sentence, become confidential and accessible only by a court order. *Id.* § 46-18-204. Nevada requires reporting agencies not to disclose a report of criminal proceedings, or other adverse information, excluding a record of a conviction of a crime, which precedes the report by more than seven years. NEV. REV. STAT. ANN. § 598C.150(2) (LexisNexis 2010). Washington prohibits the dissemination of arrest records, indictments, or records of crime conviction older than seven years from the date of disposition, release, or parole. WASH. REV. CODE ANN. § 19.182.040 (West 2013).

176. In Connecticut for example, consumer reporting agencies are required on a monthly basis or other schedule set by the Judicial Department to update records and permanently delete any "criminal matters of public record" obtained from the Judicial Department. *See* CONN. GEN. STAT. ANN. § 54-142e (West 2009).

177. *See supra* Part III.

178. Consider this key example of an attempt to use the tort of defamation as a viable cause for action regarding expungement. On June 12, 2006, a Superior Court judge in New Jersey granted G.D. a petition for an order expunging records of drug conviction, arrest and the charges. *See* G.D. v. Kenny, 15 A.3d 300, 305 (N.J. 2011). After the expungement, political smear fliers referring to the convictions were distributed by members of an opposing candidate's staff of G.D. (at that time, an aide to a political candidate in New Jersey). *Id.* at 305–06. In return, G.D. filed for a defamation suit. *Id.* at 304. In *G.D. v. Kenny*, the New Jersey Supreme Court ruled in favor of the defendant on grounds of a truth defense protected by the First Amendment (expungement does not mean that criminal history is untrue) and on the grounds that expungement does not directly lead to a reasonable expectation of privacy. *Id.* at 314, 321; *see also* Eagle v. Morgan, 88 F.3d 620, 626 (8th Cir. 1996) ("[S]tate laws, such as Arkansas' expungement provisions, do not establish the parameters of constitutional rights, like the right to privacy, that are grounded in substantive theories of due process."); Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir. 1995) (noting that the "disclosed information itself must warrant constitutional protection" but that an expunged criminal record "is not protected by the constitutional right to privacy"); Wayne, *supra* note 58, at 271–74.

179. Under the invasion of privacy tort claim, individuals with expunged records could potentially argue that any publication of facts regarding their expunged criminal history could constitute an invasion of privacy. These claims, however, are unlikely to prevail. *See, e.g.*, Gates v. Dis-

tion to recover damages for either negligence or intentional dissemination of expunged information.[180] This solution, however, might pose at least two main constitutional challenges. First, under the constitutional standing doctrine, individuals might lack a private right of action to file suit without demonstrating an injury in fact.[181] Second, this solution poses constitutional challenges of impeding speech, which will be further discussed in the next Section. Aside from the constitutional aspects, private causes of action will be generally insufficient as they could be costly and difficult to prove, among other barriers.[182]

Few policymakers have attempted to regulate criminal history records from the aspect of their end use by, inter alia, potential employers and landlords. Some states required employers to use a fair employment policy like ban the box.[183] By law, many employers must refrain from asking about an individual's criminal history (in many instances until the interview phase or a late stage in the process).[184] Moreover, both federal and state laws generally prohibit employment discrimination based upon criminal history, which includes arrests and even some convictions.[185] These initiatives have been met with some criticism in the kinetic world.[186] But beyond criticism of banning the physical box, banning the digital box—and generally placing limitations on end users—is not pragmatic. It would be nearly impossible—and unwise to a great extent—for policymakers to regulate what end users are doing online. Such policies would censor the use of the internet, would not be enforceable,[187] and would not likely be constitutional.

There are other ex-post legal measures that could be deployed, at least theoretically. Congress could place an affirmative duty on data brokers to disclose incorrect information, which could include: removing expunged

covery Commc'ns, Inc., 101 P.3d 552, 562 (Cal. 2004) ("[A]n invasion of privacy claim based on allegations of harm caused by a media defendant's publication of facts obtained from public official records of a criminal proceeding is barred by the First Amendment to the United States Constitution.").

180. *See* COMMERCIAL DATA MINING, *supra* note 155, at 23 (discussing the benefits and drawbacks of granting data subjects the ability to sue data miners).

181. *See supra* notes 120–121.

182. *See supra* notes 120–121.

183. *See supra* notes 120–121.

184. A few states have adopted some type of ban the box policy that applies to employment. *See* LEGAL ACTION CTR., *supra* note 183, at 2; Joshua Gaines, *Vermont Becomes 8th State to Ban the Box in Private Employment*, COLLATERAL CONSEQUENCES RES. CTR. (May 5, 2016), http://ccresourcecenter.org/2016/05/05/vermont-becomes-8th-state-to-ban-the-box-in-private-and-public-employment.

185. Jacobs & Crepet, *supra* note 80, at 212 (listing examples of federal and state legislation prohibiting employment discrimination).

186. Jagunic, *supra* note 104, at 175–76 (criticizing the applicability of "ban the box" initiatives).

187. *See* Jacobs & Crepet, *supra* note 80, at 212.

convictions[188]; implementing oversight regimes to enforce any requirement that data brokers regularly update their records[189]; and setting a deadline for data brokers to dispose of criminal history records.[190] On the state level, state legislatures and perhaps state governors could impose further limitations on the dissemination of data by state and local agencies. States could require that agency records always be updated, and that they provide these updates to data brokers.[191] Enforcement of statutes could be accomplished by imposing monetary sanctions on data brokers on a strict liability basis; imposing other civil sanctions like revoking or suspending business licenses; imposing criminal sanctions; and finally, granting a citizen suit provision for harms caused by violations.[192] To address the fears of employers that might face legal liability for negligent hiring, policymakers could substantially limit this cause of action.[193] Regarding end users, policymakers could expand and enforce the prohibition against end users being exposed to expunged records, or making decisions upon such exposure.[194]

Another legal solution would be regulation through information. We can shape expungement statutes so they will provide certificates of recovery or relief to individuals with a criminal history who meet the requirements set by the law. Such a certificate—which already exists in some states[195]—would be used by individuals with an expunged criminal record when applying for a job, for example. Even if the employer searches the candidate's name, he will only find information that the candidate already disclosed. One study on Ohio's certificates of recovery or relief found that such certificates were effective in facilitating employment opportunities for

188. *See* Wayne, *supra* note 58, at 278.

