

THE RIGHT TO SOCIAL EXPUNGEMENT

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ABSTRACT

In recent years, policy makers advancing criminal legal reform have engaged in attempts to correct years of harsh and expansive use of criminal laws. Two main parallel trends dominate these attempts. One is forward-looking—the decriminalization of many activities currently punishable by the criminal legal system. The second is backward-looking, and related—expungement and vacatur reforms that aim to allow individuals to start fresh.

While these latter efforts are intended to erase the criminal stain from official criminal records, the non-official domain gained less traction, leading to an absurd reality in which news stories about individuals' criminal histories remain accessible in the virtual world, practically forever. Tragically, these online news stories are often more practically detrimental to reintegration than the official criminal records. As such, they frustrate the criminal legal system's efforts to correct past mistakes.

The literature on criminal legal reform thus far has given less attention to this crucial problem. This Article contributes to narrowing this scholarly gap. To do so, it introduces “the right to social expungement”—which recognizes the right of individuals arrested for or convicted of offenses now vacated, expunged, legalized, or decriminalized to have stories about their past interaction with the criminal legal system removed from media websites.

Utilizing the case study of individuals arrested for or convicted of selling sex, this Article provides two theoretical justifications for recognizing this right: (1) the socio-legal paradigm of cultural shifts and its effects on existing law and

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policy, and (2) criminal law's amelioration doctrine, which offers a path to retroactively apply lenient criminal justice policies. The piece further argues that, counter to conventional wisdom, the right to social expungement can sit comfortably within a plausible interpretation of the right to privacy and freedom of the press. The Article concludes by offering preliminary guidance for establishing the right to social expungement.

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INTRODUCTION

M's life was never easy. She was molested as a child. As a teenager she struggled with drug and alcohol addictions and was in a string of abusive relationships. By the time she was eighteen, she was trafficked by her boyfriend which resulted in M's criminal conviction for prostitution. Finally, after years of struggling, she was able to escape the cycle of horror that plagued her life, receive treatment, begin therapy, and become sober. After taking these steps to rehabilitate her life, M hoped to start fresh alongside her family and friends. But her past haunted her. More specifically, a story detailing her past prostitution conviction in 2017 that appeared in an online local newspaper followed her wherever she went.

During her first attempt to rent a house after her recovery, the landlord discovered the 2017 story during a routine online search and asked M to pay her rent in sex. She then searched for new housing, but the new landlord also found her story online during a simple Google search and once again, she endured another landlord asking her to pay rent with sex. She had to move out, and since then, she has been trying to clear her past. She was partially successful after getting her criminal record expunged, but the online news story remained accessible to all. She reached out directly to the newspaper that published her story asking to unpublish it, but her request was rejected.¹

M, many like her, and millions of other Americans, are all products of the ultra-punitive American criminal legal system—a system that for years made criminal law more present in the public sphere by criminalizing many activities. Given the systemic flaws in the American criminal legal system—first and foremost, the deep racial biases so ingrained in its DNA—the heavy hand of this punitive system has been disproportionately felt by minorities, mostly Black and Latino populations.² Those once implicated by our harsh criminal legal system then proceed to suffer from social alienation stemming from the “Mark of Cain” that is a criminal conviction.³ The effects are long-lasting, from the deprivation of liberty by incarceration and

1. M self-identifies as a victim of sex trafficking. As such, her story amplifies her subjective experience in the sex trade. This is not to suggest that all individuals going through the experiences described by M should be inherently categorized as “victims” or “survivors.” See MOLLY SMITH & JUNO MAC, *REVOLTING PROSTITUTES: THE FIGHT FOR SEX WORKERS' RIGHTS* (2018) for other perspectives. In fact, this Article contends that all experiences should be respected and heard, but these discussions are not at its core. Instead, this Article focuses on all those who were arrested for, charged with, and/or convicted of prostitution for selling sex, regardless of the reasons that led them to sell sex or how they self-identify. From the Article's perspective, the criminalization of individuals engaged in prostitution, and then the re-criminalization through online news stories, reflect an extension of the harm from which these individuals suffer. Individuals selling sex include cisgender and transgender women and men, gender nonconforming, and LGBTQ individuals.

2. There are numerous studies supporting this proposition. See, e.g., ASHLEY NELLIS, SENT'G PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 13–15* (Oct. 13, 2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>; Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 268–74 (2021).

3. See MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., *FROM REENTRY TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2021* 1 (Jan. 2022), <https://ccresourcecenter.org/wp-content/>

through a constant struggle to reintegrate into the same society that pushed them aside, even after they have paid their dues.⁴

In recent years, we have finally started to acknowledge the deep, troubling consequences our criminal legal system has had on too many individuals and calls for a meaningful reform are gaining traction. Most of these voices are forward-looking, calling for a reduction of the involvement of the criminal legal system in our day-to-day activities by decriminalizing certain offenses, including, but not limited to, drug possession, misdemeanors, and prostitution.⁵ Some of these calls for reform, however, also recognize the need to correct the wrongs of the past. As such, the country is witnessing a wave of legislation that proposes a restoration of rights and criminal records relief initiatives, both of which are intended to address the collateral consequences of arrests and convictions.⁶ Among these initiatives is an expansion of expungement and vacatur regimes, including creating new initiatives intended to reduce administrative barriers and to speed up expungement processes for a host of offenses, including marijuana use, prostitution convictions for selling sex, and more, all with the purpose of allowing those who were once implicated by the system to start fresh.⁷

uploads/2022/01/2022_CCRC_Annual-Report.pdf (discussing “the legal restrictions and societal stigma that burden people with a criminal record long after their criminal case is closed” and act as collateral consequences).

4. *See id.* at 1.

5. Probably the most vocal voices pushing in that direction can be found among what became known as the “progressive prosecutors” movement, often characterized as democratically-elected, reform-minded prosecutors who aim to adopt new penal policies that will tackle entrenched systematic problems in the American criminal justice system. Charging policies are among the most meaningful changes these prosecutors advance, including not charging marijuana possession or prostitution. *See* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION xxvii, xxix, xxx (2019); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1417 (2021); Itay Ravid & Amit Haim, *Progressive Algorithms*, 12 U.C. IRVINE L. REV. 527, 528–29 (2022). *See also* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1056–57, 1088 (2019) (discussing the decriminalization of misdemeanors and other offenses as a form of criminal justice reform).

6. In 2021, forty states, the District of Columbia, and the federal government enacted 151 legislative bills alongside additional executive actions, aiming “to restore rights and opportunities to people with arrest or conviction history.” LOVE & SCHLUSSEL, *supra* note 3, at 2–3. Moreover, thirty-six states enacted ninety-two separate laws that “revise, supplement, or limit public access to individual criminal records,” with the goal of eliminating barriers to reentry. *Id.* “Most of these laws established or expanded laws authorizing expungement, sealing, or set-aside of convictions or arrest records.” *Id.* Over the last three years, over 400 new laws have been enacted as part of criminal records reform. These are important steps in advancing true criminal justice reform. *See id.* at 2–3, 12–23; *see also Restoration of voting and other civil rights in 2021*, COLLATERAL CONSEQUENCES RES. CTR. (July 8, 2021), <https://ccresourcecenter.org/2021/07/08/restoration-of-voting-and-other-civil-rights-in-2021/>.

7. That is, offering individuals who were once involved with the criminal legal system a path for reentry (for those who go to jail or prison) into society and the full restoration of rights and status (reintegration). *See* LOVE & SCHLUSSEL, *supra* note 3, at 1–2, 3, 4. While these efforts are still far from fully achieving their goals, they represent a shift in social norms and emphasize multiple states’ recognition of the need to repair harms from years of harsh penal policies that have affected millions of Americans, particularly Black and brown communities. *See id.* at 2–3; 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, 361–62 (2016); Brian M. Murray, *Newspaper Expungement*, 116 NW. U. L. REV. ONLINE 68, 69–70 (2021) [hereinafter Murray, *Newspaper Expungement*];

These efforts, however, are only relevant to *official records* held by *public entities*. *Private entities*—like newspapers—are not bound to delete information about past interactions with the criminal legal system, and thus are not obligated to help M and many other individuals facing the same circumstances.⁸

This creates an ironic and unsettling, situation, in which the criminal legal system offers a fresh start by expunging official criminal records, but private publishers negate these new beginnings by maintaining stories of criminal arrests and convictions online, practically forever.⁹ As M’s story demonstrates, the consequences of online information can be devastating to those individuals, resulting in meaningful challenges to their ability to fully rejoin society, to work, to own, and to love.¹⁰ Currently, legal remedies for individuals attempting to take down

Deborah L. Dwyer & Chad Painter, *Erasing the Past: Untangling the Conflicting Journalistic Loyalties and Paradigmatic Pressures of Unpublishing*, 35 J. MEDIA ETHICS 214, 214 (2020).

8. While online newspapers are just one dimension of the problem, these will be the focus of this Article. There are several reasons for doing so, including the prevalence of the problem, the ethical commitments of journalists who have unique bearing on this problem, and the increasing number of initiatives already in place in which newspapers recognize the need to take down (unpublish) stories about past involvement with the criminal legal system and offer policies that allow individuals to submit unpublishing requests. *See infra* Part I.B.1.b. I use the term “interactions” because in the virtual world, a host of exchanges with the criminal legal system might yield a news story: from arrests to pre-trials to actual trials. Furthermore, the outcomes of these interactions are often not taken into account or addressed later on, so whether or not the person was in fact indicted, sentenced, or exonerated, the story would likely remain accessible forever.

9. Indeed, as I will discuss later, there is an increased recognition in the need to change this reality, but there is still much work to be done. *See* Keri Blakinger, *Mugshots Stay Online Forever. Some Say the Police Should Stop Making Them Public*, U.S. NEWS (Nov. 11, 2021, 6:00 AM), <https://www.nbcnews.com/news/us-news/mugshots-police-public-online-rcna4897>; Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS U. L. REV. 557, 560 (2018); Rebecca Heilweil, *How Close is An American Right-To-Be-Forgotten*, FORBES (Mar. 4, 2018, 10:24 PM), <https://www.forbes.com/sites/rebeccaheilweil/2018/03/04/how-close-is-an-american-right-to-be-forgotten/?sh=b894d6c626ef> (“Before the internet . . . young people who made mistakes—from embarrassing statements to minor crimes—that ended up in the public record eventually benefitted from ‘privacy-by-obscurity.’ ‘Those things slipped out of the general consciousness of the public’ . . . Now, a youthful offense can remain at the top of search results indefinitely.”); Keri Blakinger, *Newsrooms Rethink a Crime Reporting Staple: The Mugshot*, MARSHALL PROJECT (Feb. 11, 2020), <https://www.themarshallproject.org/2020/02/11/newsrooms-rethink-a-crime-reporting-staple-the-mugshot/>; Olivia Solon, *Haunted by a Mugshot: How Predatory Websites Exploit the Shame of Arrest*, GUARDIAN (June 12, 2018), <https://www.theguardian.com/technology/2018/jun/12/mugshot-exploitation-websites-arrests-shame>; Adi Roberston, *Maryland Police Department Will Shame Prostitutes by Live-Tweeting a Sting Operation*, THE VERGE (May 1, 2014), <https://www.theverge.com/2014/5/1/5672872/maryland-police-department-will-live-tweet-prostitution-sting-operation>; Anita Ramasasty, *Mug Shot Mania: The Legal and Policy Issues Surrounding Private Websites’ Postings of Arrest Photos*, VERDICT JUSTIA (Apr. 24, 2012), <https://verdict.justia.com/2012/04/24/mug-shot-mania/>; Lola Bardaji, *The Right to Be Forgotten: Is It Possible to Disappear from the Internet?*, DO BETTER (Dec. 23, 2019), https://dobetter.esade.edu/en/right-to-be-forgotten?_wrapper_format=html (“News flies around the world as a result of this multiplying effect. And not only that, digital content also hangs around forever and ever.”); Eldar Haber, *Digital Expungement*, 77 MD. L. REV. 337, 338 (2018) (“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.”).

10. Joseph Steinberg, *Why Americans Need and Deserve The Right to Be Forgotten*, INC. (Feb. 7, 2018), <https://www.inc.com/joseph-steinberg/why-americans-need-deserve-right-to-be-forgotten.html> (explaining some long-term consequences of online archives for individuals with criminal infractions); SARAH ESTHER LAGESON,

information about them that appears online—a process known as “unpublishing”—are still few and far between.¹¹

Surprisingly, while criminal legal reform has gained a lot of scholarly attention over the last few years, only a small number of scholars have thus far emphasized this concerning phenomenon despite its enormous effects on the ability of individuals once implicated in crime to reenter society.¹² This is particularly troubling, as it seems that the information scattered online might be the last missing piece of the “criminal legal reform” puzzle.

This Article contributes to bridging this scholarly gap by offering to adopt what I call “the right to social expungement.” This right would allow individuals previously arrested for or convicted of offenses that were *later legalized, decriminalized, expunged, or vacated* to require newspapers to remove stories about their past interactions with the criminal legal system.¹³

In establishing this right, the Article builds on the intellectual origins of the right to be forgotten (“RTBF”).¹⁴ The Article argues that in the process of establishing the right to social expungement, privacy and media scholars were too quick to reject the possibility of adopting the RTBF or RTBF-adjacent rights within U.S. borders, mostly by referring to our robust First Amendment jurisprudence.¹⁵ To

Digital Punishment 9–10, 113–15 (2020) (discussing the “myriad harms embedded in the creation and dissemination of criminal records in a data-driven era” and examples of online information impacting individuals).

11. This is particularly true for adults. See Murray, *Newspaper Expungement*, *supra* note 7, at 69–71. For additional discussion about current legislative efforts and a number of court decisions adopting the remedy of unpublishing see *infra* Part II.C.

12. See LOVE & SCHLUSSEL, *supra* note 3, at 1–2, 3, 4; see also LAGESON, *supra* note 10, at 6–8.

13. The right to social expungement can take many forms: federal constitutional right, state constitutional right, state common law right, or a state-level law based right, all offering a different balance between the competing interests. Defining the particular “preferred” form is beyond the scope of this Article, the main goal of which is to bring to the fore the problem of newspaper stories as a form of unofficial criminal records, discuss their effects on American individuals, illustrate how they inhibit criminal legal reform, and offer justifications that support the adoption of legal (or at least policy) solutions. For further discussion see *infra* Part IV.

14. Defined as “the right of an individual to erase, limit, or alter past records that can be misleading, redundant, anachronistic, embarrassing, or contain irrelevant data associated with the person, likely by name, so that those past records do not continue to impede present perceptions of that individual.” Michael J. Kelly & David Satola, *The Right to be Forgotten*, 2017 U. ILL. L. REV. 1, 3, 38, 40 (2017) (arguing that the right to free speech under the First Amendment often prevails over individual privacy rights). See also MEG LETA JONES, CTRL + Z: THE RIGHT TO BE FORGOTTEN 9–10 (2016) (using the definition offered by Pino: “the right to silence on past events in life that are no longer occurring” (citing Giorgio Pino, *The Right to Personal Identity in Italian Private Law: Constitutional Interpretation and Judge-Made Rights*, in THE HARMONIZATION OF PRIVATE LAW IN EUROPE 225, 237 (Mark Van Hoecke and François Ost eds., 2000))). Jones discusses the RTBF in the context of the “digital redemption,” with a focus on a descriptive definition of forgiveness. *Id.*

15. Kelly & Satola, *supra* note 14, at 3, 38, 40; Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 88, 90–91 (2012) (criticizing attempts to create the RTBF); Ravi Antani, *The Resistance of Memory: Could the European Union’s Right to Be Forgotten Exist in the United States?*, 30 BERKELEY TECH. L.J. 1173, 1174 (2015) (stating that if the RTBF is implemented in the United States, it cannot be implemented as it stands, but should manifest in narrow contexts where privacy rights are strong); Danielle Bernstein, *Why the “Right to be Forgotten” Won’t Make it to the United States*, MICH. TECH. L. REV., <http://mttlr.org/2020/02/why-the-right-to-be-forgotten-wont-make-it-to-the-united-states/> (explaining that the RTBF competes with information

support this argument, the Article builds on scholarship which claims that over the years, courts and legislators have de facto protected elements of the RTBF by recognizing the commitment of private entities—including newspapers—to allow reintegration and protect the privacy of individuals by unpublishing past information about their involvement in crime.¹⁶ While accepting this conclusion descriptively, the piece diverts normatively from much of the concerns raised by previous scholarship and suggests adopting the right to social expungement. This right, despite sharing some of the RTBF rationales, is of a different form. In particular, the right to social expungement does not apply to all individuals whose criminal records were expunged or vacated, but rather includes a social dimension that requires a cultural shift in the societal understanding of the criminal culpability of these individuals. The right to social expungement would apply to a number of offenses, including, but not limited to cases like M's, minor drug offenses, and some misdemeanors.

The Article identifies two main groups of individuals who fall under this definition: individuals who are no longer morally blameworthy because *the offenses* based on which their informal records were created are no longer perceived as posing risks to public safety (a perception formally presented by legalization or decriminalization of such offenses), and/or individuals who, as we understand today, should not have been recognized as criminally culpable due to a host of *conditions* and *circumstances* (for example, because the law is recognizing some of them as victims).¹⁷

providers' freedom from censorship); Heilweil, *supra* note 9 (explaining that the RTBF does not currently exist in the United States); Murray, *Newspaper Expungement*, *supra* note 7, at 71–72. The European Union has placed some limits on its landmark privacy law, holding that “the privacy rule cannot be applied outside the European Union” and maintaining that “information must be weighed carefully before deleting links related to certain categories of personal data.” Adam Satariano, ‘Right to Be Forgotten’ Privacy Rule is Limited by Europe’s Top Court, N.Y. TIMES (Sept. 24, 2019), <https://www.nytimes.com/2019/09/24/technology/europe-google-right-to-be-forgotten.html>. For further discussion see *infra* Part I.B.1.a.