189. *Id.* at 279; 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, 379–80 (2016).

190. *See* Wayne, *supra* note 58, at 279.

191. *Id.* at 280.

192. *Id.* at 280–81.

193. See, for example, North Carolina's provision limiting employers' liability for negligent hiring. N.C. GEN. STAT. § 15A-173.5 (2015); LEGAL ACTION CTR., *supra* note 183, at 6.

194. For other propositions that mostly relate to data brokers, see Roberts, *supra* note 32, at 344–45 (discussing methods to limit the use of criminal history).

195. Usually referred to as a "Certificate of Rehabilitation" or a "Certificate of Good Conduct," a few states created such certificates of recovery or relief, intended to lift occupational licensing restrictions, limit employer liability for negligent hiring or retention lawsuits, and ensure employment decisions about certificate-holders are made on a case-by-case basis. *See* Pierre H. Bergeron & Kimberly A. Eberwine, *One Step in the Right Direction: Ohio's Framework for Sealing Criminal Records*, 36 U. TOL. L. REV. 595, 596 (2005); 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), http://ylpr.yale.edu/sites/default/files/IA/leasure.certificates_of_relief.produced.pdf; Irina Kashcheyeva, Comment, *Reaching a Compromise: How to Save Michigan Ex-Offenders from Unemployment and Michigan Employers from Negligent Hiring Liability*, 2007 MICH. ST. L. REV. 1051, 1077 (2007).

people with a criminal record.[196] But as effective as these certificates may be, the fact remains that the mere knowledge of criminal history could still play an important role in the employer's decision regardless of rehabilitation,[197] and the employer might still fear potential tort liability for negligent hiring. Therefore, a certification program cannot fulfill the purpose of expungement—that is, to make it as if the individual never offended in the first place.

Contextualization is another potential form of remedy. The state can issue a digital certificate of rehabilitation sent to content providers directly. Upon receiving a verified certificate of rehabilitation, content providers will allow individuals to add context to links—information next to any reference to the criminal history that was expunged. It should be noted that compelling content providers to allow contextualization text might be unconstitutional as compelled speech and could potentially violate the First Amendment, because the government cannot oblige expression against one's will.[198] However, if the government merely incentivizes this behavior by granting, for example, a safe harbor from liability, then the constitutional debate might not arise. Having said that, contextualization would still be insufficient due to the potential bias of end users.[199]

To specifically deal with the practice of mugshot websites, policymakers could reduce their profitability by restricting the practice of charging fees for removal (their so-called extortion practices), or any other financial gains from their operations.[200] While proscribing this practice altogether

196. Leasure & Andersen, *supra* note 195, at 20.

197. *See* TRAVIS ET AL., *supra* note 30, at 31 (citing a survey that indicated that "two-thirds of all employers indicated they would not knowingly hire an ex-offender and at least one-third checked the criminal histories of their most recently hired employees"); Jacobs, *supra* note 42, at 390 ("Employers often associate a criminal record with unreliability, untrustworthiness, and dangerousness."); Mayfield, *supra* note 61, at 1064 ("[J]ob applicants with criminal records face substantial obstacles in gaining work because of the biases held against them by many employers."); Pager, *supra* note 41, at 942–43 (noting that employers are strongly averse to hiring ex-offenders); Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133, 136 (1962).

198. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 707, 717 (1977) (holding that it is not constitutionally permitted for New Hampshire statutes to require that noncommercial motor vehicles bear license plates embossed with the state motto "Live Free or Die").

199. *See supra* note 197.

200. *See, e.g.*, CAL. CIV. CODE § 1798.91.1 (West 2009) (prohibiting publishers of a booking photograph from soliciting, requiring, or accepting a fee or other consideration from a subject individual, as defined, to remove, correct, modify, or to refrain from publishing or otherwise disseminating that photograph, as specified); COLO. REV. STAT. ANN. § 24-72-305.5 (West 2015); 815 ILL. COMP. STAT. ANN. 505/2QQQ (West 2008 & Supp. 2017); UTAH CODE ANN. § 17-22-30 (LexisNexis 2013). For a full review of state legislation that places limitations on such websites, see *Mug Shots and Booking Photo Websites*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 3, 2017), http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx.

might be difficult, if not almost constitutionally impermissible as such restrictions could raise First Amendment concerns,[201] it appears that these extortion practices have ceased for now.[202] Still, even upon regulating direct profits of these websites, it is rather intuitive that as long as there will be a market demand for this information, their operators will find a legal way to still make profits. Subsequently, these restrictions could perhaps lead to the formation of grey or black markets for this type of information.

Perhaps the only effective ex-post solution for enabling digital expungement is to follow the EU's recognition of control over personal information. This solution would grant individuals a legal right to compel either the holder of information or other entities that grant access to it, to update or remove such information, and thus make it inaccessible to the public.[203] Furthermore, individuals could be granted a legal right to sue over the public disclosure of private facts, as publishing this information serves no public purpose.[204] If the United States were to follow the EU in granting a right of erasure, even if narrowly tailored only to deal with expunged criminal history records, then data subjects could be granted the ability to reintegrate into society.

Under this approach, individuals would be granted the right to approach any holder of information (including data brokers and online providers) and demand that they delete and cease disseminating criminal history records that were expunged. A narrowly tailored right to be forgotten (or right of erasure) regarding expunged records could take this form: Individuals whose criminal history was expunged will be granted a certificate of expungement, preferably in a digital form. Then, they would send an online form (which would also be available offline, for individuals without access to technology or with low technological capabilities) to a state agency requesting the removal of their expunged records from data brokers' databases and from search engines with sites that contain expunged information appearing upon a search for their names. For purposes of convenience, and to raise awareness about this right, every search engine will make the form accessible from their removal policy page. Data brokers, under this new approach, will be required to register and be licensed by the state in order to

201. *See* Segal, *supra* note 165.

202. Recently, several states, including Florida, made it illegal to charge fees for the removal of mugshots. *See* S.B. 118, 2017 Leg., 119th Sess. (Fla. 2017) (enacted), http://laws.flrules.org/2017/130. It would be interesting to see if these laws will be challenged on First Amendment grounds.

203. Arguably, courts could attempt to restrict the availability of expunged records as a manifestation of their inherent power to enforce their orders. *See* United States v. Hudson, 11 U.S. (7 Cranch.) 32 (1812). The question is whether the availability of information online undermines the expungement order, and whether such enforcement will be constitutionally permitted.

204. It should be noted that this tort does not generally exist in every state. *See* Pasquale, *supra* note 129, at 519 n.14.

operate, must permanently delete any expunged records from their database, and frequently—not merely periodically—update any new datasets they receive (if not already updated by the state). Failure to comply within a highly limited timeframe set by the state would result in revocation of their license. In exchange for a safe-harbor provision, which would shield them from potential liability, search engines will be notified by the state to remove certain sites, which in turn will be delisted from search results relating to the individual's name.

A right to be forgotten, however, even if limited to expunged criminal records, will be deemed too radical under the U.S. legal regime. Such a right necessitates changing the perception of reputation protection, which is not within the existing constitutional right to privacy in the United States.[205] As further explained, it would likely be deemed censorship of speech and of the press that violates the First Amendment[206] and thus, is unlikely to pass constitutional scrutiny. Finally, it would be highly impractical to enforce such a right, as many websites holding criminal history records might be outside of U.S. legal jurisdiction and hence not within reach.[207]

Thus, the main challenge for legislating a right of digital expungement is the Constitution. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ."[208] The risk to speech in the digital world is different from the kinetic world. If a journal published an article that described the conviction of a person, expungement would not generally cause the destruction of the published article or impose liability on its publisher.[209] But unlike in the digital world, it would be much more difficult for others to find the journal article in the kinetic world. Hence, the free speech argument will only arise when dealing with the digital world, as expungement seems irrelevant in many, if not most, analog cases.

Imposing content restrictions on search engines would endanger freedom of speech, and hence, would be unconstitutional. Expunged criminal history will not generally fall into the exceptions to the First Amendment's

205. *See* JACOBS, *supra* note 97, at 186.

206. *See* U.S. CONST. amend. I.

207. Personal jurisdiction—a court's power to exercise its authority over an individual—could be challenging, especially with online activities. For more on personal jurisdiction, see, for example, Chris Rojao, *Buy It Now: Establishing Personal Jurisdiction over Out-of-State Defendants Who Conduct Business Through Online Intermediaries*, 43 SETON HALL L. REV. 1075 (2013).

208. *See* U.S. CONST. amend. I.

209. While in *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 43–44 (Cal. 1971), *overruled by* Gates v. Discovery Commc'ns, 101 P.3d 552 (Cal. 2004), the court held that publication of true, but not newsworthy, information concerning the criminal past of a rehabilitated convict could be an actionable invasion of privacy, other courts have held the opposite. *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496–97 (1975).

protection.[210] If Congress were to impose restrictions based on the content of criminal history, those restrictions must be narrowly tailored to serve a state interest of the highest order, and be the least restrictive means available to further the articulated interest.[211]

Arguably, a state interest exists in the core of expungement statutes—to reduce recidivism by enabling rehabilitation. As previously acknowledged in Part I, rehabilitation is an important part of the penal system, and expungement is an integral part of ensuring the reintegration to society. However, under the current interpretations by U.S. courts, rehabilitation is not considered an interest of the highest order.[212] Thus, prohibiting publication of public information, even if it would be relabeled as private information after expungement, could not be considered as serving a state interest of the highest order.

Whether releasing mugshots is mandatory under the Freedom of Information Act, or whether mugshots fall under the exemption for releasing personal files, which would constitute a clearly unwarranted invasion of personal privacy, is still unclear.[213] But without such clarity, the sole remedy regarding expungement, which is akin to a right to be forgotten in the United States, exists in the form of removing mugshots, and is currently

210. There are exceptions to the First Amendment's protection. For example, defamation, incitement, obscenity, and child pornography are not protected speech. The only relevant speech in this instance could be defamation. Under this argument, publishing information that was expunged is false and widely available to individuals other than the person defamed. However, while publishing criminal history could undermine a need for searching for the truth, it does not qualify as false information, even if it was later expunged. The information is truthful in the sense that the details, as described, were true at that time—and thereby not defamatory in nature. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children."); *Cox Broad. Corp.*, 420 U.S. at 491 (holding that the state may not impose sanctions on accurate publication obtained from public records); Miller v. California, 413 U.S. 15, 23–24 (1973). For more on the First Amendment and its relevancy to expungement, see generally William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995).

211. *See, e.g.*, Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979).

212. Gates, 101 P.3d at 557–61 (holding that any state interest in protecting for rehabilitative purposes the long-term anonymity of former convicts *are not* to be considered of the highest order); *see also* Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989); *Daily Mail Publ'g Co.*, 443 U.S. at 103 (setting the "highest order" standard); Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 310–12 (1977).