16. See, e.g., *Detroit Free Press, Inc. v. U.S. Dep’t of Just.*, 829 F.3d 478, 480 (6th Cir. 2016) (holding that individuals “enjoy a non-trivial privacy interest in their booking photos”); *Taha v. Bucks Cnty.*, No. 12-6867, 2021 WL 534464, at *1 (E.D. Pa. Feb. 12, 2021) (discussing privacy issues related to the publishing of mugshots online); *Hartzell v. Cummings*, 2015 Phila. Ct. Com. Pl. LEXIS 313, at *18–19 (C.P. Ct. Phila. Cnty. Nov. 4 2015) (ordering the removal of older criminal information from a website to protect the privacy of a private figure); Edward J. George, *The Pursuit of Happiness in the Digital Age: Using Bankruptcy and Copyright Law as a Blueprint for Implementing the Right to Be Forgotten in the U.S.*, 106 GEO. L.J. 905, 905, 910–11 (2018) (arguing that the RTBF is actually “quintessentially American” because it would free individuals from their past); Amy Gajda, *Privacy, Press, and the Right to Be Forgotten in the United States*, 93 WASH. L. REV. 201, 206, 263–64 (2018) (concluding that not only is there no need for the RTBF “to cross the Atlantic,” because “in some ways, it has been on U.S. shores for centuries” and is present “in common law, in the Restatement, and in statutes,” but that its presence in the United States is infeasible without action); Bernstein, *supra* note 15; Maura Dolan, *Judge’s Order that Times Alter Article Sparks 1st Amendment Fight*, L.A. TIMES (July 16, 2018, 8:45 PM), <https://www.latimes.com/local/lanow/la-me-ln-balian-media-20180716-story.html> (discussing decision issued by California judge that ordered the *L.A. Times* to remove information about a criminal case it had covered). For further discussion see *infra* Part I.B.1.b.

17. See *infra* Part II.

The Article offers two theoretical justifications for the recognition of this new right: (1) socio-legal paradigm of cultural shifts and its effects on existing law and policy, and (2) the criminal law amelioration doctrine, which opens a path to retroactively apply lenient penal policies.

Normatively, the Article argues that the traditional dichotomy,¹⁸ according to which the RTBF inherently conflicts with the freedom of the press, is flawed in the narrow context of the class of people discussed in this piece. In fact, in the context of the right to social expungement, the freedom of the press and the right to social expungement can work in tandem to advance public interest and achieve the media's duties that the First Amendment aspires to protect. Recent initiatives adopted by an increasing number of newspapers suggest that newspapers themselves do not necessarily reject this Article's proposition.¹⁹ These initiatives allow individuals to submit requests to unpublish information about past involvement with the criminal legal system. I conclude the Article by offering a few potential descriptive models for the implementation of the right to social expungement.

Adopting this right to social expungement is necessary to advance expungement and decriminalization reforms that were adopted by states in recent years in order to restore individual rights.²⁰ It does so by offering a desirable balance between freedom of the press and rights to privacy that takes into account the complex reality of online information. More broadly, the Article posits that the right to social expungement, which at its core calls for correcting a past deriving from flawed social structures and an overly punitive criminal legal system, offers a new, albeit surprising, venue to advance criminal legal reform.²¹

18. Hillary C. Webb, *'People Don't Forget': The Necessity of Legislative Guidance in Implementing a U.S. Right to Be Forgotten*, 85 GEO. WASH. L. REV. 1304, 1325 (2017); Jeffrey Abramson, *Searching for Reputation: Reconciling Free Speech and the 'Right to be Forgotten'*, 17 N.C. J.L. & TECH. 1, 72 (2015) ("[C]onsiderable work needs to be done before the 'right to be forgotten' can be acceptable in a First Amendment society."); Kelly & Satola, *supra* note 14, at 38–43; Antani, *supra* note 15, at 1183–85; Murray, *supra* note 7 at 71–72. For further discussion see *infra* Part I.B.

19. Some U.S. newspapers (for example, the *Boston Globe* and *The Cleveland Plain-Dealer*) have launched "Fresh Start" initiatives where they will remove a news story or press release that is causing an individual significant, "long-lasting" harm. See also *The Globe's Fresh Start Initiative: Frequently Asked Questions*, BOS. GLOBE <https://www.bostonglobe.com/2021/01/22/metro/globes-fresh-start-initiative-frequently-asked-questions/>; Chris Stokel-Walker, *It's Time America Adopted 'the Right to Be Forgotten'*, BUS. INSIDER (Feb. 7, 2021, 10:07 AM), <https://www.businessinsider.com/newspapers-offering-right-to-be-forgotten-practice-widely-adopted-consistent-2021-1>; Zoe Greenberg, *Boston Globe Launches 'Fresh Start' Initiative*, ED. & PUBLISHER (Jan. 22, 2021, 10:56 AM) <https://www.editorandpublisher.com/stories/boston-globe-launches-fresh-start-initiative>, 184811. See *infra* Part I.B.1.b.

20. LOVE & SCHLUSSEL, *supra* note 3, at 1–3 (surveying the legislative actions taken in furtherance of expungement policies). It also reflects "a larger cultural willingness to allow individuals to move beyond their personal past, a societal capacity to offer forgiveness, provide second chances, and recognize the value of reinvention." JONES, *supra* note 14, at 11.

21. See, e.g., Greenberg, *supra* note 19. The *Boston Globe* stated:

Following the nationwide reckoning on racial justice, the Globe is looking inward at its own practices and how they have affected communities of color. As we update how we cover the news, we

The Article proceeds as follows. Setting the stage for the *right to social expungement*, and given its shared intellectual roots with the RTBF, Part I focuses on the RTBF, contextualizes the debates that followed its recognition in Europe, and maps the American debate regarding the recognition of such a right. This Part further discusses the dominant view, according to which the RTBF cannot, and should not, be recognized in the United States, mostly due to First Amendment issues. It then illustrates the core implication of this view in the context of online newspapers that refuse to delete stories about individuals' criminal pasts. Next, and in response to the dominant view, Part I discusses the minority view, which suggests that the recognition of the right to privacy by U.S. courts and legislators supports the view that tenets of the RTBF were de facto recognized in the United States. The Article joins the minority view descriptively but diverts from it normatively by claiming that the current state of the RTBF in the United States—particularly with regard to the balance between privacy and First Amendment rights—offers a path to introduce the *right to social expungement*, applicable to past offenders that were arrested for or convicted of offenses now vacated, expunged, legalized, or decriminalized. Part I concludes by distinguishing between the RTBF and the right to social expungement. Part II utilizes the case study of individuals, like M, who were arrested for, charged with, and/or convicted of prostitution for selling sex,²² as a model for the new right to social expungement, and offers two theoretical justifications to support such an expansion: (1) the socio-legal paradigm of cultural shifts and its effects on law and policy, and (2) criminal law amelioration doctrine. Part III deals with potential objections to the recognition of the right to social expungement by suggesting that, contrary to conventional wisdom, under a right to social expungement not only does the freedom of the press align with the right to privacy, but it in fact contributes to the press' ability to maximize the social goals for which the freedom of the press is granted. Part IV offers some potential

are also working to better understand how some stories can have a lasting negative impact on someone's ability to move forward with their lives.

Id.

22. Under current laws, sex trafficking and prostitution are often intertwined. They both take the form of street prostitution, indoor prostitution, online prostitution, and so on. *See generally Myths, Facts, and Statistics*, POLARIS PROJECT, <https://polarisproject.org/myths-facts-and-statistics/> (defining terms and dispelling myths related to human trafficking); *see, e.g.,* JODY RAPHAEL & KATIE FEIFER, WORLD WITHOUT EXPLOITATION, GET THE FACTS. WHAT WE KNOW ABOUT SEX TRAFFICKING, SEXUAL EXPLOITATION AND PROSTITUTION IN THE UNITED STATES, (Jan. 2020), https://global-uploads.webflow.com/5b7ed53e01bf9702b9df675b/5e1cd98f61e439d812b34ed3_Get_the_Facts_January_2020.pdf. Any individuals who self-identify as sex trafficking victims and persons in prostitution who face exploitation in the sex trade suffer from the problem we illustrate with M's true story. While there are debates among activists, lawyers, and scholars regarding the element of coercion and choice in this setting, for the purposes of this Article, and in order to offer a legal remedy, I focus on the terminology currently used by the law. This is not to suggest that other terminologies are more or less helpful in capturing the complex universe of commercial sex. However one chooses to self-identify, the goal of this Article is to offer a remedy for all those with unofficial criminal records due to them being criminalized with prostitution for selling sex.

preliminary models to the adoption of the right with an eye towards the required constitutional balance.

I. THE INTELLECTUAL ORIGINS OF THE RIGHT TO SOCIAL EXPUNGEMENT— THE RTBF

To begin, it is important to clear out of the way some potential confusions: the right to social expungement introduced in this Article is *NOT* the Right to Be Forgotten (“RTBF”). No doubt, both of these rights share some intellectual roots, and thus it is not surprising that some might recognize the former as related to the latter. However, the right to social expungement is of a different form and applies to narrower circumstances, as will be later elaborated. Given the commonalities, and the fact that the RTBF is a conceptual springboard to discuss the right to social expungement, this Article first offers a comprehensive review of the RTBF and the debates about it in the United States. Building on these discussions, this Part will explain how the RTBF informs the right to social expungement and how the two differ.

A. *The RTBF—General*

The RTBF, or the right to an erasure, is defined as “the right of an individual to erase, limit, or alter past records that can be misleading, redundant, anachronistic, embarrassing, or contain irrelevant data associated with the person, likely by name, so that those past records do not continue to impede present perceptions of that individual.”²³ This right recognizes an individual’s privacy interest on the issue of internet publications and other online data, including information that appears in online media news outlets.²⁴

Currently, the RTBF only exists in the European Union after the Court of Justice of the European Union’s 2014 holding in *Google Spain v. González (Costeja)*.²⁵ The RTBF allows a private EU citizen to request data controllers (such as Google)

23. Kelly & Satola, *supra* note 14, at 38 (arguing that the right to free speech under the First Amendment would prevail over individual privacy rights); *see also* JONES, *supra* note 14, at 9–11. Some claim that the RTBF is different than the right to erasure. Indeed, the original language of the European Data Protection Regulation was the “right to be forgotten and deletion,” and was changed since to the “the right to deletion and erasure.” However, as Jones asserts, the *González* decision “has been considered enforcement of a right to be forgotten.” *Id.* at 10.

24. JONES, *supra* note 14, at 11. Jones emphasizes the concepts of “digital redemption” and “digital reinvention,” that is, the “willingness and means to transform digital public information into private information upon the subject’s request, liberating the individual from discoverable personal information.” *Id.* at 9. According to Jones, digital redemption reflects a form of social forgiveness, “a larger cultural willingness to allow individuals to move beyond their personal pasts, a societal capacity to offer forgiveness, provide second chances, and recognize the value of reinvention.” *Id.* at 11. As I will discuss further, the justifications for the right to social expungement mirror, in part, similar social values.

25. Case C-131/12, *Google Spain SL v. González*, ECLI:EU:C:2014:317, ¶¶ 91–94 (May 13, 2014), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1033117/>. In this case, Mario Costeja González exercised his rights by first requesting a Spanish newspaper to remove information about a sale of his property related to insolvency

to remove certain online search results related to their name.²⁶ The RTBF is not an absolute right and has its own limitations,²⁷ but since the landmark *Costeja* decision, the RTBF has become an established and enforceable right in Europe that has led to meaningful victories, forcing companies like Google to deindex negative information about individuals.²⁸ The European Union's General Data Protection Regulation ("GDPR") even codified the RTBF as the right to erasure, in which it proposes to balance an individual's right to privacy against another's right to access information.²⁹ Through this regulation, individuals who are the subject of sources displaying their personal data on the internet can request data controllers to erase the information.³⁰

As adopted by the European Union, responsibility for compliance with the regulation and erasure of information lies with the data controller who is the "natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data."³¹ The EU Court of Justice further specified that the fundamental RTBF "override[s] . . . not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information," unless the citizen was "in public life," a category determined on a case-by-case basis by the data controller in choosing to delist.³² Although this right is not absolute in the European Union, any data controller that receives a request to remove information must establish that "its denial of a removal request was necessary to protect

proceedings. The newspaper refused, and Costeja González requested Google to remove the search results that included his name. Google refused as well.

26. *Id.*

27. See Murray, *Newspaper Expungement*, *supra* note 7, at 76; Commission Regulation 2016/679, art. 17 § 1, 2016 O.J. (L 119) 43, 44 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679>.

28. See James Ball, *Costeja González and a Memorable Fight for the "Right to Be Forgotten,"* GUARDIAN (May 14, 2014), <https://www.theguardian.com/world/blog/2014/may/14/mario-costeja-gonzalez-fight-right-forgotten> (discussing the importance of the ECJ's decision in this case for solidifying the right to be forgotten).

29. Commission Regulation, *supra* note 27, at art. 17.

30. *Id.*

31. Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281), ch. 1 art. 2(d), http://ec.europa.eu/justice/policies/privacy/docs/95-46-ce/dir1995-46_part1_en.pdf/.

32. Case C-131/12, *Google Spain SL v. González*, ECLI:EU:C:2014:317, ¶¶ 81, 94, 99 (May 13, 2014), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1033117>. The Court identified a limitation of the RTBF in that:

Whilst it is true that the data subject's rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.

Id. See also *Right to Be Forgotten Overview*, GOOGLE, <https://support.google.com/legal/answer/10769224?hl=en#zippy=%2Cyour-role-in-public-life> (identifying Google's rule regarding a person's role in public life, stating that in its decisions to delist, it looks at a person's role in public life, how the published information relates to an individual's public role, and the significance of the individual's public role).

the public interest regarding public health, historical or scientific purposes, or legal obligations to retain the data.”³³ To date, Google has received 1,363,502 requests to delist and 5,298,527 requests to delist URLs, and ninety percent of requesters are private individuals.³⁴

However, following that landmark decision, the European Union subsequently ruled that data controllers would not have to apply the RTBF globally, meaning that data controllers would only have to remove links from search results carried out in the European Union—and not elsewhere—after an appropriate request.³⁵ In recognition of that holding, France’s Council of State cancelled a fine against Google for failing to remove such search results globally.³⁶

Following the *Costeja* decision in the European Union, several U.S. privacy scholars borrowed heavily from nautical terminology to discuss a question that sparked interest from internet providers, the media, and the public: whether the EU Right to be Forgotten could cross the Atlantic and find safe harbor within U.S. jurisprudence? In answering these questions, two main schools of legal thought have offered views about both the feasibility and desirability of adopting the RTBF in the United States.³⁷ While offering different justifications, these schools share similar visions regarding the challenges of adopting a RTBF in the U.S. setting. They both suggest that given the U.S. constitutional structure, the likelihood of adopting the *European RTBF* in the United States is low.³⁸ They differ, however, with regard to the possibility of adopting an “American style” RTBF.

The *first* school of thought, which represents the dominant view, suggests that First Amendment considerations bar the possibility of any type of RTBF in the U.S. setting. Scholars who belong to this group also support this outcome normatively, that is, they claim that given the U.S. constitutional structure, a RTBF should not be recognized. In fact, many scholars that belong to this school of thought plainly claim that the RTBF is legally unviable in the United States.³⁹

33. Megan Deitz, *A Crime Remembered: The Possible Impact of the “Right to be Forgotten” in the United States for Crime Victims, Criminal Defendants, and the Convicted*, 9 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 197, 200 (2018).

34. *Requests to Delist Content Under European Privacy Law*, GOOGLE: TRANSPARENCY REP., <https://transparencyreport.google.com/eu-privacy/overview/> (last accessed Jan. 15, 2023).

35. Case C-507/17, *Google LLC, v. CNIL*, ECLI:EU:C:2019:15, ¶ 43 (Sept. 24, 2019), https://curia.europa.eu/juris/document/document_print.jsf?mode=lst&pageIndex=0&docid=218105&part=1&doclang=EN&text=&dir=&occ=first&cid=290765.

36. *See, e.g., French Court Cancels Fine on Google Over Right to Be Forgotten*, JAPAN TIMES, (Mar. 28, 2020) <https://www.japantimes.co.jp/news/2020/03/28/business/tech/french-court-cancels-fine-google-right-forgotten/> (reporting the decision to cancel the fine).

37. *See* Savanna Shuntich, *The Life, the Death, and the Long-Awaited Resurrection of Privacy: How Americans Can Reclaim Their Lives from the Internet With a Right to Be Forgotten*, 41 HUM. RTS. 2–3 (2015) (explaining that there are “three general schools of legal thought on the subject” of the RTBF, at least two of which reject its availability in the United States). In this Article I posit that in fact there are only two schools of thought and both tend to normatively reject its recognition.

38. *Id.* at 2–3 (stating that most U.S. case law defeats the concept of the RTBF).

39. *See id.* at 2; Kimberly A. W. Peaslee, *Does the United States Need a “Right to be Forgotten”?*, 55 N.H. BAR J. 6, 14 (2015); Leslie E. Minora, *U.S. Courts Should Not Let Europe’s “Right to be Forgotten” Force the*

The *second* school of thought, to which the Article refers in the next Section, offers a more complex vision of the RTBF. Scholars belonging to this group posit that despite the constitutional challenges described above, an American version of the RTBF can potentially be adopted, or has already been de facto adopted, in various forms in U.S. jurisdictions, at least in spirit.⁴⁰ Scholars that belong to this school of thought differ, however, on their normative stance: while some claim such a de facto recognition offers a positive balance between freedom of speech and privacy rights, others suggest that adopting these RTBF variants poses a significant risk to free speech and freedom of the press.⁴¹ As the Article will discuss later, some offer different models to balance the potential infringement on First Amendment rights.

World to Forget, 89 TEMP. L. REV. 609, 628–29, 641 (2017) (arguing that the Communications Decency Act liberated search engines from liability, that punishing publishers for truthful, publicly available information would not advance the values of the U.S. government, and that the implementation of the RTBF could lead to link removals, unreliable search results, the erosion of public trust, and a return to newspapers); Katherine Stewart, *Looking Backward, Moving Forward: What Must Be Remembered When Resolving the Right to Be Forgotten*, 42 BROOK. J. INT'L L. 843, 846, 873 (2017) (arguing that in the United States there is a demonstrated interest in the right to free speech over the right to privacy, and claiming that it could only exist if what is published is “considerably harmful acts”).