213. Detroit Free Press, Inc. v. U.S. Dep't of Justice, 73 F.3d 93, 98 (1996), *overruled by* Detroit Free Press Inc. v. U.S. Dep't of Justice, 829 F.3d 478 (6th Cir. 2016) (holding that the Freedom of Information Act ("FOIA") exemption does not apply to booking photographs created by federal law-enforcement agencies); *cf.* Detroit Free Press, Inc. v. U.S. Dep't of Justice, 796 F.3d 649, 651 (6th Cir. 2015) (urging the full court to reconsider whether Exemption 7(C) applies to booking photographs), *vacated on reh'g*; World Publ'g Co. v. U.S. Dep't of Justice, 672 F.3d 825, 831–32 (10th Cir. 2012) (holding that mugshots are covered by the FOIA exemption for privacy); JACOBS, *supra* note 97, at 197–99.

limited. In Oregon, for instance, individuals can request the removal of mugshots if they can prove that they were acquitted or that their record has been expunged.[214] If legally challenged, however, this law would likely be deemed unconstitutional.

All in all, as long as the United States treats criminal history records as public records, regulating the use of these records will be unconstitutional, even if they were expunged. Therefore, policymakers cannot ban publication of the name of anyone connected to a criminal proceeding, regardless of whether it was expunged or not. An ex-post approach is therefore not legally feasible or pragmatic in the United States, and other measures of enabling digital expungement are necessary.

B. Ex-Ante *Expungement*

An ex-ante approach to digital expungement necessitates regulating the use of criminal history records in general, regardless of expungement statutes. The market, social norms, and technology, much like with ex-post regulation, will be insufficient on their own to aid in digital expungement ex-ante. Legal intervention in this instance would take the form of regulating the dissemination of information in the first place,[215] and not merely changing a particular item after the data has changed. While this form of regulation will not be easily achieved, it might be the only pragmatic, constitutional solution available in the United States.

1. Ex-Ante *Regulation on Data Brokers*

From the perspective of data brokers, there are a few approaches that would eliminate, or at least substantially reduce, the dissemination of expunged criminal history records ex-ante. Naturally, an ex-ante approach would require that criminal history records not be disseminated in the first place, or be disseminated only after meeting certain requirements.

An extreme ex-ante approach would be to completely outlaw the practice of data brokers selling criminal histories.[216] With some exceptions, the state can either ban the practice directly, or ban the practice indirectly by

214. OR. REV. STAT. § 646A.806 (2015).

215. *See* Murray, *supra* note 189, at 380 ("Perhaps the best way to limit the effect of criminal record history information is to prevent its systematic creation in the first place, even after an individual encounters the system.").

216. Unlike the United States, the EU's approach towards criminal record-based employment discrimination is different. While both do not generally prohibit this form of discrimination, EU privacy laws place restrictions on access to and dissemination of conviction (and arrest) information. *See* James B. Jacobs, *European Employment Discrimination Based on Criminal Record II—Discretionary Bars*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 13, 2015), http://ccresourcecenter.org/2015/01/13/european-discretionary-employment-discrimination-based-criminal-record.

banning the end use of criminal history records. It can require end users to obtain criminal history records directly from individuals or the state—not data brokers.[217] However, aside from the potential constitutional constraints on this form of regulation,[218] this strong-arm strategy is unlikely to succeed for three reasons. First, these commercial vendors play a vital role in the market. They provide an efficient, and relatively cheap, method of conducting background checks while "reduc[ing] the burden on government clerks[,]" which "would otherwise consume public resources."[219] Because background checks are mandatory for some employers, and recommended for others,[220] a wholesale ban on the practice of data brokers is unlikely.[221] Second, without the ability to perform criminal background checks, employers might increase their indirect screening of potential candidates. For instance, based on the perceived correlation between criminality and race, employers may draw harmful inferences about particular ethnic groups. Basing their decisions on this form of discrimination could prove even more harmful to many individuals.[222] Thus, nondiscrimination laws, which forbid employers from using criminal records to deny employment or negatively discriminate against an individual based on a criminal record, would

217. The exceptions could be several. For example, when according to employment law, the job justifies an inquiry—like public service positions and perhaps some private positions as well—employers could disqualify any conviction for abuse of power, e.g., embezzlement and bribery, and other misconduct like theft, fraud, extortion, and forgery. Another example could be setting an exemption for specific crimes that might be perceived as crucial for public safety and will always remain public, such as sex offenses.

218. The Supreme Court has previously held that distribution of criminal history records by private parties is legally permissible and constitutional. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580–81 (1980); Paul v. Davis, 424 U.S. 693, 713 (1976). However, it should be noted that, at least concerning consumer reports, the District Court for the Eastern District of Pennsylvania ruled that they are considered as commercial speech, and thus entitled to a reduced First Amendment protection. *See* King v. Gen. Info. Servs., Inc., 903 F. Supp. 2d 303, 313 (E.D. Pa. 2012); JACOBS, *supra* note 97, at 179–81.

219. THE COMMERCIAL SALE REPORT, *supra* note 93, at 1 (quoting COAL. FOR SENSIBLE PUB. RECORDS ACCESS, PUBLIC BENEFITS FROM OPEN PUBLIC RECORDS 3, http://www.cspra.us/yahoo_site_admin/assets/docs/publicbenefits.31982156.pdf).

220. For example, after September 11, 2001, Congress mandated criminal background checks of hazardous material transporters; individuals who would have access to controlled areas of maritime facilities or biological agents; transportation personnel; and private security officers. *See* Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 70105, 116 Stat. 2064, 2073–74 (2002); Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, § 201, 116 Stat. 594, 637 (2002); Aviation and Transportation Security Act, Pub. L. No. 107-71, § 138, 115 Stat. 597, 639 (2001); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, § 5103a, 115 Stat. 272, 396–97 (2001); Jacobs & Crepet, *supra* note 80, at 209.