40. Gajda, *supra* note 16, at 206, 263–64 (concluding in her compelling work that not only is there no need for the RTBF “to cross the Atlantic” because “in some ways, it has been on U.S. shores for centuries” but raises questions on “how to cabin [it] effectively in a way that strongly and nearly always supports press freedoms but also recognizes those very limited times in which exposure of the past implicates individual privacy in a significant way”); John W. Dowdell, *An American Right to Be Forgotten*, 52 TULSA L. REV. 311, 338–40 (2017) (arguing that an American Style RTBF could be implemented—mimicking a California law that requires websites to provide minors with a process for deleting posted content before transmitting to a third-party—but it should be overseen by a governmental body like the FCC for all valid delisting requests, not just minors); Erin Cooper, *Following in the European Union’s Footsteps: Why the United States Should Adopt Its Own “Right to be Forgotten” Law for Crime Victims*, 32 J. MARSHALL J. INFO. TECH. & PRIV. L. 185, 206–07 (2016) (advocating for a limited form of the RTBF for crime victims using a “Search Results Removal Test”); Deitz, *supra* note 33, at 206–11 (advocating for a limited RTBF for crime victims, former criminal defendants, and certain convicted individuals); George, *supra* note 16, at 905, 910–11 (arguing that the RTBF is actually “quintessentially American” because it would free individuals from their pasts); Webb, *supra* note 18, at 1325 (arguing that in implementing an American Style RTBF that Congress could enact a tailored balancing test “weighing the values of individual privacy against the value of the data” in considering delisting requests); James J. Lavelle, *Search Query: Can America Accept a Right to Be Forgotten as a Publicity Right?*, 83 BROOK. L. REV. 1115, 1133 (2018) (arguing that the RTBF could be implemented if framed as a publicity right in the United States); Hannah L. Cook, *Flagging the Middle Ground of the Right to be Forgotten: Combatting Old News with Search Engine Flags*, 20 VAND. J. ENT. & TECH. L. 1, 14 (2017) (suggesting that the RTBF could be implemented in the United States through a flagging system administered through FTC adjudications); Andrea Gallinucci-Martinez, *Is the European Right to Be Forgotten Viable in the Land of the First Amendment?*, 122 PA. ST. L. REV. PENN STATIM 1, 22 (2018) (suggesting using clickwrap adhesion contracts to create a viable and broad American RTBF); Danyaw Chen, *A Limited Right to Be Forgotten to Protect the Privacy Rights of Juvenile Offenders*, 23 CARDOZO J.L. & GENDER 277, 278 (2016) (advocating for a limited RTBF for juvenile offenders); Antani, *supra* note 15, at 1210 (stating that if the RTBF is implemented in the United States, it cannot be implemented as it stands, but should manifest in narrow contexts); Stewart, *supra* note 39, at 848–49, 886 (conceding that a limited form of a RTBF could be feasible, but still advocating against the RTBF as a whole).

41. See Shuntich, *supra* note 37, at 2–3 (stating, “[o]thers argue that a right to be forgotten is both impossible and unwise, suggesting it would chill speech and innovation”).

The next Section delves deeper into the different arguments of these schools of thought, while laying the constitutional grounds for the debates surrounding the adoption of a RTBF in the United States.

B. *The RTBF in the U.S. Context*

1. The Dominant View: No RTBF in the United States

a. First Amendment Superiority

At the core of the debates revolving around recognizing the RTBF in the United States lies a clash between the constitutional First Amendment right to free speech and press and the right to privacy.⁴² The first school of thought, which represents the majority, argues plainly that while in Europe the right to free speech and the right to privacy do not conflict because the Universal Declaration of Human Rights protects both rights equally,⁴³ in the United States, the right to free speech, outlined explicitly in the First Amendment, outweighs the right to privacy because the word “privacy” does not appear in the U.S. Constitution (even though it has become a recognized right).⁴⁴ As such, the first school of thought claims that it would be impossible to recognize a RTBF in the United States, no matter the potential privacy benefits to citizens and how citizens may want the RTBF.⁴⁵ They also argue

42. See, e.g., Abramson, *supra* note 18, at 72. Abramson stated:

At its best, the ECJ decision on a ‘right to be forgotten’ is an attempt to restore the dignity of reputation to persons. However, considerable work needs to be done before the ‘right to be forgotten’ can be acceptable in a First Amendment society. The most serious problem is that the ECJ decision would require the removal of links to even *truthful* information, a position that the Supreme Court has found difficult to accept in other contexts.

Id.

43. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 12, 19 (Dec. 10, 1948).

44. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that the U.S. Constitution guarantees a right to privacy against government intrusion); see also *infra* Part I.B. Some argue, however, that the recent Supreme Court decision in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) has dramatically narrowed the constitutional protection of privacy rights, while others suggest that the decision in *Dobbs* has mostly affected privacy rights in the context of Fourteenth Amendment substantive due process. See Amy Gajda, *How Dobbs Threatens to Torpedo Privacy Rights in the US*, WIRED (June 29, 2022, 11:09 AM), <https://www.wired.com/story/scotus-dobbs-roe-privacy-abortion/>. While this discussion is beyond the scope of this Article, the privacy rights discussed in the context of the right to social expungement are likely to fall within different categories of privacy that, as will be discussed below, receive more protection through legal precedents and legislation.

45. Shuntich, *supra* note 37, at 2 (stating, “[o]ne view asserts that a right to be forgotten would be impossible in the United States under the First Amendment and existing First Amendment jurisprudence even though it could be beneficial to the citizens”); see also Eric Posner, *We All Have the Right to Be Forgotten*, SLATE (May 14, 2014, 4:37 PM), <https://slate.com/news-and-politics/2014/05/the-european-right-to-be-forgotten-is-just-what-the-internet-needs.html> (“It’s hard to imagine a ‘right to be forgotten’ in the United States . . . [because] [t]he First Amendment will protect Google, or any other company, that resurfaces or publishes information that’s already public.”); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844 (2006) (explaining that free speech cases comprise forty-eight percent of all applications of strict scrutiny, meaning invasive laws limiting free speech must be narrowly drawn to survive strict scrutiny); JONES, *supra* note 14, at 10–11.

that, normatively, a RTBF should not be recognized as it would “chill speech and innovation.”⁴⁶ These scholars weigh the right to free speech more heavily than the right to privacy because of its strong roots in the United States.⁴⁷ Scholars who belong to this group argue that the RTBF would remove the internet’s qualities of being “free and open.”⁴⁸ One scholar even compares the potential effects of recognizing a RTBF to the “Newspeak” of George Orwell’s *1984*.⁴⁹ More broadly, it seems that the argument against the RTBF goes to the core of American values and suggests that the commitment to transparency, the fear of government power, and the importance of public access to data, create meaningful—not to say impassable—hurdles, that prevent individuals from deleting information upon request (which would be the RTBF’s immediate outcome).⁵⁰ In other words, and as Jones suggests: “[t]his broad concept is controversial and has been called ‘rewriting history,’ ‘personal history revisionism,’ and simply ‘censorship.’”⁵¹

When exploring the approach taken by courts on this question, scholars that belong to this camp claim that since 2015, it is a clear and undisputed fact that the RTBF is not recognized in the United States. To support this claim, they cite to a Ninth Circuit decision from 2015 which clearly stated that the RTBF was not recognized in the United States due to the legal supremacy of the right to free speech under the First Amendment.⁵² Based on that declaration, the Ninth Circuit found that an individual could not petition in the courts to force a data controller to remove data of which they are the subject.⁵³

46. Shuntich, *supra* note 37, at 3.

47. *See id.*

48. Rosen, *supra* note 15, at 92 (stating, “the European framework could be imposed on U.S. companies doing business in Europe as well. It’s hard to imagine that the Internet that results will be as free and open as it is now.”).

49. Stewart, *supra* note 39, at 843. Stewart stated:

Though published in 1949, the dystopia described in . . . ‘1984’ feels all too familiar today. Orwell’s novel describes a global war that has been going on ‘seemingly forever’; it describes ‘Newspeak,’ a form of stripped down English language used to limit free thought, and articulates the idea of a ‘memory hole.’

Id.

50. Murray, *Newspaper Expungement*, *supra* note 7, at 77–78.

51. JONES, *supra* note 14, at 10.

52. *Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015) (holding that because the RTBF is not recognized in the United States, and because a takedown of an image would constitute prior restraint of speech, an actress could not force an internet provider to remove a film with her image that had been transformed into a religious matter, resulting in death threats against her). Some find support for the proposition against the RTBF in older Supreme Court decisions that emphasized the public’s right to access public records, if through the long hand of the press. *See Nixon v. Warner Commc’ns. Inc.*, 435 U.S. 589, 597 (1978); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495–96 (1975).

53. *Garcia*, 786 F.3d at 746.

b. Implications of the Dominant View: The RTBF and the News Media

While the RTBF was traditionally discussed in the context of internet providers and tech giants such as Google, with the expansion of the media to online platforms, debates about the RTBF in the context of news reporting have become more prominent. People with past interactions with law enforcement—from arrests to charges—are likely to be severely impacted due to a potential litany of articles with their mugshots littered across the internet.⁵⁴ As discussed, the continued publication of these types of articles perpetuates punitive effects against these individuals and exacerbates inequities resulting from an unfair administration of justice.⁵⁵ *L.A. Times* columnist Nicolas Goldberg expressed this problem accurately:

In the old days, a story [] would appear in the print editions [of newspapers], but a few days later all those papers would be lining birdcages or wrapping fish, and the article would only be findable in archives, often on microfilm or microfiche. But now, nothing goes away. Everything can be found online, instantly.⁵⁶

Due to their eternal online presence on media websites, the impact of these arrests and charges can rarely be fully erased from the lives of those who have interacted with the criminal legal system, even after a vacatur or expungement remedy is effectuated. To no one's surprise, minority groups that have experienced significantly more interactions with the police and the criminal legal system are more likely to be affected by these barriers to reentry.⁵⁷

In the United States, given the superiority of the right to free speech under the First Amendment, several legal theories protect publishers by claiming that the burden of evaluating erasure requests would be too weighty for data controllers and search engines.⁵⁸ These scholars believe that search engines and social media websites would be overly influenced by potential financial ramifications that would result from failing to comply with any potential regulation concerning the right to be forgotten.⁵⁹ Thus, these scholars fear that data controllers will remove nearly all data that individuals request to be removed, resulting in a suppression of free speech.⁶⁰

54. See Sarah Esther Lageson, *Can a Criminal Record Ever Be Fully Expunged?*, PAC. STANDARD (Jan. 11, 2019), <https://psmag.com/social-justice/can-a-criminal-record-ever-be-fully-expunged> (stating that even when criminal records have been expunged, websites still have information regarding the initial arrest and charge available online).

55. See Murray, *Newspaper Expungement*, *supra* note 7, at 72.

56. Nicholas Goldberg, *Some Newspapers Are Deleting Old Crime Stories to Give People Fresh Starts. Is That Wise?*, L.A. TIMES (Feb. 7, 2021), <https://www.latimes.com/opinion/story/2021-02-07/newspapers-rewrite-history/>.

57. LAGESON, *supra* note 10, at 9.

58. Steven M. LoCascio, *Forcing Europe to Wear the Rose-Colored Google Glass: The "Right to Be Forgotten" and the Struggle to Manage Compliance Post Google Spain*, 54 COLUM. J. TRANSNAT'L L. 296, 326–29 (2015) (stating that financial incentives may lead to increased approval of deletion requests); Rosen, *supra* note 15, at 90–92 (stating that in ambiguous cases, data controllers would opt for deletion).

59. LoCascio, *supra* note 58, at 327; Rosen, *supra* note 15, at 90–91.

60. LoCascio, *supra* note 58, at 327; Rosen, *supra* note 15, at 90–91.

However, Google itself has indicated in its reports that only about forty-nine percent of erasure requests under European privacy law resulted in deletion as of January 2023.⁶¹

Regardless, these concerns lead to strong scholarly support toward placing the burden of showing a compelling reason for the data's removal on the petitioner. Under free speech jurisprudence, if such data requests are brought to the courts, any restriction imposed upon the right must be a "compelling [government] interest" narrowly tailored to carry out that interest,⁶² and the imposed restriction must be the "least restrictive alternative that can be used to achieve that goal."⁶³ Due to this high judicial standard, regardless of the type of information, one of the only methods an individual has in succeeding to have data removed is contacting the publisher of the data themselves with a request to remove the data and simply hoping that it is granted.⁶⁴

However, and despite some recent changes as will be discussed below, under this current regime and due to First Amendment superiority, there are newspapers that still refuse to delete previously published media content from their online archive in response to external requests (a process known as "unpublishing"⁶⁵) based on the rationale that unpublishing equals changing the course of history and would lead newspapers to violate their obligations to present transparent, accurate information.⁶⁶ For example, in a recent op-ed authored by *L.A. Times* columnist Nicolas Goldberg, he suggested that "erasing history by 'rectifying' past stories sets a dangerous precedent."⁶⁷ Similar views were expressed by additional columnists, for example, Adrian Vore from the San Diego Union-Tribune in his quite telling op-ed "A Bad Precedent: Removing News Stories from Online."⁶⁸

61. See *Requests to Delist Content*, *supra* note 34 (specifying, on its constantly updated website, that 49.2% of URL delisting requests have been granted as of January 2023).

62. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 131 (1989) (stating that to "withstand constitutional scrutiny," the government may serve a compelling interest through "narrowly drawn regulations," in holding that a ban on indecent interstate commercial telephone messages to protect minors cannot survive constitutional scrutiny).

63. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (holding the Child Online Protection Act unconstitutional under the right to free speech because it did not meet the least restrictive method for protecting children from obscene content).

64. See Jessica Ronay, *Adults Post the Darndest Things: [Ctrl + Shift] Freedom of Speech to [Esc] Our Past*, 46 *TOL. L. REV.* 73, 87 (2014).

65. Dwyer & Painter, *supra* note 7, at 215.

66. Goldberg, *supra* note 56.

67. *Id.* "There is no current discussion at the L.A. Times of adopting a policy that would allow the paper to change or hide already-published stories." *Id.*

68. Adrian Vore, *A Bad Precedent: Removing News Stories from Online*, *SAN DIEGO UNION-TRIBUNE* (Mar. 9, 2018), <https://www.sandiegouniontribune.com/opinion/readers-rep/sd-me-readersrepnb-0311-story.html> ("Removing news from a website bothers me to the core. News organizations document history. They report news; they don't erase it. They chronicle bad happenings and good, report big news and small. They reflect their communities and the times."). Vore also cites to what he calls the "boiler-plate" response sent by the *L.A. Times* to unpublishing requests. *Id.*

Goldberg's and Vore's voices, though not unique,⁶⁹ represent only one side of the spectrum, as media ethicists have argued that the ethics of "unpublishing" does not clearly push toward refusal to unpublish as the only viable approach.⁷⁰ Alongside this lack of recognition of the RTBF, resulting in the superiority of keeping the published stories despite the impact on the lives of individuals, another, opposite movement has recently begun in a variety of publications. These publications have announced that—in an acknowledgment of how such an action can contribute to a continued effort of reducing societal harms against vulnerable populations—they will no longer routinely publish mugshots or name suspects in minor crimes.⁷¹ Such policies are well aligned with the spirit of the RTBF.⁷²

Other publications, including the *Boston Globe* and *Cleveland Plain-Dealer*, have begun performing their own RTBF experiments. The *Boston Globe's* "Fresh Start" initiative, launched in 2021, seems to be reflecting on the "nationwide reckoning on racial justice" and the need to reflect on its own crime reportage that has "disproportionately affected communities of color."⁷³ Both of these initiatives created appeals processes for individuals to ask the newspapers to review articles on a case-by-case basis to see if the publication warrants removal to protect the individual's privacy, akin to the European Union's RTBF process of reviewing delisting

69. See, e.g., *Policies and Standards*, WASH. POST, <https://www.washingtonpost.com/policies-and-standards/> (explaining that "[a]s a matter of editorial policy, [the *Washington Post*] do[es] not grant take-down requests, which should be vetted at the highest level"). The *Washington Post* will decide "whether further editorial action is warranted" such as correcting inaccurate information or a follow-up story, "but [maintains a policy] not to remove the article as though it had never been published." *Id.* For an overview of unpublishing policies compiled through a self-reported policy repository see UNPUBLISHING THE NEWS, <https://unpublishingthenews.com/>.

70. Dwyer & Painter, *supra* note 7, at 217–18.

71. See Danese Kenon, *The Inquirer Introduces New Policy Against Use of Mug Shots*, PHILA. INQUIRER (Sept. 11, 2020), <https://www.inquirer.com/news/police-mugshots-crime-stories-philadelphia-inquirer-policy-20200911.html/> (announcing its policy that it will no longer publish mugshots—except for rare uses—due to racial disparities, the depiction of individuals as criminals before an adjudication of guilt, the impact on employment opportunities, and the fact that publishing mugshots—except those of public figures or the perpetrators of notorious crimes—does not have value); Terry Langford, *The Houston Chronicle Will No Longer Publish Mug Shot Galleries*, HOUS. CHRONICLE (Feb. 21, 2020, 2:42 PM CST), <https://www.kut.org/texas/2020-02-21/the-houston-chronicle-will-no-longer-publish-mug-shot-galleries/> (announcing its policy to end the use of mug shot galleries); *Orlando Sentinel Discontinues Arrest Mugshots Database*, ORLANDO SENTINEL (June 12, 2020, 9:43 AM), <https://www.orlandosentinel.com/about/os-ne-arrest-mugshots-database-ended-20200612-p4hte2i2fbzxnvz2cpgheuxoe-story.html> (announcing its policy to discontinue use of arrest mugshot galleries); Zack Kucharski, *Gazette Policy Guides Removing Minor Crime Stories from Website*, GAZETTE (Oct. 29, 2019, 8:43 AM), <https://www.thegazette.com/crime-courts/gazette-policy-guides-removing-minor-crime-stories-from-website/> (announcing its policy of removing minor crime stories from its website); David Bauder, *AP Says It Will No Longer Name Suspects in Minor Crimes*, AP NEWS (June 15, 2021), <https://apnews.com/article/crime-technology-df0a7cd66590d9cb29ed1526ec03b58f/> (announcing its policy of no longer publishing the names of individuals charged with minor crimes due to the potentially damaging effect of such a publication that makes it difficult for "individuals to move on with their lives"). See also AMY GAJDA, *SEEK AND HIDE: THE TANGLED HISTORY OF THE RIGHT TO PRIVACY* 248–49 (2022) [hereinafter GAJDA, *SEEK AND HIDE*].