221. THE COMMERCIAL SALE REPORT, *supra* note 93, at 1.

222. For this potential form of statistical discrimination, see Raphael, *supra* note 92, at 518–19.

be insufficient as they are unenforceable and easily bypassed.[223] Finally, the government has a substantial interest in the information gathered by these private vendors, who often maintain larger datasets of information than the government. Indeed, the government frequently contracts with these vendors.[224]

A less radical solution would place more limited restrictions on the practices of data brokers. A few states acknowledged the social risks in the dissemination of arrest information and placed limitations on data brokers.[225] While this Article supports such a move, these restrictions will not solve the problem of digital expungement completely because they relate only to arrest information. Furthermore, such policies may still violate the First Amendment.

Another form of potential restriction on data brokers would be to regulate the practices of purchasing bulk data and maintaining databases.[226] This solution could improve chances of digital rehabilitation, at least as far as data brokers are concerned. It could ensure that their databases are updated, and that only non-expunged records are disseminated. While data brokers could find other ways to aggregate data,[227] this solution is still rather good for current practices.

Essentially, while important, placing restrictions on data brokers regarding criminal history records is insufficient. Even if they advance rehabilitation to some extent, these restrictions will not extend to online information, which would remain easily accessible by end users. Thus, while acknowledging the importance of regulating data brokers, policymakers must recognize that this move would be insufficient to fully enable digital rehabilitation.

2. Ex-Ante *Regulation of Information: The Public-Private Records Conundrum*

Enabling digital expungement requires the acknowledgment that any solution must apply to both data brokers and online sources, as regulating only one form of data dissemination would be insufficient to substantially

223. *See* Jacobs, *supra* note 42, at 412–14.

224. *See* Solove, *supra* note 167, at 1151.

225. Several states have precluded the reporting of arrests that did not result in convictions by consumer reporting agencies. *See, e.g.*, CAL. CIV. CODE § 1786.18(a)(7) (West 2009); COLO. REV. STAT. § 12-14-.3-105.3(1)(e) (2010); N.M. STAT. ANN. § 56-3-6(a)(5) (LexisNexis 2010); N.Y. GEN. BUS. LAW § 380-j(a)(1) (McKinney 2012); COMMERCIAL DATA MINING, *supra* note 155, at 21–22.

226. *See* Richard J. Peltz et al., *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms*, 59 ARK. L. REV. 555, 626 (2006); Kessler, *supra* note 89, at 439.

227. Jagunic, *supra* note 104, at 181; Kessler, *supra* note 89, at 439.

reduce, and naturally eliminate, the social collateral consequences of expunged criminal records. A comprehensive solution should begin by relabeling criminal history records as private information. This relabeling approach will cease dissemination of new information by both data brokers and online platforms. Unfortunately, this solution will not be easily achieved due to the deep-rooted perception of criminal history records as public information.

This solution relies on an approach to information privacy much like the approach that currently exists in many EU states—extracted from the perception of privacy as control over personal information (the privacy-control paradigm).[228] In the EU, criminal history records, including convictions, are conceptualized as personal information entitled to privacy protection.[229] They are not generally available to non-governmental agencies, except for the record subject.[230] In many instances, identifying information in criminal cases is anonymized in published judicial opinions.[231] The United States, on the other hand, considers criminal history records as public information "infused with public interest."[232] Furthermore, any government records deemed public are accessible by the Freedom of Information Act ("FOIA").[233] Enacted in 1966, FOIA was designed to "implement 'a general philosophy of full agency disclosure'" of government records.[234] Under FOIA, federal agencies are required to make their opinions and policy statements generally available to the public, and to make other records "promptly available" to any person who requests them.[235]

The U.S. treatment of criminal history records as public information is rooted within the perception that court records should be open to the pub-

228. First coined by Alan Westin in 1967, the privacy-control paradigm has gained much scholarly attention in the last few decades. *See generally* ALAN F. WESTIN, PRIVACY AND FREEDOM (1970). For more on the privacy-control paradigm, see generally ANN CAVOUKIAN & DON TAPSCOTT, WHO KNOWS: SAFEGUARDING YOUR PRIVACY IN A NETWORKED WORLD 9 (1997); Paul M. Schwartz, *Internet Privacy and the State*, 32 CONN. L. REV. 815, 816 (2000); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2059 (2004) (discussing privacy as a public good capable of generating commercial opportunities).

229. *See* JACOBS, *supra* note 97, at 163.

230. *Id.* at 159.

231. *Id.*

232. *Id.* at 188; *see also* Kevin Lapp, *American Criminal Record Exceptionalism*, 14 OHIO ST. J. CRIM. L. 303, 308 (2016).

233. *See* Pub. L. No. 89-487, 80 Stat. 250 (1966). Note that the Act was revised several times since its enactment in 1966. *See* Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974); Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976); Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, §§ 1801–04, 100 Stat. 3207-48-50 (1986); Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996).

234. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 754 (1989) (quoting Dep't of Air Force v. Rose, 425 U.S. 352, 360 (1976)).

235. 5 U.S.C. § 552(a)(2)–(3) (2012).

lic.[236] Unless confidentiality is required by law, or a case is sealed under the specific discretion of government officials, court records are public.[237] There are three main reasons that the U.S. legal system keeps criminal history records open to the public: public safety, transparency, and theories of punishment.