72. See GAJDA, *SEEK AND HIDE*, *supra* note 71, at 248–49.

73. *Fresh Start Initiative: Submit your Appeal*, BOS. GLOBE, <https://www.boston.com/fresh-start-submit-your-appeal/#:~:text=We%20welcome%20public%20comments%20and%20concerns%20at%20freshstart%40globe.com.>

requests.⁷⁴ However, this type of process could instead result in other methods to appease the requestor besides unpublishing; for example, the publication could make an offer to revise or update the article, turn the individual anonymous in the article, use a code to hide the article from online search results, or add an editor's note.⁷⁵ In a study into newsroom officials' practices in this realm, the majority of newsroom officials were strongly opposed to unpublishing; however, eighty percent of the respondents agreed that some requests may be justifiable.⁷⁶ In another study, over ninety-three percent of respondents in the United States agreed that "journalists always should adhere to codes of professional ethics regardless of situation and context," which conflicts with their view against unpublishing.⁷⁷

Even one columnist at the *L.A. Times*, which as we saw supports a policy of never unpublishing or altering past articles, including those concerning vacated crimes, recognizes that along with the possibility of amending an article explaining a later outcome,⁷⁸ "[n]ewspapers absolutely should play a part in ameliorating the situation by reconsidering, going forward, what they report in the paper, how they play and contextualize crime stories, what language they use and how they evaluate facts they get from police."⁷⁹ Recently, a journalist at the *L.A. Times*, in commenting on the trial of Ghislaine Maxwell, noted that "[v]ictim-defendants in sex trafficking cases are often doubly punished by the criminal system" and that "[w]e should be having a broader discussion about just treatment for these defendants and consider more nuanced solutions."⁸⁰ Despite these statements, the *L.A. Times* continues to maintain its policy of not removing past articles nor mugshots, even though the *L.A. Times* itself recommends alternative solutions for the populations it impacts.⁸¹

74. *Id.*; see Sydney Smith, *Cleveland.com's New 'Right to Be Forgotten' Program Removes Names from Some Expunged Crime Stories*, iMEDIAETHICS (Oct. 12, 2018, 5:00 AM), <https://imediaethics.org/cleveland-coms-new-right-to-be-forgotten-program-removes-names-from-some-expunged-crime-stories/> (stating that Cleveland.com "is voluntarily exploring its own 'right-to-be-forgotten experiment,' allowing people to request their names to be removed from stories about 'minor crimes they committed'").

75. Dwyer & Painter, *supra* note 7, at 215–16. For additional discussion on proposed solutions see *infra* Part IV.

76. Dwyer & Painter, *supra* note 7, at 216.

77. *Id.* (citing TIM P. VOS & STEPHANIE CRAFT, *WORLDS OF JOURNALISM STUDY, COUNTRY REPORT: JOURNALISTS IN THE UNITED STATES* (2016), https://epub.ub.uni-muenchen.de/34878/1/Country_report_US.pdf).

78. Goldberg, *supra* note 56. While no official language related to unpublishing can be found on the *L.A. Times* Ethics Guidelines, Goldberg claims that "[t]here is no current discussion at the *L.A. Times* of adopting a policy that would allow the paper to change or hide already-published stories." *Id.*; *L.A. Times Ethics Guidelines*, *L.A. TIMES* (Apr. 15, 2014), <https://www.latimes.com/about/la-xpm-2014-apr-15-la-about-ethics-guidelines-story.html>; see Vore, *supra* note 68 (claiming that, at least in 2018, the *L.A. Times* had the following "boilerplate" response to unpublishing requests: "The Los Angeles Times has a policy not to change or remove articles from its historical archives. Our archived content on the Internet is a matter of public record, as are the archives of the newspaper editions.").

79. Goldberg, *supra* note 56.

80. Julie Dahlstrom, *Op-Ed: Ghislaine Maxwell's Case Puts a Spotlight on Trafficking's Victim-Defendants*, *L.A. TIMES*, (Dec. 13, 2021, 3:15 AM), <https://www.latimes.com/opinion/story/2021-12-13/defendants-trafficking-cases-victims/>.

81. See Goldberg, *supra* note 56. The *L.A. Times* Ethics Guidelines are silent with regard to unpublishing. They do, however, address the option of publishing follow-up stories in cases where criminal suspects were not ultimately charged. See *L.A. Times Ethics Guidelines*, *supra* note 78.

Ultimately, what is clear is that unpublishing requires complex normative balancing between different values. Dwyer and Painter suggest the focus is on the balance between accuracy and objectivity.⁸² On the one hand, journalists want to protect the historical record and on the other hand they want to protect individuals from suffering permanent damage in their social standing, employment, and educational opportunities that all can stem from one, simple, Google search.⁸³ More concretely, Dwyer and Painter report that discussions with journalists revealed three dominant themes, often pushing toward different directions: the pursuit of truth, the need to minimize harm, and loyalty to society. As discussed later, this Article claims that all three themes in fact support the recognition of the right to social expungement.

Given the view that the RTBF does not exist in the United States, the media is not required at any point to delete past, published articles, no matter their deleterious impact on an individual. However, although the dominant view is well aligned with the practices of many online news outlets, this Article suggests that the second school of thought, offering the potential implementation of an American style RTBF, should gain more traction. Indeed, as discussed above, more newspapers are now willing to adopt such a path. From a constitutional perspective, scholars have claimed that although First Amendment rights indeed stand higher on the constitutional hierarchy, a host of court cases and legislative actions have suggested that the right to privacy—which stands at the heart of the RTBF—should be given more weight when considering the rationales behind the RTBF, as the next Section will discuss.

2. Recognition of Privacy: A Door to Rethink the RTBF

Although a strict constitutional reading could indeed support the proposition advanced by the first maximalist school of thought, the second school of thought, which seems to represent a minority view, recognizes the challenges of adopting the RTBF but claims that the actual feasibility of its adoption has not been fully explored, developed, or explained in the United States. Moreover, scholars that belong to this group claim that based on the recognition of the right to privacy in American courts, an “American Style” RTBF could potentially exist in the United States—at least in a limited scope.⁸⁴ As will be discussed later, scholars that belong

82. See Dwyer & Painter, *supra* note 7, at 214–15. Gajda seems to offer a different balance: between newsworthiness and privacy rights of the individuals. See Gajda, *supra* note 16, at 263–64. As I will argue later, these views converge through balancing the need to minimize harm to individuals and serving society.

83. See Dwyer & Painter, *supra* note 7, at 215.

84. Shuntich, *supra* note 37, at 2–3; see generally Webb, *supra* note 18, at 1325 (proposing that “Congress enact legislation establishing the requirement that search engine providers engage in a judicial-type of balancing test, weighing the values of individual privacy against the value of the data in question to the public”); Cooper, *supra* note 40, 206–07; Lavelle, *supra* note 40, at 1141–42; Gallinucci-Martinez, *supra* note 40, at 20–23; Deitz, *supra* note 33, at 206; Keltie Haley, *Sharenting and the (Potential) Right to Be Forgotten*, 95 IND. L.J. 1005, 1015 (2020); Chen, *supra* note 40, at 279; see also Gajda, *supra* note 16, at 220 (noting that juvenile offender

to this group contemplate the feasibility of the RTBF in multiple methods and for different types of populations, including crime victims and juvenile offenders. By offering these methods, these scholars reflect upon changing notions in society regarding what type of information should be or should not be public.

Indeed, this group of scholars seems to recognize that the legal reality is more complex than the one offered by the dominant school of thought. They point at certain precedents, laws, and policies that de facto incorporate principles of the RTBF in balancing the right to free speech with the right to privacy and demonstrate how society honors the protection of certain information, including expunged criminal records.⁸⁵

Interestingly, this second school of thought seems to better reflect public notions regarding the need to protect privacy. For example—despite scholars arguing that there exists a consensus against comprehensive data privacy legislation—a Pew Research Center survey conducted in June 2019 showed that given the option, “74% of U.S. adults say it is more important to be able to ‘keep things about themselves from being searchable online,’ while 23% say it is more important to be able to ‘discover potentially useful information about others.’”⁸⁶

Although the Supreme Court has recognized a fundamental right to privacy, the U.S. Constitution contains no express right to privacy,⁸⁷ akin to the right from

records are generally kept private and constitute a notion of the RTBF that currently exists in the law); GAJDA, *SEEK AND HIDE*, *supra* note 71, at 242–50.

85. Shuntich, *supra* note 37, at 3.

86. Brooke Auxier, *Most Americans Support Right to Have Some Personal Info Removed from Online Searches*, PEW RSCH. CTR. (Jan. 27, 2020), <https://www.pewresearch.org/fact-tank/2020/01/27/most-americans-support-right-to-have-some-personal-info-removed-from-online-searches/>.

87. *See generally* U.S. CONST.; *see, e.g.*, Andrew D. Morton, *Much Ado About Newsgathering: Personal Privacy, Law Enforcement, and the Law of Unintended Consequences for Anti-Paparazzi Legislation*, 147 U. PA. L. REV. 1435, 1440–41 (1999). Morton stated:

The United States Constitution contains no express right to privacy. Nevertheless, the medieval English common law proposition that a person’s ‘house is his castle’ has been incorporated as a central tenet of American legal principles since the colonial period Over the last thirty years, however, the Court has begun to find a constitutionally protected right to privacy embedded in an interpretation of the First, Third, Fourth, Fifth, and Fourteenth Amendments to supplement existing common law guardianship.

Id.; *see, e.g.*, Editorial Board, *Privacy—State Statute Prohibiting the Promotion of Obscene Devices Did Not Violate the Defendant’s Privacy Rights as Provided Under the Louisiana Constitution*, 32 RUTGERS L.J. 1086, 1115–16 (2001). The editorial board stated:

The right to privacy is not a right enumerated in the United States Constitution, rather it is a right that grew out of those rights promulgated in the Bill of Rights. The United States Supreme Court has recognized the protection of privacy rights in a series of landmark cases. The Court has decided cases on whether privacy rights cover the right to have an abortion; the right to use contraceptive devices; the right to obtain contraceptive devices; the right to homosexual sodomy; and the right to private possession of obscene materials. These cases have stated that privacy rights are protected by the Due Process Clause of the Fourteenth Amendment.

Id. (citations omitted). *But see* Gajda, *supra* note 44 (discussing the recent *Dobbs* decision).

which the European Union derived its RTBF.⁸⁸ However, elements of individual privacy have been honored in the U.S. Constitution since its drafting. For example, the First Amendment grants the privacy of beliefs through the explicit freedoms of religion and expression,⁸⁹ the Third Amendment grants citizens the privacy of their home against demands that their home must be used to house soldiers,⁹⁰ the Fourth Amendment grants citizens the privacy of their person and possessions against unreasonable searches and seizures,⁹¹ and the Fifth Amendment grants citizens a protection of privacy in personal information through the privilege against self-incrimination.⁹²

In a recent illustration, Amy Gajda reaches a similar conclusion by exploring almost a century of cases in U.S. courts and argues that even though a formal RTBF currently does not exist in the United States, its tenets echo throughout common law and specifically in the right to privacy.⁹³ Gajda's survey of cases demonstrates a recognition that certain information should not be published.⁹⁴

Indeed, the Supreme Court has explicitly recognized the right to privacy in multiple cases, the most significant being *Griswold v. Connecticut* in 1965, and has held that the U.S. Constitution guarantees a fundamental right to privacy in the Due Process Clause of the Fourteenth Amendment.⁹⁵ However, like any right, it is not absolute.⁹⁶ Even as early as 1890, Samuel D. Warren and Louis D. Brandeis published their famous Harvard Law Review article⁹⁷ criticizing the press for publishing embarrassing information about private individuals and stating that individuals should have the right to be left alone under a right to privacy. The Court in *Griswold* recognized the importance of this article in defining the right to

88. See Case C-131/12, *Google Spain SL v. González*, ECLI:EU:C:2014:317, ¶¶ 91–94 (May 13, 2014), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1033117/>.

89. U.S. CONST. amend. I.

90. U.S. CONST. amend. III.

91. U.S. CONST. amend. IV.

92. U.S. CONST. amend. V.

93. Gajda, *supra* note 16, at 206.

94. Gajda offers a comprehensive and illuminating review of court cases in which “Right to Be Forgotten-Like Sentiments” were present. See Gajda, *supra* note 16, at 228. Gajda seems to belong to the second school of thought; descriptively suggesting that a form of RTBF was recognized in the United States, while expressing concerns about the normative desirability of such reality particularly in the freedom of the press context. *Id.* at 263–64.

95. A guarantee that, as mentioned, is currently being reassessed in light of *Dobbs*. See generally *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

96. See *Griswold v. Connecticut*, 381 U.S. 479, 484, 504 (1965) (holding that the Constitution guarantees a right to privacy against governmental intrusion through emanations from “penumbras” created by the Bill of Rights, but these rights are not absolute and can be overcome); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (holding that citizens had personal civil liberties under the Fourteenth Amendment); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (reaffirming the right to privacy in holding laws criminalizing sodomy unconstitutional).

97. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890); see Gajda, *supra*, note 16, at 206.

privacy.⁹⁸ This right to privacy has since been “defined as the right to live one’s life in seclusion, without being subjected to unwarranted and undesired publicity,”⁹⁹ and has only been recognized to be limited when “one, whether willingly or not, becomes an actor in an occurrence of public or general interest” and “[w]hen this takes place, [the actor] emerges from [their] seclusion, and it is not an invasion of [their] right of privacy to publish [their] photograph with an account of such occurrence.”¹⁰⁰

For example, in 1931 the Court of Appeal of California discussed the right to privacy in *Melvin v. Reid*. The case involved a former person in prostitution’s complaint suing filmmakers under a right to privacy; she claimed that the filmmakers used her name and life story in a film they produced and distributed about the life of a “reformed prostitute.”¹⁰¹ In its ruling, the Court of Appeal recognized certain principles of the right of privacy: (1) it is a right unknown to ancient common law; (2) it “is an incident of the person and not of property;” (3) it is a “purely personal action” that dies with the complainant; (4) it does not exist if the person published or consented to the publication; (5) it does not exist for persons prominent in public life; (6) it does not exist if the public has a rightful interests in the information or if

98. See *Griswold*, 381 U.S. at 510, n.1. The Court stated:

The phrase “right to privacy” appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890 which urged that States should give some form of tort relief to persons whose private affairs were exploited by others . . . Largely as a result of this article, some States have passed statutes creating such a cause of action, and in others state courts have done the same thing by exercising their powers as courts of common law . . . Thus the Supreme Court of Georgia, in granting a cause of action for damages to a man whose picture had been used in a newspaper advertisement without his consent, said that “A right of privacy in matters purely private is . . . derived from natural law” and that “The conclusion reached by us seems to be . . . thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law . . . Observing that “the right of privacy . . . presses for recognition here,” today this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with “privacy.”

Id.

99. *Jones v. Herald Post Co.*, 18 S.W.2d 972, 973 (1929); *Hamilton v. Lumbermen’s Mut. Cas. Co.*, 82 So. 2d 61, 61 (1955). See also *Banks v. King Features Syndicate*, 30 F. Supp. 352, 353 (1936); *Brents v. Morgan*, 299 S.W. 967, 970 (1927).

100. *Melvin v. Reid*, 297 P. 91, 91 (1931) (citing *Jones v. Herald Post Co.*, 18 S.W.2d 972, 973 (1929)).

101. *Melvin*, 297 P. at 91, 93 (*superceded by* *Roberts v. Gulf Oil Corp.*, 195 Cal. Rptr. 393, 409–10, n.16 (1983)) (noting that a later amendment to article 1, section 1 of the California Constitution did not grant plaintiff, as a corporation, standing to assert a right to privacy under that section, but this does not abscond with an individual’s right to privacy); see also *Rosenbloom v. Metromedia*, 403 U.S. 29, 80 n.3 (1971) (Marshall, J., dissenting) (noting that *Melvin* protected the privacy of persons involved in dramatic public events). While *Melvin* dates back to almost one-hundred years ago, it was not the first case to discuss the right to privacy. In fact, Gajda documents a number of cases that go back even further, such as *State v. Bienvenu*, in which the Louisiana court decided “that it would be [a] ‘barbarous’” doctrine should newspapers be allowed to report anything truthful that they wanted, including “‘crimes long since forgotten’” and perhaps “‘expiated by years of remorse and sincere reform.’” GAJDA, *SEEK AND HIDE*, *supra* note 71, at 245 (citing *State v. Bienvenu*, 36 La. Ann. 378, 382 (La. 1884)).

the information could be for public benefit, for example, information concerning a person running for public office; (7) the right can only be “violated by printings, writings, pictures or other permanent publications or reproductions, and not by word of mouth;” and (8) the “right of action accrues when the publication is made for gain or profit,” a tenet that is questioned in some cases.¹⁰²

Despite the fact that the complainant in *Melvin* had been involved in a public trial for murder, the court ruled that the right to privacy could justify Melvin’s cause of action, particularly given her steps toward reforming her life and because the filmmakers used Melvin’s name in the film.¹⁰³ Moreover, the court specified that the use of the complainant’s name in the movie was “unnecessary and indelicate, and a willful and wanton disregard of that charity which should actuate us in our social intercourse, and which should keep us from unnecessarily holding another up to the scorn and contempt of upright members of society.”¹⁰⁴ This early case exemplifies situations in which principles of the RTBF can be found many years before the RTBF was officially recognized. The application of that right in the context of *Melvin* is well-aligned with the idea that the RTBF can be utilized when individuals strive to reform their position in a society with ever-changing values.

In 1975, following *Melvin v. Reid*, the United States Supreme Court held in *Cox Broadcasting Corp. v. Cohn* that free speech and the freedom of the press outweighed privacy rights in publishing publicly available information concerning crimes.¹⁰⁵ In its holding, the Court emphasized how within the sphere of privacy claims and freedom of the press claims, the legal interests on both sides are plainly rooted in the traditions and concerns of society, reflecting our ever-changing values.¹⁰⁶ It even noted that other cases—such as those involving juvenile criminal records and less accessible government records—could result in

102. See *Melvin*, 297 P. at 92–93.

103. *Id.* at 93–94. The court stated:

We believe that the publication by respondents of the unsavory incidents in the past life of appellant after she had reformed, coupled with her true name, was not justified by any standard of morals or ethics known to us, and was a direct invasion of her inalienable right guaranteed to her by our Constitution, to pursue and obtain happiness. Whether we call this a right of privacy or give it any other name is immaterial, because it is a right guaranteed by our Constitution that must not be ruthlessly and needlessly invaded by others. We are of the opinion that the first cause of action of appellant’s complaint states facts sufficient to constitute a cause of action against respondents.

Id.

104. *Id.* at 93.

105. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (refusing to issue a rule forbidding the media from publishing information in public records if offensive to the “supposed reasonable man”).

106. *Id.* at 491.

different constitutional answers because of state policies honoring the protection of such information.¹⁰⁷ Thus, the Court intentionally left this question open.¹⁰⁸

Then, in the 1989 case, *Florida Star v. B.J.F.*, the Court ruled unconstitutional a law that made it illegal to print the name of a victim of sexual violence without consent; but it further held that if a State seeks to punish “truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly.”¹⁰⁹ That same case then emphasized that truthful publications do not automatically have constitutional protections nor “that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press,” and that any lawful punishment against the press must be narrowly tailored to a “state interest of the highest order.”¹¹⁰ Thus, this case left room for future liability for the same facts if values develop in society to grant individuals protection from the exposure of their trauma in the media, as discussed later.¹¹¹

Then, in 2001 in *Bartnicki v. Vopper*, the Court once more denied the press the freedom to publish *any* truthful information in the context of intercepted communications obtained illegally by a third-party and then given to the media.¹¹² It should be noted, however, that while the Court still found in favor of the media’s right to publish given that the facts of this case were a matter of public concern,¹¹³ Breyer and O’Connor’s concurrence, when read with Rehnquist, Scalia, and Thomas’ dissent, offers a broader privacy protection than the particular outcome might suggest. In citing the aforementioned Warren and Brandeis article regarding the right to privacy, it emphasized that “[t]he right of privacy does not prohibit any publication of matter which is of public or general interest.”¹¹⁴ Thus, this case left open the possibility of liability against the media where the media obtains the information illegally and it is not of public concern.

Many cases have also arisen in the context of the publication of mugshots in print and online media. Some of these cases have been dismissed due to a lack of legal basis.¹¹⁵ However, other cases have granted relief or have settled where

107. *Id.* at 496 n.26. (“We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile-court proceedings.”).

108. *Id.*

109. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

110. *Id.* at 541.

111. See Gajda, *supra* note 16, at 217 (noting that this case “suggests that there could well be times in which liability even for the publication of the name of a rape victim would be appropriate and constitutional. The decision, described in the Court’s own language, does not stand for the principle that all publication of truthful information is protected.”).

112. *Bartnicki v. Vopper*, 532 U.S. 514, 517–18, 534–35 (2001).

113. *Id.* at 518, 535.

114. *Id.* at 534 (citing Warren & Brandeis, *supra* note 97, at 214).

115. See, e.g., *Paul v. Davis*, 424 U.S. 693, 713–14 (1976) (denying a challenge under 42 U.S.C. § 1983 to publication of official acts like arrests records, notwithstanding a finding of guilt); *Tramaglini v. Martin*, No. 19-11915, 2019 U.S. Dist. LEXIS 152961, at *10, *14–17, *24 (D.N.J. Sept. 9, 2019) (dismissing plaintiffs’ Fourth,

criminal history record identification acts have been violated, especially where the plaintiffs had their criminal records expunged.¹¹⁶ Notably, a class action is pending in Illinois regarding a class of arrestees suing “Mugshots.com” for various claims because the website posted their mugshots online, serving to ruin their chances to reform their lives after their records have been expunged.¹¹⁷

These cases help demonstrate that the media’s rights under the First Amendment are not boundless, and that an RTBF in the age of the internet would be difficult but not impossible to implement in the United States. This is because the First Amendment has its own limitations,¹¹⁸ and in the face of the right to privacy free speech can be limited.¹¹⁹

As expressed by the second school of thought, principles of the RTBF have been littered throughout U.S. common law and statutory law, especially in cases and laws dealing with the publication and dissemination of information not necessary for the public good, all the while balancing the right to privacy against the right to free speech.¹²⁰

Fifth, Sixth, and Fourteenth Amendment claims against an officer for distribution of mugshots in New Jersey); *Freedom Commc’ns, Inc. v. Sotelo*, No. 11-05-00336-CV, 2006 Tex. App. LEXIS 5132, at *16–17 (Tex. App. June 15, 2006) (dismissing a plaintiff’s suit for libel against a newspaper for posting the plaintiff’s picture under a headline about sex offenders because the articles were found to be privileged under Tex. Civ. Prac. & Rem. Code Ann. 7.002(a), (b)(1)(B), (b)(2), and plaintiff did not raise a material fact issue regarding actual malice).

116. *See, e.g., Mediaone, L.L.C. v. Henderson*, 592 S.W.3d 933, 943, 945–46 (2019) (holding that plaintiff established a prime facie case for defamation after defendant published plaintiff’s mugshots by mistake (it intended to publish the mugshot of someone with the same last name), but not for the subsequent corrections defendant issued); *D Mag. Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 440, 442 (2017) (granting relief under a defamation claim to a plaintiff whose mugshot was published in an article where the court found that the magazine failed to take reasonable steps to verify the story’s accuracy); *Taha v. Bucks Cnty.*, 408 F. Supp. 3d 628, 632–33, 650 (E.D. Pa. 2019) (approving the jury’s award of damages for a class action suing the county for dissemination of mugshots after certifying the class); *Taha v. Bucks Cnty.*, No. 12-6867, 2021 WL 534464, at *4 (E.D. Pa. Feb. 12, 2021) (ordering Mugshots.com to pay \$150,000 in damages).

117. *See Gabiola v. Sarid*, No. 16-cv-02076, 2017 U.S. Dist. LEXIS 157699, at *29–30 (N.D. Ill. Sept. 26, 2017) (holding that the claim could not be dismissed because the websites are not entitled to complete protection under the First Amendment as a matter of law); *see also Gabiola v. Mugshots.com, Ltd. Liab. Co.*, No. 16-cv-2076, 2019 U.S. Dist. LEXIS 17611, at *3–5 (N.D. Ill. Feb. 4, 2019) (granting plaintiffs’ second motion to compel discovery); *Detroit Free Press, Inc. v. U.S. Dep’t of Just.*, 829 F.3d 478, 484–85 (6th Cir. 2016).

118. *See, e.g., Virginia v. Black*, 538 U.S. 343, 358–60 (2003) (stating that “[t]he protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution”).

119. *See Bartnicki*, 532 U.S. at 529. The Court stated:

[O]ur cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily We continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.

Id. (citing *Florida Star v. B.J.F.*, 491 U.S. 524, 532–33 (1989)).

120. *See Gajda, supra* note 16, at 206.

3. RTBF on the Ground: Legislative Protections

As claimed by Gajda and others and discussed above, the principles of the RTBF have been demonstrated in a limited form across U.S. case law under the tenets of the right to privacy. Furthermore, we also know that certain data privacy laws appear to create a de facto limited RTBF.¹²¹ The de facto limited RTBF can be seen, for example, in state laws that allow individuals to expunge or vacate criminal records;¹²² the Fair Credit Reporting Act, which regulates companies that provide credit reports and background checks;¹²³ and erasure laws in multiple states such as those that grant minors the right to remove public content they have personally posted on the internet.¹²⁴ As Gajda also mentions, other statutes from Tennessee,¹²⁵ Minnesota,¹²⁶ Montana,¹²⁷ and North Carolina¹²⁸ also demonstrate the state interest in protecting the privacy of past historical information, including: “medical records, military records, school records, children’s services records, motor vehicle records, mental health files, records that would identify those involved in executions, photographs of rape victims, among multiple other[] [records].”¹²⁹ Such statutes demonstrate the country’s changing attitude toward privacy for certain types of information.

Similarly, four established torts protect privacy interests: intrusion on seclusion;¹³⁰ appropriation of name or likeness;¹³¹ publicity given to a private life;¹³² and publicity placing a person in false light.¹³³ Also, despite a lack of

121. *Id.* at 249–54.

122. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 10-105 (West 2021).

123. Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681.

124. *See, e.g.*, Privacy Rights for California Minors in the Digital World Act (Eraser Act), CAL. BUS. & PROF. CODE §§ 22580-82 (West 2015). Other state laws provide for erasure if offenses have been decriminalized. *See, e.g.*, CONN. GEN. STAT. § 54-142d (West 2022).

125. TENN. CODE ANN. § 10-7-504 (West 2022).

126. MINN. STAT. ANN. § 626.556 11(c) (West 2022).

127. MONT. CODE ANN. § 41-5-216(1) (West 2021).

128. N.C. GEN. STAT. § 7B-2901 (West 2022).

129. Gajda, *supra* note 16, at 249 (discussing the types of protected records under Tennessee’s law) (citations omitted).

130. RESTATEMENT (SECOND) OF TORTS § 652B (1977) (defines “[i]ntrusion upon [s]eclusion” as when “[o]ne [] intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns” and, as such, “is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person”).

131. RESTATEMENT (SECOND) OF TORTS § 652C (1977) (defines “[a]ppropriation of [n]ame or [l]ikeness” as “[o]ne who appropriates to his own use or benefit the name or likeness of another” and “is subject to liability to the other for invasion of his privacy”).

132. RESTATEMENT (SECOND) OF TORTS § 652D (1977) (defines “[p]ublicity [g]iven to [p]rivate [l]ife” as “[o]ne who gives publicity to a matter concerning the private life of another” and “is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that . . . would be highly offensive to a reasonable person . . .”).

133. RESTATEMENT (SECOND) OF TORTS § 652E (1977) (defines “[p]ublicity [p]lacing [p]erson in [f]alse [l]ight” as “[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light” and “is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in

comprehensive data privacy legislation in the United States, this gap has not prevented some statutes and other causes of action from providing U.S. citizens with certain privacy protections. Such legislation includes the Health Insurance Portability and Accountability Act, known as HIPAA, which protects an individual's medical information,¹³⁴ and the Driver's Privacy Protection Act, known as DPPA, which illegalizes the act of knowingly obtaining or disclosing personal information from a motor vehicle record.¹³⁵ Additionally, states have begun to take steps to limit the power of publishers to profit from booking photos and mugshots, demonstrating the state's interests in protecting privacy regarding an individual's criminal history or pending criminal cases. For example, Arkansas,¹³⁶ Illinois,¹³⁷ Florida,¹³⁸ California,¹³⁹ Georgia,¹⁴⁰ and Vermont,¹⁴¹ among other states, all have laws in place prohibiting the publication of mugshots for profit or accepting fees for the removal of mugshots.¹⁴² Utah even has a law requiring a publication or website to remove and destroy a mugshot when the individual in the mugshot requests its removal, and further requires it be removed within a certain time frame.¹⁴³ Florida specifies that refusal to remove would constitute an unfair or deceptive trade practice.¹⁴⁴ Also, Pennsylvania, among other states, is currently seeking to pass legislation that will prohibit the publication or dissemination of booking photographs for commercial use.¹⁴⁵ In this context, the Restatement (Second) of Torts should also be mentioned,¹⁴⁶ as it offers some language alluding to an individual's privacy interests in their past, including "some of his past history that he would rather forget."¹⁴⁷ Furthermore, the Restatement clarifies that publication of truthful information might be punished under certain conditions, based off how offensive the information is and its newsworthiness (or lackthereof).¹⁴⁸

Ultimately, these statutes indeed demonstrate that the spirit of the RTBF is in fact much more present in states' legislation than most have recognized. Particularly, we can see how tenets of the RTBF are implemented to protect

reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed").

134. Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

135. 18 U.S.C. § 2721.

136. ARK. CODE ANN. § 4-75-102 (West 2021).

137. 5 ILL. COMP. STAT. ANN. § 140/2.15 (West 2023).

138. FLA. STAT. ANN. § 901.43 (West 2021).

139. CAL. CIV. CODE ANN. § 1798.91.1 (West 2015).

140. GA. CODE ANN. § 35-1-19 (West 2014).

141. VT. STAT. ANN. TIT. 9, § 4191 (West 2015).

142. See *Mug Shots and Booking Photo Websites*, NAT'L CONF. STATE LEGISLATURES (Aug. 8, 2022), <https://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx>.

143. UTAH CODE § 17-22-30(4)(a) (2022).

144. FLA. STAT. ANN. § 901.43(4) (West 2021).

145. H.B. 1736, 205th Gen. Assemb., Reg. Sess. (Pa. 2021).

146. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

147. *Id.* at cmt b. See also Gajda, *supra* note 16, at 206–07.

148. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

individuals from the release of certain information that can impact their standing in society. In the instances of mugshots and expunged records, states recognize the interest in allowing these individuals to live normal lives without a criminal record impugning their day-to-day. However, and as discussed, despite these states' efforts, there remains a meaningful gap in the ability to accomplish such important state interests because private entities, like newspapers, maintain complete control over information that keeps linking individuals with their criminal past.

In sum, despite strong constitutional arguments and case law which outright reject the notion that a RTBF was or could be adopted in the United States, and as scholars that belong to the second school of thought previously argued, a significant number of state and federal laws, alongside case law, suggest otherwise and point at the delicate and particular balance adopted by state legislators and the judiciary between freedom of press and speech and privacy rights. As such, it is safe to say that different forms and expressions of the RTBF have indeed been introduced and adopted in the United States. In fact, in some instances the spirit of the RTBF was adopted in the United States even before the RTBF was formalized in its current form.¹⁴⁹

What is clear, however, is that although one can find some recognition of the RTBF within U.S. borders, it is evident that it was recognized only in limited forms. There remains a scholarly gap, however, in precisely understanding the types of categories in which a form of the RTBF was recognized. Based on the analysis of the existing case law and state legislation discussed above, this Article identifies three main categories in which a form of the RTBF was recognized:

First, Courts and statutes were willing to possibly recognize a limited form of RTBF in situations where the data was *obtained illegally*.¹⁵⁰ In these situations, one can potentially request that content providers remove information from the web, and such removal might be granted despite First Amendment limitations. This possibility, however, will likely be limited to information that is not of public concern.

Second, Courts and legislators also recognized a limited RTBF in situations where the data is *no longer public*.¹⁵¹ It will likely be much harder, however, to

149. Gajda, *supra* note 16, at 203–04.

150. See *Florida Star v. B.J.F.*, 491 U.S. 524, 540–41 (1989) (holding it unconstitutional to impose damages on newspapers for publishing rape victim's name because of First Amendment but implying that it may be constitutional to do so when newspaper has illegally obtained data); *Bartnicki v. Vopper*, 532 U.S. 514, 518–19, 534–35 (2001) (holding in favor of the media based on First Amendment right when media obtained data of public concern legally, but denying the press an absolute freedom to publish any truthful information in the context of intercepted communication obtained illegally); see also *Dahlstrom v. Sun-Times Media, L.L.C.*, 777 F.3d 937, 954 (7th Cir. 2015) (holding that the Sun-Times had no constitutional right to illegally obtain information about police officers from DMV records).

151. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (holding that courts cannot prevent the media from publishing already public information); *Melvin v. Reid*, 297 P. 91, 93–94 (1931) (holding in favor of a person formerly involved prostitution who did not want her private information public in the media based on

protect privacy rights in information that is in the public domain.¹⁵²

Third, Courts and legislators offered a distinction between *truthful and untruthful information*. If the information is truthful, the chances of protecting one's privacy through the RTBF decrease dramatically.¹⁵³ That is not to say, however, that courts view truth as a dispositive factor.

Based on the above, this Article amplifies the voices of those supporting the minority, second school of thought: that an "American Style" RTBF is not only a viable option despite the seemingly clear constitutional structure, but it has also been recognized *de facto*. More broadly, and for the purposes of establishing the right to social expungement, the analysis shows that there could be particular settings in which, despite First Amendment superiority, the right to privacy could support the unpublishing of stories by the news media.

This Article diverges, however, normatively from some of the scholars who belong in that group by claiming that such an adoption is desirable. Furthermore, this Article argues that the categories of cases currently recognized are insufficient from the perspective of those being haunted by their criminal past through online news stories. For those individuals, the Article suggests adopting the right to social expungement.

C. *The Right to Social Expungement: A Primer*

As mentioned, this Article argues that the current law and policy that led to the narrow recognition discussed in the typology above overlook an *additional* important group of individuals that deserves to be protected. These are the group of individuals that fall under *the right to social expungement*.

constitutional right to "pursue and obtain happiness"); *Mediaone, L.L.C. v. Henderson*, 592 S.W.3d 943 (2019) (finding that plaintiff established a *prima facie* case for defamation after defendant published plaintiff's mugshots by mistake); *D Mag. Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 440, 442 (2017) (granting relief under a defamation claim to a plaintiff whose mugshot was published in an article where the court found that the magazine failed to take reasonable steps to verify the story's accuracy); *Taha v. Bucks Cnty.*, 408 F. Supp. 3d 628, 632–33, 650 (E.D. Pa. 2019) (approving the damages for the class action suing the county for dissemination of mugshots after certifying the class).

152. But see, however, what Jones entitles "digital redemption" or "digital intervention": "[T]he willingness and means to transform digital public information into private information upon the subject's request, liberating the individual from discoverable personal information." JONES, *supra* note 14, at 9.

153. See generally *Florida Star*, 491 U.S. at 540–41 (signaling importance of balancing publication's truthfulness with privacy concerns). In *Florida Star*, the Court noted that the information the newspaper published was truthful; while this was not dispositive, the Court did note that truthful information that is obtained legally can be published and is only punished in certain circumstances. *Id.* at 541 (articulating punishment in circumstances where information is truthful and obtained legally depends on whether it is narrowly tailored to "a state interest of the highest order"); see also *Bartnicki*, 532 U.S. at 529 (mentioning that the truthfulness of information at issue is a relevant factor). In *Bartnicki*, the Court held in favor of the media even though the media had reason to know the recordings were illegally obtained. Further, the Court explained that it would not "categorically" answer whether a state actor may ever punish someone from publishing truthful information in light of the First Amendment. *Id.* at 529 (demonstrating Court's refusal to create rule where truthfulness is dispositive but showing that Court will consider truthfulness under the appropriate standard of constitutional review).

This right should provide protection for members of society who were arrested, charged, and/or convicted of offenses that were later legalized, decriminalized, no longer enforced, and were found eligible for expungement or vacatur processes—such as prostitution, minor drug offenses (particularly with marijuana), petty theft, and more—but whose criminal pasts remain in the public domain through online news stories. The information relating to those members likely does not fall under the existing categories discussed above because: it is (a) officially truthful (X was charged with an offense), (b) most likely legally obtained, and (c) is in the public domain. For the most part, an offense that was expunged or vacated effectively erases the information from the public view,¹⁵⁴ but it often remains in online or print publications.