The first reason is public safety. Criminal activity is perceived as a legitimate concern to the public.[238] Such legitimate concerns extend to any public records and documents.[239] Even alleged criminal activity falls within this public safety argument, as presumably the public should be warned against potential offenders prior to hiring them, leasing their property to them, or even simply dating them. Thus, because non-conviction arrest data could be relevant in assessing risk by the public, the state must warn the public against any alleged criminal conduct even if it did not result in criminal proceedings. Expungement is treated similarly. While expungement makes these records publicly unavailable, it does not change their public nature.[240]

The public safety argument is generally unpersuasive, particularly regarding non-conviction and expunged records. Non-conviction arrest data—which is beyond the purposes of this Article's examination—is generally irrelevant to the public and should not be treated as public information. Arrests are in no way proof of guilt, and the presumption of innocence should be guaranteed. Otherwise, mere arrests would carry harsh collateral consequences even without indictment or conviction. Thus, the social collateral consequences must not result from an arrest, and if they do, they should be reserved for conduct that is deemed especially crucial for public safety such as sex offenses and violent crimes. Expunged records should be treated similarly. Because trial courts already balance state and private in-

236. Callanan, *supra* note 67, at 1291 ("Public access to the court system is one of the most basic rights within the United States' legal system."); *cf.* Solove, *supra* note 167, at 1155 (mentioning that early U.S. courts which followed the English practice of limiting access to documents was limited only to litigation purposes).

237. Solove, *supra* note 167, at 1153–54, 1159.

238. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975).

239. *Id.* at 495 ("Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media."); Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) ("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.").

240. *See* Kessler, *supra* note 89, at 411 ("[T]he expungement of a record does not alter its public nature."); *see also* Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 115 (1983), *superseded by statute*, Firearms Owners' Protection Act, 100 Pub. L. No. 99-308, 100 Stat. 449, *as recognized in* Logan v. United States, 552 U.S. 23, 127–28 (2007) ("[E]xpunction under state law does not alter the historical fact of the conviction."); Nunez v. Pachman, 578 F.3d 228, 231 (3d Cir. 2009) (holding that expunged information is "never truly private" because the criminal record is publicly available prior to expungement).

terests when determining whether expungement is appropriate,[241] not only is the public safety argument irrelevant, it is harmful. Successful expungement could actually improve public safety by reducing recidivism.[242]

Moreover, the public safety argument could be achieved by less restrictive means already deployed in other jurisdictions. In some jurisdictions, criminal history records are kept private, with an exception that allows, and even mandates in certain circumstances, individuals to provide a "certificate of good conduct" or "lack of a criminal record."[243] Individuals are able to request that governmental agencies conduct a local or state criminal records search and provide them with a document reflecting that there is no history of a criminal record. This process allows individuals to examine whether their expunged record appears in the database of the governmental agency. Yet the agency may still provide vital information to interested parties and thus address the public safety concerns to a great extent.

The second reason for maintaining open court records is transparency. Transparency, or openness, is generally perceived as an essential component of good governance,[244] and is considered important to allow the public and press to exercise their First Amendment rights.[245] Transparency is designed to enable public oversight of both governmental agencies and courts' actions. The public can serve as a "watchdog" and ensure that these bodies do not exercise their power beyond their legal mandate.[246] If someone is unlawfully arrested or prosecuted, the fourth and fifth estates'[247] involvement in the process is considered important for maintaining the proper checks and balances essential to the function of liberal-democratic states.

241. Murray, *supra* note 189, at 368.

242. For a summary of research on whether having a criminal record increases recidivism rather than protects the public, see Lapp, *supra* note 232, at 315, 320.

243. A similar approach currently exists in other jurisdictions like the EU and Israel. *See* JACOBS, *supra* note 97, at 159; Jacobs & Blitsa, *supra* note 78, at 194–95. Israeli law imposes criminal sanctions on the disclosure of a criminal record to anyone who is not the individual with the criminal record or other governmental agencies set by the law. *See* Crime Register and Rehabilitation of Offenders Law, 5741–1981, § 22, 35 LSI 398 (1980–81) (Isr.).

244. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

245. *See* Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 93 (2d Cir. 2004).

246. Solove, *supra* note 167, at 1140, 1173–74; *see also* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978) (explaining that the right to access public records is justified by "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" (citation omitted) (first citing state *ex rel.* Colscott v. King, 57 N.E. 535, 536–38 (Ind. 1900); and then citing State *ex rel.* Ferry v. Williams, 41 N.J.L. 332, 336–39 (N.J. 1879))); JACOBS, *supra* note 97, at 163.

247. "The historical conception of feudal societies [was traditionally] divided into [three] 'estates of the realm' . . . ." William H. Dutton, *The Fifth Estate Emerging Through the Network of Networks*, 27 PROMETHEUS 1, 1 (2009). The fourth estate is traditionally attributed to the media, while the fifth estate could be attributed to any networked individuals. *See id.* at 2; STEPHEN D. COOPER, WATCHING THE WATCHDOG: BLOGGERS AS THE FIFTH ESTATE (2006).

This transparency approach advocates fairness, integrity, and competence of enforcement agencies, judges, and courts.[248] In addition, transparency can be crucial for learning about public officials and candidates for public office.[249]

Oversight, however, could also be achieved within a perception of criminal history records as private: criminal proceedings could remain mostly open to the public and media to attend; lawyers are present almost from the moment of arrest; and defendants have a right to transcripts of the proceedings and to have their cases reviewed by an appellate court.[250] Moreover, oversight of the judicial system does not necessarily require publication of the name of the defendant.[251] Even without identifying information, the public can still have access to the relevant information such as the judge's, prosecutor's, and defense attorney's names, and the entire court proceeding.[252]

The third reason for maintaining open court records relies on theories of punishment. While rehabilitation endorses categorizing criminal history records as private, both deterrence and retribution theories could imply otherwise. Under the deterrence theory, keeping criminal history records public is essential for deterring potential offenders, as they would (allegedly) fear the eternal nature of their criminal activity.[253] Retribution could suggest that ex-offenders should be held accountable for their tainted biography as a form of punishment.[254]

The reasoning of punishment theories is also highly unpersuasive. The public availability of information does not necessarily lead to deterrence. Along with general criticism of deterrence theory in criminal sanctioning,[255] empirical research on the deterrent effects of community notification laws, specifically those for sex offenders often referred to as "Megan's Laws,"[256] suggest that not only did these laws fail to advance deterrence, but they in-

248. *See* JACOBS, *supra* note 97, at 191.