Thus, the right to social expungement offers a new path for individuals aiming to delete the criminal scarlet letter that remains present unofficially—particularly through online news stories. The right includes a social dimension that requires a cultural shift in the societal understanding of the criminal culpability of these individuals. This Article identifies two main groups of individuals that fall under this definition: individuals who are no longer morally blameworthy because the offenses on which their informal record was created are no longer perceived as posing a risk to public safety (a perception formally presented by legalization or decriminalization of such offenses), and/or individuals who, as we understand today, should not have been recognized as criminally culpable—for example, because we should have considered them victims instead.

The right to social expungement is different from the RTBF. It recognizes societal willingness not only to forgive and forget but also to accept that criminal law is a value-laden domain that needs to be constantly reassessed and understood in conjunction with the passage of time. Particularly, the right to social expungement recognizes the shift in the moral blameworthiness of criminal acts, whether per the act itself or per the individual implicated with the criminal legal system. These individuals suffer the most when news stories about their pasts remain online. On the one hand, there is an official recognition by the state that the offenses they were arrested for or charged with should no longer be considered offenses, or there is a recognition that their interaction with the criminal legal system should no longer stain their past as it reflects deep social structures more than criminal culpability. On the other hand, and at the same time, these individuals do not have an established remedy against private newspapers that keep stories concerning past

154. See VILL. UNIV. CHARLES WIDGER SCH. OF L. INST. TO ADDRESS COM. SEXUAL EXPLOITATION, REPORT ON COMMERCIAL SEXUAL EXPLOITATION IN PENNSYLVANIA 30 (2021) [hereinafter REPORT ON COMMERCIAL SEXUAL EXPLOITATION IN PENNSYLVANIA] (“Unlike expungement, which simply erases criminal information, vacatur erases criminal information and declares the survivor factually innocent of the criminal activity and eliminates [sic] the vacated offense’s associated fines and costs. Vacatur expunges all derivative information from the originating arrest through the criminal trial.”) (citations omitted); see, e.g., 18 PA. STAT. AND CONS. STAT. ANN. § 3019(g) (West 2014) (outlining Pennsylvania’s vacatur remedy).

criminal activity open and accessible. The Article contends the interests of these individuals should be recognized through the social expungement lens.

Social expungement can be justified by two main arguments: (1) socio-legal theories of cultural shifts, and (2) criminal law amelioration doctrine. Based on these justifications, it is clear that the right to social expungement does not apply to *all* individuals whose criminal records were expunged or vacated. It should be recognized only in settings where both these justifications can be satisfied.¹⁵⁵ In the next Part, the Article further applies and elaborates on these arguments by utilizing the case study of individuals who were arrested for, charged with, and/or convicted of prostitution for selling sex.

II. APPLYING THE RIGHT TO SOCIAL EXPUNGEMENT: PROSTITUTION CHARGES AS A CASE STUDY

A. General

As held by the Supreme Court in 1891 in *Botsford*, “[n]o right is held more sacred, or . . . carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”¹⁵⁶ As shown in the aforementioned story of M, the ideal expressed in *Botsford*¹⁵⁷ is far removed from reality; one, single Google search of a person’s name can lead anyone to thousands of results. Many Americans suffer severe consequences from this reality in which past involvement, even in low-level crimes, can stain their reputation forever, even if the criminal offense was expunged or vacated by the state.¹⁵⁸ This scenario is applicable to a host of situations and offenses—from minor drug offenses to petty theft, trespassing, other misdemeanors, and more. This Article uses the case study of individuals who were arrested, charged, and/or convicted of prostitution to articulate the need to recognize the right to social expungement for individuals like M and others who are similarly situated.

The Article uses this case study because it offers a good representation of the problem. From the perspective of the public and the government, there is an obvious cultural shift which suggests that individuals involved in particular offenses (e.g., prostitution, some drug offenses, petty theft, and more) should not carry the heavy load of being considered “criminals.” From a forward-looking perspective, there are calls for *de jure* and *de facto* decriminalization of those offenses.

155. As such, the right to social expungement does not necessarily apply to all individuals whose cases were expunged over time if the additional dimension of cultural shift is lacking. For example, the right will likely not be applicable for individuals who were charged with rape, an offense that still carries social condemnation and clear moral blameworthiness.

156. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (holding that a court may not order a plaintiff without consent to submit to a surgical examination).

157. *Id.* at 251.

158. See, e.g., *supra* INTRODUCTION; see also LAGESON, *supra* note 10, at 113–35 (discussing the impact of digital conviction records on individual lives).

Alongside these initiatives are the backward-looking initiatives aiming to achieve the same goals: expansion of the ability to vacate or expunge past criminal records.¹⁵⁹ These steps suggest that criminal law may not have been the right venue to deal with these situations and that past decisions to criminalize should be altered to allow individuals involved in these offenses an opportunity to integrate into society.

At the same time, private entities, like newspapers, keep hold of information about past convictions without any legal framework that would require them to remove it from the virtual realm.¹⁶⁰ With the current legal landscape and the relatively narrow recognition of what may be considered by some the American version of the RTBF, that is not a surprise. These entities inhibit the success of the above-mentioned policy decisions, making it much more difficult for individuals to forego their past and start fresh. The right to social expungement can diffuse this tension.

Like in M's story, people may find mugshots and details online about the past of individuals who were criminalized for selling sex, even if prostitution charges have been vacated or expunged.¹⁶¹ Although the courts, through the vacatur process, have erased their criminal records—often acknowledging their prior victimization and trauma—individuals may continue to experience the detriments of a Google search, which could result in employment denial, tainted reputations in their communities, and an expectation of sex in exchange for rent.¹⁶² The same situation affects those who did have their charges vacated. In the eyes of the courts that vacated their records, these individuals never committed a crime, but in the eyes of the Internet, they are permanent offenders. As discussed above, some media outlets refuse to recognize the harm caused by the information posted online regarding one's past involvement with prostitution.

Given the magnitude of the harm caused to these individuals, alongside recent policies to detach them from the stain of criminality, by recognizing the right to social expungement, this Article offers a different approach which could allow individuals like M (and others), who were criminally arrested or charged for selling sex, to challenge inaccurate, excessive, irrelevant, and damaging information and request to have data concerning their offenses erased from news websites. Recognizing this right will not only enable these individuals to effectively return to regular life but will also reflect a recognition in society's ever-changing values, including the social acceptance of the trauma at least some of them endured, and more broadly, the strong ties between criminalization and our society's deep structures of oppression and inequality.

159. See *infra* Part II.C.2.

160. See *supra* Part I.B.1.b.

161. *Id.*

162. M's story is one illustration of the problem. For additional discussion about the collateral damage of criminal records, see LOVE & SCHLUSSEL, *supra* note 3, at 1. For discussion about the effects of digital information, see LAGESON, *supra* note 10, at 126–31.

It should be mentioned that one can claim that recognizing this right in the context of individuals who were criminalized for selling sex, whose offenses were vacated or expunged, should be a simple ask, as the vacatur or expungement remedy motions for courts to remove criminal histories for certain offenses, like prostitution, are now gaining more judicial support. Thus, based on the categorization above, these remedies can fall under the categories already recognized by American courts to allow the recognition of the RTBF and do not require any additional expansion. However, despite this potential recognition alongside legislators' recognition (typically marked through a granting of a vacatur remedy) that these individuals should never have been criminalized, it is still evident that information pertaining to these individuals' past prostitution convictions remains littered throughout the media.¹⁶³

In order to fight for this advancement, a right to social expungement can be implemented while honoring the tenets of the First Amendment right to free speech due to the compelling privacy interests of individuals like M—survivors at risk of re-victimization—and others that fall under the categorization discussed above.¹⁶⁴ Ultimately, as the remaining parts of the Article will discuss, the right to social expungement through online news outlets can serve both the interests of free speech and privacy and succeed in protecting the reputations of individuals where other solutions have failed.¹⁶⁵

To be clear, even under the assumption that the vacated or expunged information somehow remains in the public domain, albeit in a different format than the original criminal record (and thus does not fall under the categories defined earlier), the Article advances the idea that the right to social expungement should be applied to cases like M's and other similarly situated individuals.

163. This was the case for M and additional individuals who reached out to the Commerical Sexual Exploitation Institute at Villanova University. See generally REPORT ON COMMERCIAL SEXUAL EXPLOITATION IN PENNSYLVANIA, *supra* note 154.

164. For more context on self-identified survivors, like M, see for example Pranab Dahal, Sunil Kumar Joshi & Katarina Swahnberg, 'We Are Looked Down Upon and Rejected Socially': A Qualitative Study on the Experiences of Trafficking Survivors in Nepal, 8 GLOB. HEALTH ACTION 2 (2015). Dahal, Joshi, and Swahnberg stated:

In her study on trafficked survivors in the United States, Shigekane explains that even if survivors of trafficking are settled in their community, they face challenges like a sense of terror, helplessness, and lack of confidence in appearing in public, which result in psychological trauma. The threats from society and pressures from one's family and relatives add extra emotional and psychological strains, increasing threats of abuse and re-victimization. Stigmatization by the social environment, discouraging reintegration, is often cited as the primary cause of re-trafficking. Trafficked survivors are frequently rejected and shunned by their families or communities for having been forced to work as a prostitute, sexually abused, failing to return with the promise income, or for leaving a debt unpaid.

Id. (citations omitted) (citing Rachel Shigekane, *Rehabilitation and Community Integration of Trafficking Survivors in the United States*, 29 HUM. RTS. Q. 112, 112–36 (2007)).

165. See Deitz, *supra* note 33, at 202.

Before elaborating on the argument, and in order to establish the cultural shift claims, the next Section provides an overview of recent changes and evolution of our social understanding of sex work related offenses.

B. Cultural Shift: Moving Away From Criminalization

From the second half of the twentieth century to present day, attitudes in the United States towards people involved in prostitution have become more tolerant, understanding, and empathetic.¹⁶⁶ A host of indicators, including public perception, the evolution of social discourse, lenient enforcement policies, and openly debated movements all demonstrate the trend of increasing acceptance and comprehension of prostitution and the socioeconomic context of those who become part of the sex trade.¹⁶⁷

Much of this trend can be attributed to studies conducted in recent years, making tight links between prostitution, victimization, and abuse.¹⁶⁸ Indeed, studies from anti-trafficking organizations have shown that entry into prostitution is not necessarily the product of a free and informed decision.¹⁶⁹ Many studies have shown that at least some individuals in street prostitution reported being sexually abused or sexually assaulted as children.¹⁷⁰ This trauma can lead young children, mostly girls, to run away from home and drive them into the arms of traffickers.¹⁷¹ For

166. See, e.g., Liqun Cao & Edward R. Maguire, *A Test of the Temperance Hypothesis: Class, Religiosity, and Tolerance of Prostitution*, 60 SOC. PROBS. 188, 201 (2013); NINA LUO, DATA FOR PROGRESS, DECRIMINALIZING SURVIVAL: POLICY PLATFORM AND POLLING ON THE DECRIMINALIZATION OF SEX WORK 3, 22 (2020) <https://www.filesforprogress.org/memos/decriminalizing-sex-work.pdf> (reporting on “the growing consensus for decriminalization” based on a poll showing that fifty-two percent of voters somewhat or strongly support decriminalizing sex work); Katelyn E. Nichols, *Public Attitudes Toward Prostitution and Sex Trafficking Awareness 27–28* (2015) (Master of Social Work clinical research paper, St. Catherine University and the University of St. Thomas), https://sophia.skate.edu/cgi/viewcontent.cgi?article=1500&context=msw_papers. However, while there is a clear shift in societal attitudes toward prostitution, there are still members in society who oppose decriminalization of prostitution. See, e.g., *Opinion Polls/Surveys: 1978–2016*, BRITANICA PROCON.ORG (Mar. 29, 2018), <https://prostitution.procon.org/opinion-polls-surveys/> (displaying a summary of polls about legalization of prostitution between 1978 and 2016, showing a consistent upward trend in support of legalization, alongside clear opposition).

167. See generally RAPHAEL & FEIFER, *supra* note 22; see also SMITH & MAC, *supra* note 1, at 5, 217–20.

168. But see SMITH & MAC, *supra* note 1, at 217–20 (discussing different rationales for this trend); Meg Panichelli, Moshoula Capous-Desyllas & Yvette Butler, *From Fallen Women to the Tumblr Ban: Representing the Landscape of Sex Work from a Historical and Legal Perspective*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF SOCIAL WORK AND SEXUALITIES 512, 513 (SJ Dodd, ed., 2021).

169. See, e.g., RAPHAEL & FEIFER, *supra* note 22, at 31 (listing methods of coercion used in sex trafficking cases); *Sex Trafficking Examples*, POLARIS PROJECT, <https://polarisproject.org/sex-trafficking-examples/> (describing examples of how individuals may be tricked into entering prostitution); Mimi H. Silbert & Ayala M. Pines, *Early Sexual Exploitation as an Influence in Prostitution* 28 SOC. WORK 285, 286 (1983) (noting a finding that abuse may impact victims’ decisions to enter prostitution).

170. RAPHAEL & FEIFER, *supra* note 22, at 53–54.

171. *Innocence for Sale: Domestic Minor Sex Trafficking: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec., and Investigations of the H. Comm. on the Judiciary*, 113th Cong. (2014) (statement of Michael T. Harpster, Acting Deputy Assistant Dir., Crim. Investigative Div. Fed. Bureau of Investigation) (insinuating that growing up in unstable and unsafe households may render girls vulnerable to manipulation and grooming tactics by traffickers who promise to take care of them).

some, entry into prostitution, as studies have confirmed, often begins as a minor, with girls as young as fourteen and fifteen trading sex for money or drugs.¹⁷² Involvement in the sex trade is often a way to “procure money for food, shelter, and drugs,” demonstrating that at least some persons in prostitution face no real choice in selling sex.¹⁷³

A study of Native American women in Minnesota found that ninety-eight percent of Native prostituted women were currently or formerly homeless.¹⁷⁴ Ten to twenty percent of homeless youth “in social services settings or on the street have been found to have traded or been selling sex.”¹⁷⁵ Substance abuse is also very common among persons in prostitution, and dependence on drugs is a way through which many traffickers keep exploited persons in their control.¹⁷⁶ A study of 222 women in the sex trade in Chicago revealed that 100% of the women surveyed used drugs or alcohol on the street.¹⁷⁷ These studies show that at least for some, entry into prostitution is not the product of free choice.¹⁷⁸ Instead, entry is motivated by poverty and trauma that sucks those in the sex trade into an exploitative system; a lack of choice leads to their criminal label.¹⁷⁹

Alongside these studies, increased education about the nature and circumstances of a person’s entry into prostitution seems to have contributed to shifting public belief that prostitution should not be criminalized.¹⁸⁰ When looking to explain some of these shifts, one study found, for example, that the majority of participants in that study believe that “[w]omen and children used in prostitution are victims of

172. RAPHAEL & FEIFER, *supra* note 22, at 62, 79; RICHARD J. ESTES & NEIL ALAN WEINER, UNIV. PA. SCH. OF SOCIAL WORK, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO 150 (Sept. 18, 2001), https://abolitionistmom.org/wp-content/uploads/2014/05/Complete_CSEC_0estes-weiner.pdf (categorizing groups of American youth at risk of sexual exploitation).

173. RAPHAEL & FEIFER, *supra* note 22, at 71.

174. MELISSA FARLEY, NICOLE MATTHEWS, SARAH DEER, GUADALUPE LOPEZ, CHRISTINE STARK & EILEEN HUDON, MINN. INDIAN WOMEN’S SEXUAL ASSAULT COAL. & PROSTITUTION RSCH. & EDUC., GARDEN OF TRUTH: THE PROSTITUTION AND TRAFFICKING OF NATIVE WOMEN IN MINNESOTA 28 (Oct. 27, 2011), <https://www.niwrc.org/sites/default/files/images/resource/Garden-of-Truth.pdf>.

175. RAPHAEL & FEIFER, *supra* note 22, at 79.

176. *Id.* at 31.

177. JODY RAPHAEL & DEBORAH L. SHAPIRO, CTR. FOR IMPACT RSCH., SISTERS SPEAK OUT: THE LIVES AND NEEDS OF PROSTITUTED WOMEN IN CHICAGO 23 (Aug. 2002), <https://www.issueab.org/resources/351/351.pdf> (noting that “[o]nly small percentages of women *never* used alcohol or drugs during prostitution, [but] no women in escort services, in drug houses, or on the streets never used any substances”).

178. See RAPHAEL & FEIFER, *supra* note 22, at 29; *Sex Trafficking Examples*, *supra* note 169; Silbert & Pines, *supra* note 169, at 286. But note that some feminists, often falling under the category of “sex-work activists” or “abolitionists,” offer a different take on questions of coercion and choice. See generally Panichelli, Capous-Desyllas & Butler, *supra* note 168; SMITH & MAC, *supra* note 1.

179. See, e.g., RAPHAEL & FEIFER, *supra* note 22, at 31 (listing methods of coercion used in sex trafficking cases); *Sex Trafficking Examples*, *supra* note 169 (describing examples of how individuals may be tricked into entering prostitution); Silbert & Pines, *supra* note 169, at 286 (noting a finding that abuse may impact victims’ decisions to enter prostitution).

180. See, e.g., RAPHAEL & FEIFER, *supra* note 22, at 4–5 (discussing why such a report contributes to a better understanding of human trafficking and sexual exploitation in the United States).

sex trafficking” and believe that they should be treated as victims not criminals.¹⁸¹ Increasingly, the public recognizes that a person in prostitution is a “victim trapped in demeaning, dangerous servitude.”¹⁸²

More broadly, a study from 2013 showed that attitudes towards prostitution became more tolerant in the United States over the twenty-year period from 1980 to 2000.¹⁸³ The results of the study supported the hypothesis that, overall, the public “moved toward a more general tolerance of cosmopolitan and democratic culture, in which tolerance of prostitution is one part of a larger cultural shift.”¹⁸⁴ This shift parallels “the changing attitudes about sexual morality with regard to premarital sex and homosexual relationships.”¹⁸⁵ The trend towards more progressive attitudes and perceptions surrounding prostitution has continued to shift throughout the 2000s. To illustrate this change, one reporter compared legislative sessions in Georgia in the 1950s and 2011, showing a different use of language and content when discussing issues related to prostitution.¹⁸⁶

Another illustration of such a cultural shift relates to the language being used in the context of prostitution. Indeed, we witness a much more careful consideration of the terms used in an attempt to destigmatize prostitution and properly identify child abuse when a minor is involved. All this demonstrates further sensitivity to, and comprehension of, the topic within our public discourse. For example, *Salon* writer Mary Elizabeth Williams drafted an essay to journalists pleading with them “to learn the difference between the terms *abuse* and *sex*” in response to articles describing the sexual abuse of an eleven-year-old as “sex.”¹⁸⁷

Academics have also developed and compiled a “Chart of Preferred Terminology for Sex Trafficking and Prostitution,” to introduce more

181. See Nichols, *supra* note 166, at 37; see also LUO, *supra* note 166, at 22 (showing majority support for the decriminalization of sex work); see also Data for Progress report, *supra* note 166, showing majority support in the decriminalization of sex work. In another study, conducted between 2016-2017, a diverse group of 340 Americans was recruited to explore how “Americans understand – and don’t understand – the sex trade, and the ways our society might address the issue.” See *Seen and Unseen: The Public Conversation on Prostitution*, Topos (2020) <https://seenunseen.topospartnership.com/>. Among other things, the study found that “across varying cross-sections of the American public, across gender, age, ethnicity, and ideology, most people are driven by a desire to protect women in the sex trade from harm”. *Id.* at 7. Furthermore, the study found that “American progressives care deeply about protecting women from harm, about affirming the legitimacy of women’s choices, about creating solutions to the violence within the sex trade and about the need to stop throwing women to jail”. *Id.* at 21. It should be noted, however, as the authors mention, that “although some political and cultural conservatives were included in the study” the study “focused on progressives.”

182. Ann Woolner, *How Attitudes About Prostitution Have Changed*, DENVER POST (Mar. 4, 2011, 7:58 AM), <https://www.denverpost.com/2011/03/04/how-attitudes-about-prostitution-have-changed/>.

183. See Cao & Maguire, *supra* note 166, at 194.

184. *Id.* at 201.

185. *Id.*

186. Woolner, *supra* note 182 (“We created a cultural shift,” says Stephanie Davis, executive director of Georgia Women for a Change. A cultural shift is exactly what it took.”).

187. See LISA L. THOMPSON, *What Terminology Can We Use to Help Move Beyond Labeling and Stigma?*, in FINDING OUR WAY THROUGH THE TRAFFICK 53–54 (Christa Foster Crawford, Glenn Miles, Gundelina Velazco eds., 2017).

destigmatizing language into the conversation surrounding these issues.¹⁸⁸ Others, mostly those contending that people engage in sex selling voluntarily, have promoted different linguistic change surrounding the “sex worker” terminology. Similarly, some linguistic shifts in and of themselves serve as evidence of a cultural shift, rather than language shifting to adapt to culture. For example, the change in terminology from “child prostitution” to “child sexual exploitation,” or “child sex trafficking,” highlights the recognition that a child could never be a prostitute because of their minor status and lack of consent involved in the transaction under the law. For example, under federal law, when a child is trafficked, prosecutors do not have to establish the specific means by which their trafficker exploited them because of their minor status, contrasted to adults where the prosecutor would have to establish either force, fraud, or coercion.¹⁸⁹ This change is seen as a “paradigm shift in how we understand the problem and those caught up in it” due to further research and consideration of prostitution that has taken into account “the social and economic circumstances surrounding involvement in prostitution.”¹⁹⁰

Further evidence of a cultural shift toward acceptance, empathy, and understanding of persons in prostitution and the socioeconomic factors that lead to people entering or being forced into prostitution exists within the growing movement of public health workers, academics, lawyers, and lawmakers who advocate for different legislative models to address prostitution, with a main question in mind: *should prostitution even be categorized as a crime?*¹⁹¹

Two of the major competing movements, that of prostitution abolitionists versus sex worker advocates, has become “the most contentious and divisive issue in today’s women’s movement,” according to Liesl Gerntholtz of Human Rights Watch.¹⁹² Disagreements aside, the size of these movements and the openness with which their issues are discussed reveals a shift in how the public views prostitution.

This cultural shift, however, has moved far beyond linguistic debates and social movements and has spread from the realm of public opinion to the policies and practices of elected officials, from prosecutors to legislators.¹⁹³

188. *See id.* at 54–60.

189. 18 U.S.C. § 1591 (2018).

190. *See* SOPHIE HALLETT, *From ‘Child Prostitution’ to ‘Child Sexual Exploitation’: An Overview*, in MAKING SENSE OF CHILD SEXUAL EXPLOITATION 11, 16 (2017).

191. A question that sparked even more attention after a 2016 *N.Y. Times* feature. *See* Emily Bazelon, *Should Prostitution Be a Crime?*, N.Y. TIMES MAG. (May 5, 2016), <https://www.nytimes.com/2016/05/08/magazine/should-prostitution-be-a-crime.html>.

192. *Id.*

193. Woolner offers an anecdotal illustration. *See* Woolner, *supra* note 182. However, the following paragraphs will expand.

Many law enforcement agencies have changed how they handle prostitution-related offenses.¹⁹⁴ In the 1970s and 1980s, major cities engaged in a war on prostitution in an attempt to eliminate vice crimes.¹⁹⁵ Starting in 1980, misdemeanor prostitution arrests in New York City were on a steep incline, peaking in 1986, when around 20,000 arrests took place.¹⁹⁶ Since then, however, misdemeanor prostitution arrests have been on a steady decline.¹⁹⁷ In 2017, there were less than 6,000 misdemeanor prostitution arrests in New York City.¹⁹⁸ The New York Police Department only arrested ninety-six people for prostitution in 2020.¹⁹⁹

The dramatic shift in law enforcement attitudes towards the treatment of prostitution as a criminal offense demonstrates cultural efforts to reduce carceral populations for so-called “consensual sex work.”²⁰⁰ District Attorney’s offices in major cities, including New York City, Philadelphia, and Baltimore, have announced that they will no longer prosecute prostitution-related offenses in most instances.²⁰¹ For example, in April 2021, the Manhattan DA announced that his office will stop prosecuting prostitution and unlicensed massage “under a new policy that’s believed to be the first of its kind in New York.”²⁰² In addition to this new policy, the Manhattan DA dismissed cases, erased convictions, and vacated warrants that were issued “at a time when we did not recognize the circumstances that these individuals [in prostitution] were facing.”²⁰³ Similarly, Philadelphia DA Larry Krasner has a policy of not prosecuting prostitution.²⁰⁴

For the most part, these policies result from the need to recognize that communities must “support those most at risk of exploitation,” instead of criminalizing and

194. See, e.g., Jonah E. Bromwich, *Manhattan to Stop Prosecuting Prostitution, Part of Nationwide Shift*, N. Y. TIMES (last updated July 23, 2021), <https://www.nytimes.com/2021/04/21/nyregion/manhattan-to-stop-prosecuting-prostitution.html>; Tom Jackman, *After Crime Plummeted in 2020, Baltimore Will Stop Drug, Sex Prosecutions*, WASH. POST (Mar. 26, 2021, 8:00 AM), <https://www.washingtonpost.com/dc-md-va/2021/03/26/baltimore-reducing-prosecutions/>; Bobby Allyn, *After Year One, Philly DA Larry Krasner Earns Praise From Reformers, Scorn From Victim Advocates*, WHYY (Feb. 5, 2019), <https://whyy.org/articles/after-his-first-year-philly-d-a-larry-krasner-earns-praise-from-reformers-scorn-from-victim-advocates/>.

195. See, e.g., Bromwich, *supra* note 194.

196. MEREDITH PATTEN, QUINN O. HOOD, CECILIA LOW-WEINER, OLIVE LU, ERICA BOND, DAVID HATTEN & PREETI CHAUHAN, THE MISDEMEANOR JUST. PROJECT, *Trends in Misdemeanor Arrests in New York, 1980 to 2017* 48 (Dec. 26, 2018) <http://datacollaborativeforjustice.org/wp-content/uploads/2018/12/FINAL.pdf>.

197. *Id.*

198. *Id.*

199. Mary Murphy, *Prostitution Busts Drop Sharply as NYPD Sends ‘Targeted’ Messages to ‘Johns,’* PIX11 (Oct. 30, 2021, 8:12 AM), <https://pix11.com/news/local-news/prostitution-busts-drop-sharply-as-nypd-sends-targeted-messages-to-johns/>.

200. See Rachel Treisman, *A ‘Relic’ and ‘Burden’: Manhattan District Attorney to Stop Prosecuting Prostitution*, NPR (Apr. 21, 2021, 4:40 PM), <https://www.npr.org/2021/04/21/989588072/a-relic-and-burden-manhattan-district-attorney-to-stop-prosecuting-prostitution/>.

201. *Id.*

202. *Id.*

203. *Id.*

204. See Jon Hurdle & Jonah E. Bromwich, *Victory in Philadelphia Buys Supporters of Progressive District Attorney*, N.Y. TIMES (last updated May 20, 2021), <https://www.nytimes.com/2021/05/19/us/krasner-vega-philadelphia.html>.

incarcerating vulnerable populations.²⁰⁵ Women of color, immigrants, and members of the LGBTQ+ community historically have been disproportionately harmed by prostitution laws, and law enforcement did not stop to consider “the circumstances that these individuals were facing.”²⁰⁶

On the legislative end, we are witnessing a series of legislative responses to the shift away from criminalizing individuals of sex trafficking or prostitution. This shift has led to general responses on an international, federal, and state level through legislative efforts. These efforts demonstrate willingness to adopt retroactive change—for example, by revoking, or protecting, a victim from criminal punishment associated with an offense based on a new understanding of circumstances associated with prostitution. These legislative efforts indeed represent a shift in the approach to the criminalization of people selling sex, though mostly through the victimization narrative. The next Section will address each of these responses separately.

C. Cultural Shifts Translated into Legislative Actions

1. International and Federal Legislative Responses

International law condemns criminalizing victims of human trafficking as a violation of fundamental human rights.²⁰⁷ “The Office of the High Commissioner on Human Rights recommends that “[t]rafficked persons . . . not be detained, charged or prosecuted for . . . their involvement in unlawful activities” when it “is a direct consequence of their situation as trafficked persons.”²⁰⁸ Further, in 2014, the United Nations issued a report which condemned the “criminalization of trafficking victims as a violation of the International Covenant on Civil and Political Rights”²⁰⁹

The responses to this general shift are seen prominently in the Trafficking Victims Protection Act of 2000 (“TVPA”), which provided the United States with “new tools and resources to mount a comprehensive and coordinated campaign to eliminate” trafficking domestically and internationally.²¹⁰ Congress has defined severe forms of sex trafficking as “a commercial sex act [] induced by force, fraud,

205. Treisman, *supra* note 200.

206. *Id.*

207. Jessica Emerson & Alison Aminzadeh, *Left Behind: How the Absence of a Federal Vacatur Law Disadvantages Survivors of Human Trafficking*, 16 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 239, 249 (2016) (citing U.N. Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, ¶ 7, U.N. Doc. E/2002/68/Add.1 (May 20, 2002)). See also PREVENT, COMBAT, PROTECT HUMAN TRAFFICKING, JOINT U.N. COMMENTARY ON THE EU DIRECTIVE – A HUMAN RIGHTS-BASED APPROACH 21 (Nov. 2011), https://www.unodc.org/documents/human-trafficking/2011/UN_Commentary_EU_Trafficking_Directive_2011.pdf.

208. Emerson & Aminzadeh, *supra* note 207, at 249.

209. *Id.* at 250.

210. See *Human Trafficking: Key Legislation*, U.S. DEP’T OF JUST., <https://www.justice.gov/humantrafficking/key-legislation> (last visited Jan. 23, 2022).

or coercion, or in which the person induced to perform such act has not attained 18 years of age.”²¹¹

Despite the TVPA, many individuals still find themselves criminalized instead of being seen as victims needing exit services.²¹² Victims of sex trafficking are on the street, on online advertisements, at illicit massage businesses, and other public places.²¹³

Due to the continued practice of arresting victims of sex trafficking, three key tenets of legislation attempt to combat trafficking and protect victims: protection, prosecution, and prevention.²¹⁴ Protection and assistance for victims of trafficking includes enabling the Secretary of State and Administrator of the United States Agency for International Development to “carry out programs and initiatives in foreign countries to assist in the safe integration, reintegration, or resettlement, as appropriate, of victims of trafficking.”²¹⁵ Prosecution is addressed by the TVPA with the possibility to amend sentencing guidelines if the United States Sentencing Commission finds it appropriate.²¹⁶ Prevention is focused on actions such as providing economic alternatives that would prevent and deter trafficking, and increasing public awareness and information through various programs.²¹⁷ Additionally, TVPA recommends that foreign governments should “ensure[] that victims [of severe trafficking] are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked”²¹⁸

211. 22 U.S.C. § 7102(11)(A).

212. CUNY SCH. OF L., CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZED TRAFFICKING VICTIMS 6, 17, <https://ncjtc-static.fvtc.edu/Resources/RS00002861.pdf>.

213. See, e.g., Mae C. Quinn, *Revisiting Anna Moscowitz Kross’s Critique of New York City’s Women’s Court: The Continued Problem of Solving the “Problem” of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L.J. 665, 682, 707, 725 (2006); *Street-Based*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/en/sex-sex-trafficking-venuesindustries/street-based> (mentioning that “[h]uman trafficking victims are often found in street-based commercial sex”); Kristina A. Lugo-Graulich, Leah F. Meyer, Karen Souza, Susannah N. Tapp, Bailey Maryfield & Lindsay Bostwick, *Debunking Conventional Wisdom: Using Online Escort Ads in Sex Trafficking Investigations*, POLICE CHIEF MAG., <https://www.policemagazine.org/debunking-conventional-wisdom/> (discussing the use of online escort advertisements); POLARIS PROJECT, HIDDEN IN PLAIN SIGHT: HOW CORPORATE SECRECY FACILITATES HUMAN TRAFFICKING IN ILLICIT MASSAGE PARLORS 1, <https://polarisproject.org/wp-content/uploads/2018/04/How-Corporate-Secrecy-Facilitates-Human-Trafficking-in-Illicit-Massage-Parlors.pdf> (arguing that women “engaging in commercial sex in illicit massage parlors are victims of human trafficking”).

214. 22 U.S.C. § 7103(d)(2) (describing the activities of task force related to these three tenets).

215. 22 U.S.C. § 7105(a)(1) (including the tenets that should be included in each of the programs and initiatives used to provide protection).

216. 22 U.S.C. § 7109(b)(1)–(2) (discussing the amendment of sentencing guidelines for those involved in trafficking of persons, further stating that appropriate measures should be taken to ensure these sentencing guidelines still appropriately deter heinous offenses).

217. 22 U.S.C. § 7104 (discussing the various methods of prevention that are provided for in the TVPA). These elements also include efforts to assist international governments. There are also specific supports available for victims in the United States. See 22 U.S.C. § 7105(b).

218. Emerson & Aminzadeh, *supra* note 207, at 249; 22 U.S.C. § 7106(b)(2). See also U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 74 (June 2021) (discussing the minimum standards for the elimination of trafficking in persons set forth by the TVPA); Alice Mutter, *From Criminals to Survivors: Recognizing Domestic Sex Trafficking as Violence Against Women in the District of Columbia*, 26 AM. U. J. GENDER SOC. POL’Y & L.

2. State Legislative Responses

Along with federal and international guidelines, state legislators have responded to these shifts by implementing legislation to address the developing understanding of prostitution and human trafficking. First, many states have implemented post-conviction remedies, namely the vacatur remedy, which allows convictions resulting from prostitution or sex trafficking victimization to be vacated.²¹⁹ Often, individuals who were selling sex face prostitution convictions even though at least some of them were forced to sell sex to sex buyers.²²⁰ Second, multiple states have enacted safe harbor provisions, which remove the ability of law enforcement to charge a minor with the crime of prostitution because they are *per se* sexually exploited. Finally, the implementation of human trafficking as an affirmative defense, which is built off of the coercion defense, accounts for the specific experiences of a survivor of human trafficking.

a. Post-Conviction Relief: Vacatur Remedy

Individuals who were involved in selling sex are often subjected to criminal penalties and convictions for offenses that, at least in some circumstances, their traffickers forced them to commit, including prostitution-related offenses.²²¹ As we saw above, efforts to change this reality at the front-end, before any convictions, are now much more ubiquitous, albeit insufficient regarding the reality of sex trafficking.

However, the systematic injustice experienced by those who were arrested for or charged with prostitution for selling sex, including those who self-identify as survivors of sex trafficking, has affected many individuals over the years who will not be directly remedied by any future decision to decriminalize these offenses. Attempting to remedy the harm already caused, backward-looking vacatur remedies have emerged to erase certain prostitution-related convictions for those individuals. These vacatur remedies differ dramatically among the states that have enacted them, however.²²² To access this remedy in most states, survivors must divulge details of their victimization to the court.²²³

593, 603 (2017) (asserting that D.C.'s criminalization of victims of sex trafficking through their current prostitution laws, while also providing limited recourse for survivors, violates the TVPA).

219. See POLARIS PROJECT, STATE REPORT CARDS: GRADING CRIMINAL RECORD RELIEF LAWS FOR SURVIVORS OF HUMAN TRAFFICKING 31–32 (Mar. 2019).

220. RAPHAEL & FEIFFER, *supra* note 22, at 97 (outlining how different women in the sex trade have experienced violence including forced sex).

221. Alyssa M. Barnard, "The Second Chance They Deserve": Vacating Convictions of Sex Trafficking Victims, 114 COLUM. L. REV. 1463, 1463, 1466–70 (2014).

222. SURVIVOR REENTRY PROJECT, AM. BAR ASSOC. COMM'N ON DOMESTIC AND SEXUAL VIOLENCE, POST-CONVICTION ADVOCACY FOR SURVIVORS OF HUMAN TRAFFICKING: A GUIDE FOR ATTORNEYS 9 (2016), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/projects/srp/practice-guide.pdf.