249. Solove, *supra* note 167, at 1173.

250. *See* Lapp, *supra* note 232, at 307.

251. Obscuring identity does exist in American law, especially when dealing with juvenile records, and it seems that this practice does not undermine oversight on these proceedings. *See id.* at 317–21 (describing the "Juvenile Exception").

252. *See* Callanan, *supra* note 67, at 1305.

253. *See* JACOBS, *supra* note 97, at 155. *But see* Lapp, *supra* note 232, at 314–15 (asserting that "the prevalence of offending" is more related to age than any other factor).

254. *See* JACOBS, *supra* note 97, at 299.

255. Deterrence theory has been widely criticized over the years. *See, e.g.*, Dan M. Kahan, *The Theory of Value Dilemma: A Critique of the Economic Analysis of Criminal Law*, 1 OHIO ST. J. CRIM. L. 643 (2004).

256. "'Megan's Laws' [usually] require the maintenance of databases of information about prior sex offenders and disclosure of their identities and where they live." Solove, *supra* note 167, at 1148. *See generally* Jane A. Small, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1459–60 (1999).

creased the chances of recidivism.[257] Retribution is equally uncompelling. Making the information public contributes to the punishment of the offender beyond the prescribed sentence. Even if we accept relying on deterrence and retribution as reasons for keeping criminal records public, these purposes should be weighed against the objective of rehabilitation and other goals of criminal law like reducing recidivism.

Along with the reasons discussed above, the American approach towards the publication of criminal records is rooted in the Constitution. The First Amendment grants the public a right to print and broadcast news about crimes and criminal justice events, including arrests, indictments, and trials.[258] It protects the right to publish information obtained from government records.[259] Another example is the Sixth Amendment, which grants criminal defendants the right to a public trial.[260] Under this right, there is a strong societal interest in public access to court proceedings.[261]

There are a few exceptions to the American approach towards the publication of criminal records, as court proceedings are not always open,[262] and dissemination of personal information is not always permissible.[263] FOIA, for example, permits agencies to refuse requests for "records or information compiled for law enforcement purposes" if public release "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[264] Currently, however, it seems that criminal history records do not fall within this exemption.[265]

There are also some exceptions to the general availability of criminal history records at the state level. A few states regulate the initial dissemina-

257. For such empirical analysis, see J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161 (2011).

258. *See* Press-Enter. Co. v. Superior Court, 464 U.S. 501, 516–18 (1984) (Stevens, J., concurring); Jacobs, *supra* note 42, at 410.

259. *See* Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 105–06 (1979) (holding that a West Virginia statute, that made it a crime to publish the name of any child connected with a juvenile proceeding without court permission, was unconstitutional because maintaining the juvenile's anonymity as a means of promoting rehabilitation is not an "interest of the highest order"); Okla. Publ'g Co. v. District Court, 430 U.S. 308 (1977) (per curiam); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975).

260. U.S. CONST. amend. VI. For an interpretation of this right, *see Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 7 (1986).

261. Jacobs, *supra* note 42, at 410.

262. *Press-Enter.,* 478 U.S. at 13–14 (mentioning exceptions that allow the closing of any court hearing); Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978) (ruling that a court can limit access to court records if it believes that access to those records "ha[s] become a vehicle for improper purposes").

263. For examples of U.S. laws that prohibit the dissemination of information under certain circumstances, see JACOBS, *supra* note 97, at 186–87.

264. 5 U.S.C. § 552(b)(7) (2012).

265. *See* JACOBS, *supra* note 97, at 173–75.

tion of criminal history records by limiting disclosure of information to the private sector. The State of Texas, for example, placed a limitation on the publication and sharing of certain criminal records with the private sector.[266] Some states have also differentiated between conviction and non-conviction data, and restricted dissemination accordingly.[267] Still, most states, and the federal government, generally take the approach that criminal history records are public information.

Generally, the emergence of new technologies necessitates rethinking the regulation of public records,[268] including criminal history records. The openness approach toward criminal history records could be overcome by findings showing that "closure is essential to preserve higher values and is narrowly tailored to serve" those values.[269] Relabeling all criminal history records as private will likely be held unconstitutional. Any proposal to relabel all criminal history records would probably not, therefore, be narrowly tailored because it encompasses certain sensitive criminal histories, which should remain public. The interests in making expunged records private could override other interests, as this Article argues.

This Article suggests taking a graduated approach toward criminal history records, which would be narrowly tailored to serve the interests of rehabilitation-by-expungement. This approach could aid in reducing the collateral consequences faced by those who were never convicted or who are eligible for reform. This graduated approach would require reexamining current criminal offenses and relabeling each based on the potential collateral consequences of making the record of a conviction under the offense publicly available. Beyond the necessity of labeling criminal rehabilitation as a state interest of the highest order—a change in perception that would not be easily achieved—this approach would require a few steps.

The first step would be to make non-conviction criminal history records private. Criminal charges should not be considered as an indication of a defendant's guilt. At the very least, if the rationales behind keeping criminal records publicly available prevail, the United States could use pseudonyms for criminal proceedings prior to conviction. This would allow the public to be notified of proceedings while keeping the subject safe from

266. *See* GAEBLER, *supra* note 41, at 26–28.

267. Kentucky, for example, limits disclosure of non-conviction data to criminal justice agencies and research purposes—unless otherwise authorized by statute, ordinance, executive order, or court order. 502 KY. ADMIN. REGS. 30:060 (2009). Louisiana limits the dissemination of reports containing non-conviction records. LA. STAT. ANN. § 15:548 (2012). In Nebraska, the notation of arrest is removed from the public record under certain circumstances. NEB. REV. STAT. § 29-3523 (2008).

268. *See* Solove, *supra* note 167, at 1140.

269. Press-Enter. Co. v. Superior Court, 478 U.S. 1, 13–14 (1986) (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984)).

collateral consequences absent conviction.[270] In rare cases, where there is a strong public interest in publication of a non-conviction criminal record that is evident and overrides the interest of rehabilitation, there could be full public disclosure. Obviously, it would be difficult to prevent individuals who, for example, witnessed their neighbor's arrest from reporting it online or by any other means. Still, this approach could dramatically decrease the publicity of these events.

The second step would directly relate to expungement. After conviction, the state would differentiate between offenses that are eligible for expungement and those that are not. The latter will become public immediately. Specific offenses that require community notification, like sex offenses, could remain public.[271] As for the former, the information will generally remain private, accessible only to governmental agencies. Upon release from prison, the state would decide whether the public interest necessitates the release of such information, depending mostly on the subject's eligibility for expungement.

This approach could also integrate other exceptions to the general rule. For example, if the state decided that some types of work, like working with children and other vulnerable populations, require employees who have never been convicted of a crime (even if expunged), then policymakers could create exceptions. These employers could file a request for the criminal history records of an individual, and the state would search a database tailored to meet these needs.

As long as a right to digital expungement does not exist, and policymakers fail to implement a graduated approach to criminal history records, other methods of decreasing the potential collateral consequences that arise from digital technology must be considered. Policymakers could, for example, influence employers, landlords, and educational institutions to hire, lease property to, and enroll students with expunged criminal histories by granting monetary and non-monetary incentives.[272] Mainly, acknowledgment of the problem must be deeply rooted in the justice system. Infor-

270. *See* Callanan, *supra* note 67, at 1292 (giving the example of using pseudonyms in adoption cases).

271. *See supra* note 256.

272. An example of such suggested incentive programs is extending tax incentives to employers (or others for that matter) who agree to hire all or some specified categories of ex-offenders. One such example is the Work Opportunity Tax Credit that provides tax incentives for employers who hire persons with felony records in some circumstances. *See* EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, EMPLOYERS: 8 WAYS TO EARN INCOME TAX CREDITS FOR YOUR COMPANY 3 (2012), http://www.doleta.gov/business/incentives/opptax/PDF/wotc_fact_sheet_new.pdf; *see also* Franklin & Johnsen, *supra* note 60, at 771–73 (offering various solutions instead of expungement which rely, inter alia, on incentives to employers and landlords); Jacobs & Crepet, *supra* note 80, at 212–13 (listing examples of federal and state legislation prohibiting employment discrimination).

mation about collateral consequences in general,[273] and in the digital age in particular, is essential in reducing their negative impact.[274] To ensure the possibility of reintegration into society, policymakers, the judiciary, and individuals in society must acknowledge the impact of distributed networks and the wide availability of information on individuals with criminal history.

On a more abstract level, this Article also strongly encourages policymakers to reconsider alternative corrective measures for criminal law. They should generally increase the availability of expungement in the kinetic world. Judges should also consider the possibility of collateral consequences, which could be enhanced in the digital era, when deciding the scope of punishment. Defendants need to understand better the consequences resulting from a guilty plea.[275] In essence, while many courts rule differently, collateral consequences are punishment, especially in an era where information is widely available and accessible to everyone at any given time.

Overall, a right to digital expungement is clearly a necessity. While the U.S. legal system places many limitations on the regulation of content, policymakers must reconsider the need to make criminal history records public. A graduated approach to digital expungement is perhaps the only practical way to reduce the social collateral consequences of a criminal record in the United States, and it requires the reconceptualization of criminal history records as private information as the default, with set exceptions for public safety.

V. CONCLUSION

Rehabilitation in America is profoundly at risk. While prior to the digital age, the architecture of the kinetic world made criminal history records effectively invisible to the public, the digital age made them almost eternal. With the easy and wide availability of information via distributed networks, it would be presumptuous to assume that legal measures in liberal democracies could eliminate all traces of records that were expunged. People can always talk, text, post on social media or blogs, and find other ways to

273. *See* Chin & Holmes, *supra* note 32, at 699 (arguing that most attorneys are not required to inform defendants about collateral consequences); Pinard, *supra* note 31, at 686 (discussing the importance of bringing collateral consequences "to the surface.").

274. *See* Murray, *supra* note 189, at 381 (arguing that "the most important piece of the puzzle relates to awareness of the limits of expungement and how those shortcomings relate to the effect of collateral consequences").

275. Such an attempt was previously made by the ABA when they issued a number of standards designed to inform criminal defendants of collateral consequences of a plea or conviction. *See* Bergeron & Eberwine, *supra* note 195, at 596. *See generally* Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119 (2009).

communicate regarding the criminal activity of an individual. The practices of data brokers and online services like mugshot websites make this information more readily available and accessible to anyone. As regulating content in the United States is almost an impossible task due to the First Amendment, the only pragmatic method for reducing the social collateral consequences of criminal history records in the United States is to reconceptualize criminal history records, or at least large portions of them, as private information by default.

Even this reconceptualization is not easily achieved. The U.S. perception of criminal history records as public is rooted within the legal system. Under this perception, from the moment of arrest, individuals are bound to have a publicly available criminal record. But acknowledgment of the negative effects of the digital environment on criminal rehabilitation must not be overlooked. Expungement must be revisited and revised to address the challenges of digital technology to rehabilitation. Failure to acknowledge the importance of digital expungement could have dire consequences, not merely on those individuals with a criminal history, but also on related, wholly innocent members of society. Ignoring this problem will likely increase recidivism as individuals are effectively barred from reintegrating into society. Essentially, digital technology should not lead to the demise of criminal rehabilitation, and policymakers must incorporate methods of ensuring a right to digital expungement.