223. Some states do not require such details though. See, e.g., HAW. REV. STAT. ANN. § 712-1209.6 (West 2019).

In New York, for example, a majority of those arrested for prostitution also fit all legal criteria for sex trafficking.²²⁴ This creates challenges for victims while they are being trafficked, as traffickers will use this information as a barrier to exiting “the life.”²²⁵ Convictions also present barriers for a victim after they have exited, including difficulty engaging with “services like admission into diversion programs, public benefits, educational grants, housing assistance, and loans.”²²⁶

Vacatur laws in jurisdictions that provide the remedy afford those individuals post-conviction relief from certain prostitution offenses if their engagement in the crime was a result of their victimization.²²⁷ Akin to expungement and sealing, vacatur similarly asks the court to clear certain information regarding a person’s criminal history from public view. However, whereas expungement or sealing can only be applied to criminal charges that did not result in a conviction, vacatur applies directly to criminal convictions, thus providing a much stronger form of protection. A signed Order to Vacate, in this context, is a legal recognition that the petitioner should not have been convicted because of their status as a victim of sex trafficking.²²⁸ Generally, receiving a vacatur remedy reverses the conviction and returns any fines, costs, or fees associated with the vacated convictions to the survivor to return them to the same position that they would have been in without the conviction.²²⁹

In 2010, New York was the first state to adopt a vacatur remedy through legislative action.²³⁰ Legislators in New York recognized that a criminal record affects these individuals for life, noting they would be given a deserved second chance.²³¹ In a Memorandum of Support for the bill, the bill’s sponsor stated:

Victims of sex trafficking who are forced into prostitution are frequently arrested for prostitution-related offenses and are saddled with the criminal record. They are blocked from decent jobs and other prospects for rebuilding

224. Barnard, *supra* note 221, at 1471.

225. *Id.* at 1472 (explaining that traffickers will use victim’s convictions (and their potential effect on employment opportunities) as a threat to prevent them from exiting, in stating that a claim against the trafficker will not be believed due to the victim’s previous conviction, or as a threat during family-court proceedings).

226. Mutter, *supra* note 218, at 600 (explaining the challenges presented by convictions for crimes committed as a result of a sex trafficker’s coercion).

227. *See generally* Barnard, *supra* note 221, at 1474 (citing Act of Aug. 13, 2010, ch. 332, 2010 N.Y. Sess. Laws 1083 (McKinney); Legislative Memorandum Relating to Ch. 332, 2010 N.Y. Sess. Laws 1906, 1906–07 (McKinney)); *see also* N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2014) (explaining that judge may, any time after conviction, vacate a judgement where the defendant’s participation in the offense was a result of having been sex-trafficked).

228. *See, e.g.*, 18 PA. STAT. AND CONS. STAT. ANN. § 9122.4 (West 2019) (detailing instructions for Orders to Vacate).

229. *See Nelson v. Colorado*, 581 U.S. 128, 139 (2017) (holding that no state may impose “anything more than minimal procedures” on a petitioner’s right to obtain a refund of money extracted as a result of criminal conviction).

230. Barnard, *supra* note 221, at 1464, 1474; *see also* CRIM. § 440.10(1)(i) (creating post-conviction relief for sex trafficking victims).

231. Emerson & Aminzadeh, *supra* note 207, at 250–51.

their lives. Even after they escape from sex trafficking, the criminal record victimizes them for life. This bill would give victims of human trafficking a desperately needed second chance they deserve.²³²

New York's Vacatur Law is codified in Section 440.10(1)(i) of the New York Criminal Procedure Law.²³³ Since the passage of New York's vacatur law, fifteen additional states have enacted sex-trafficking vacatur laws.²³⁴ Moreover, in January 2022, New York and New Jersey amended their vacatur remedies in recognition of human trafficking awareness month.²³⁵

Two prominent New York cases broadened the scope of New York's vacatur provision: *People v. G.M.* and *People v. L.G.*²³⁶ In *People v. G.M.*, the defendant was "recognized . . . as a victim of human trafficking,"²³⁷ which the court concluded created a presumption that the offenses were committed as a result of her victimization, and therefore vacated all convictions, including those not specifically prostitution-related.²³⁸ Similarly, in *People v. L.G.*, the Criminal Court of the City of New York, Queens County extended vacatur protections to include offenses that are not prostitution-related, but that are "undeniably connected to the coerced trafficking activity which led to [the victim's] arrest on prostitution-related charges."²³⁹ However, not all state provisions are interpreted so broadly.²⁴⁰

232. Memorandum in Support of Legislation B. A7670, N.Y. State Assemb. 2009–2010 Reg. Sess. (Apr. 20, 2009), http://assembly.state.ny.us/leg/?default_fid=&bn=A07670&term=2009&Memo=Y&Text=Y.) (explaining the rationale for New York's Vacatur Law, which is in accordance with this cultural shift away from criminalization); see also Barnard, *supra* note 221, at 1474 (acknowledging Assemblyperson Richard Gottfried's statement in favor of the legislation that "[t]rafficked persons should not suffer ongoing punishment for acts they committed unwillingly under coercion").

233. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (addressing vacating convictions of prostitution related offenses where "the defendant's participation in the offense was a result of having been a victim of sex trafficking" under either New York or Federal Law).

234. Mutter, *supra* note 218, at 599–600. As of January 2017, states that enacted vacatur statutes include Connecticut, Florida, Hawaii, Illinois Maryland, Mississippi, Montana, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Vermont, Washington, and Wyoming. *Id.*

235. S. 674, 2021–2022 Leg. Sess. (N.Y. 2021), <https://www.nysenate.gov/legislation/bills/2021/S674> (signed by Governor and "[r]elates to confidentiality of records in proceedings to vacate convictions for offenses resulting from sex trafficking, labor trafficking and compelling prostitution"); N.J. Assembly Bill 5322, 219th Leg. Reg. Sess. (N.J. 2021) (signed by Governor and "[p]rovides for process to vacate and expunge certain arrests, charges, complaints, convictions, other dispositions, and DNA records, associated with violations by certain human trafficking victims").

236. See generally *People v. G.M.*, 922 N.Y.S.2d 761 (N.Y. Crim. Ct. 2011) (applying the vacatur remedy to a non-prostitution related offense which occurred as the result of victimization, with a prosecutor's consent); see generally *People v. L.G.*, 972 N.Y.S.2d 418, 436 (N.Y. Crim. Ct. 2013) (holding that the vacatur remedy in New York applied to non-prostitution related offense which occurred as the result of an offender's victimization, without the consent of the prosecutor).

237. *People v. G.M.*, 922 N.Y.S.2d at 763.

238. *Id.* at 765–66.

239. *People v. L.G.*, 972 N.Y.S.2d at 436–37.

240. POLARIS PROJECT, HUMAN TRAFFICKING ISSUE BRIEF: VACATING CONVICTIONS (2015), <https://polarisproject.org/wp-content/uploads/2019/09/2015-Vacating-Convictions-Issue-Brief.pdf>.

This approach has been supported by legal organizations like the American Bar Association, which passed a resolution urging states to enact legislation allowing survivors of human trafficking to have criminal charges removed, and was reflected in the Uniform Law Commission's Uniform Act on Prevention of and Remedies for Human Trafficking ("Uniform Act").²⁴¹ The Uniform Act proposed legislation that extended beyond solely prostitution offenses to include non-violent offenses.²⁴² No doubt, there is still much to be done²⁴³ with regard to the improvement of the vacatur and expungement as remedies, but these clearly go hand in hand with broader approaches to reassess the connection between sex trafficking and criminality, and to allow individuals who were criminalized due to selling sex to reenter society without the criminal stigma attached.

b. Safe Harbor Provisions

Shortly after enacting its Vacatur Law, New York State enacted a Safe Harbor Provision, which encouraged law enforcement to provide minors who were sex trafficked with services, focusing on the minor's health and safety, not prosecution.²⁴⁴ Safe Harbor Provisions recognize children as victims under the law and not as criminals; in effect, a child is "*de facto* being sexually exploited and is therefore a victim of human trafficking."²⁴⁵ Therefore, they are immune from prosecution, not simply offered an affirmative defense in the event of prosecution.²⁴⁶ Following New York, twenty-two other states have enacted Safe Harbor Provisions.²⁴⁷

c. Affirmative Defenses

Sex trafficking as an affirmative defense enables victims to prevent convictions prior to the point of requesting vacatur. For example, New York Penal Law § 230.01 states, "it is an affirmative defense that the defendant's participation in the offense was a result of having been a victim of compelling prostitution[,] . . . a victim of sex trafficking[,] . . . a victim of sex trafficking of a child[,] . . . or a victim of trafficking in persons under the" TVPA.²⁴⁸

241. *Id.*

242. *Id.*; see also LAUREN ULRICH, AMARA LEGAL CTR., VACATUR STATUTES FOR SURVIVORS OF SEX TRAFFICKING (2016), <http://www.amaralegal.org/wp-content/uploads/2016/06/Vacatur-Statutes-for-Survivors-of-Sex-Trafficking.pdf> (describing effective vacatur statutes, which is in line with these recommendations).

243. See REPORT ON COMMERCIAL SEXUAL EXPLOITATION IN PENNSYLVANIA, *supra* note 154, at 31 (providing recommendations to improve Pennsylvania's vacatur remedies); see, e.g., 18 PA. STAT. AND CONS. STAT. ANN. § 2019 (West 2022) (Pennsylvania's vacatur remedy).

244. Barnard, *supra* note 221, at 1473–74.

245. Danielle Augustson, *Protecting Human-Trafficking Victims from Criminal Liability—A Legislative Approach*, 17 GEO. J. GENDER & L. 625, 641–42 (2016) (acknowledging that this change began as a national movement to address prostitution charges against children).

246. *Id.*

247. *Id.*

248. N.Y. PENAL LAW § 230.01 (McKinney 2022).

This affirmative defense mirrors the coercion defense—according to the Tenth Circuit, “[c]oercion, which will excuse the commission of a criminal act, must be immediate and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done.”²⁴⁹ Legislatures, like that in New York State, have implemented these defenses as another avenue of relief specific to the circumstances of sex trafficking that would not have previously been afforded.²⁵⁰

3. Cultural Shift as Justification for the Right to Social Expungement

As we witnessed in the last decade, many state legislatures have enacted laws or adopted policies offering protection from prosecution or post-conviction remedies for individuals who are facing prostitution arrests, charges, and convictions.²⁵¹ Lack of enforcement; decriminalization; safe harbor laws; and vacating, expunging, or sealing convictions are all legislative and policy efforts that send a similar message: there is an urgent need to reassess our understanding of prostitution offenses and to divert from the criminalization of those who were arrested or charged for selling sex. Most current legislative efforts adopted these changes as a form of recognition of these individuals’ victimization.

While lawyers and those with the power to make and interpret the law have been adapting to society’s changing attitude towards treating and helping those who were criminalized for selling sex—including those who identify as victims—rather than punishing them, there continues to exist a gap between full relief for these individuals and what the law offers.²⁵² Recognizing that these individuals deserve full relief seems incomplete so long as the information linking them to criminal activity remains online, free, and accessible to all. Not recognizing a right to social expungement, despite such comprehensive legislative, judicial, and other efforts to allow those who were charged with prostitution-related offenses to start fresh, hinders these important policy efforts that have gained meaningful support among the general public.²⁵³

Such changes in legislative approaches, reflective of changes in social values (at least to some extent), establish two main theoretical justifications for the right to

249. Augustson, *supra* note 245, at 636. (citing *United States v. Michelson*, 559 F.2d 567, 569 n.3 (9th Cir. 1977) and explaining the coercion defense as it pertains to the evolution of the affirmative defense of human trafficking).

250. *See, e.g.*, N.Y. PENAL LAW § 230.01 (McKinney 2022)

251. NAT’L COUNCIL OF JEWISH WOMEN, *Fact Sheet: Safe Harbor Laws* (Sept. 2016), https://www.ncjw.org/wp-content/uploads/2017/07/Fact-Sheet_Safe-Harbor_Updated-2016.pdf.

252. For further discussion of what the law does not currently do and what needs to happen to give full relief to individuals who were arrested for or charged with prostitution for selling sex, see *supra* Part II.A.

253. The idea that the “existence and content of law depends on social facts and not on its merits” is at the core of legal positivism and was repeated throughout history by many (including throughout social theory in the works of Weber, Marx, and Durkheim). Under the positivist logic, a social-cultural shift should be reflected in existing laws. *See* Stan. Encyc. of Phil., *Legal Positivism* (last updated Dec. 17, 2019), <https://plato.stanford.edu/entries/legal-positivism/>

social expungement: first, socio-legal theories of cultural shifts and their effects on law and policy, and second, criminal law amelioration doctrine.

D. Socio-Legal Theories of Cultural Shift: Law and Policy as Reflections of Changing Social and Moral Values

Most—if not all—legal scholars agree that the purpose of having laws in the first place is to protect society’s rights and ensure society operates properly.²⁵⁴ In general, the law is inherently based on social values, with both the law and society’s ideals informing one another.²⁵⁵ Legal scholars also generally view criminal law as different from other areas of the law²⁵⁶ because it inherently acts in the public’s best interest. That said, civil law also attempts to ensure that individuals receive appropriate redress when that person has been wronged.²⁵⁷ Society generally views the law as a mechanism to keep its values in place.²⁵⁸ In fact, scholars posit that the law is ineffective if it does not reflect social norms.²⁵⁹ It is important to recognize that individual members of a society often do not agree with one another on every single issue, especially in as polarized a time as today. However, society does generally believe in a democratic process, especially when it comes to the law and what society believes the law should be doing.²⁶⁰

Given the above, the troubling situation discussed in this Article—one in which individuals who were involved in offenses whose moral blameworthiness society

254. See Robert Post, *Law and Cultural Conflict*, 78 CHL-KENT L. REV. 485, 486–87 (2003) (recognizing societal standards are not necessarily uniform, but align with what “most people entertain”). This is even more so in a world that is arguably becoming increasingly polarized, especially in the context of public interest law. See W. Bradley Wendel, *Pluralism, Polarization, and the Common Good: The Possibility of Modus Vivendi Legal Ethics*, 131 YALE L.J. F. 89, 89–90 (2021) (acknowledging challenges facing the public interest sector during polarizing times).

255. See Yehezkel Dror, *Values and the Law*, 17 ANTIOCH REV. 440, 440–42 (1957) (discussing relationship between societal values and the law); see also Richard K. Greenstein, *Toward a Jurisprudence of Social Values*, 8 WASH. U. JURIS. REV. 1, 1 (2015) (explaining that the community ultimately informs what the law is, even if there may not be a “consensus”); see also Ronald Dworkin, *Law as Interpretation*, 9 CRITICAL INQUIRY 179, 194 (1982) (exploring the way political values inform the law, which is arguably inherently political).

256. See Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 449–54 (2020) (differentiating criminal law from other kinds of law based on its purpose and reason for existing). Mayson ultimately endorses Antony Duff’s belief that what makes criminal law different is that it acts as a “mechanism of condemnation” on behalf of the “polity,” or society. Given that sex trafficking has historically been examined through a criminal law lens, any gaps with regard to a victim’s relief should also account for whether society would endorse a gap continuing to exist.

257. *Id.* at 453.

258. See Greenstein, *supra* note 255, at 6. Greenstein accurately recognizes individual members of society often do not agree with one another on a host of issues; however, a significant “consensus” of individuals may generally reflect what a society believes and thinks at a given time.

259. See Clifton B. Parker, *Laws May Be Ineffective If They Don’t Reflect Social Norms*, *Stanford Scholar Says*, STAN. NEWS (Nov. 24, 2014), <https://news.stanford.edu/news/2014/november/social-norms-jackson-112414.html> (arguing that the law does not fulfill its purpose if it does not accomplish society’s goals or reflect its norms).

260. See *The Public, the Political System and American Democracy*, PEW RSCH. CTR. (Apr. 26, 2018), <https://www.pewresearch.org/politics/2018/04/26/the-public-the-political-system-and-american-democracy/>.

now challenges, whose official records have been formally expunged and/or vacated but whose unofficial records remain available in the public domain without legal remedy that could allow unpublishing it—exposes an unwanted gap between society’s current values and existing law. The right to social expungement offers a way to bridge this troubling gap between society’s changing norms and views and the de facto criminalization of individuals we, as a society, no longer believe should be carrying the criminal scarlet letter.

While the argument pertaining to cultural shift has its clear internal logic, the meanings and consequences of cultural shifts in the context of the right to social expungement can also be substantiated by a formal (if neglected) criminal law doctrine known as the amelioration doctrine, which is discussed in the next Section.

E. Retroactive Leniency: Amelioration Doctrine

Throughout the United States, there is a growing recognition that certain criminal laws prescribe unjust punishments, inside and outside of the judicial system.²⁶¹ Recent history has shown that legislators are willing to recognize years of harsh and unjust punishment and make widespread changes to existing laws, particularly in specific domains such as drugs or sex work. Along with those changes, American society is experiencing another related shift characterized by “retroactive application of legislative changes which redefine criminal conduct or reduce the penalty for criminal behavior.”²⁶²

These changes reflect a lesser-known common law protection known as the “amelioration doctrine.” The doctrine in its purest form allows a defendant “to take an advantage of a statute that decreases the penalty for a crime,” usually in situations when “the ameliorative amendment is enacted after the commission of the crime but before sentencing.”²⁶³ The doctrine rebuts the presumption against statutory retroactivity.²⁶⁴ In effect, the doctrine can result in criminal pardons dependent on amended changes in the law.²⁶⁵

The United States’ incorporation of the ex post facto clause, which ensures the law does not retroactively grant negative consequences to those who have committed crimes in the past, was in response to England having no such protection. While England did not have this protection the United States has today, England did have the doctrine of “abatment,” which applied to repeals of criminal statutes

261. See Gajda, *supra* note 16, at 201; Press Release, Open Soc’y Found., Majority of Americans Think U.S. Criminal Justice System is Broken, Ineffective; See Need for Change (Feb. 12, 2002) <https://www.opensocietyfoundations.org/newsroom/majority-americans-think-us-criminal-justice-system-broken-ineffective-see-need>.

262. Editors, *Today’s Law and Yesterday’s Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. PA. L. REV. 120, 120 (1972) (emphasis added).

263. Eileen L. Morrison, *Resurrecting the Amelioration Doctrine: A Call to Action for Courts and Legislatures*, 95 B.U. L. REV. 335, 337–38 (2015) (citing TRACY BATEMAN FARRELL, 8 INDIANA LAW ENCYCLOPEDIA § 10 (2014)).

264. *Id.* at 338.

265. *Id.* at 340–41.

in a recognition of the deleterious effect of ex post facto laws “which punish people for acts that were lawful at the time they were committed or increase the associated penalties after the commission of a crime.”²⁶⁶ The amelioration doctrine originated from the English doctrine of abatement.²⁶⁷ However, the amelioration doctrine applies specifically to amendments to penalties in criminal statutes after the commission of the crime.²⁶⁸

In justifying the doctrine, scholars have argued that the broadening of retroactive amelioration makes the proposed retroactive leniency legislation consistent with the legitimate goals of punishment,²⁶⁹ both for consequentialists and retributivists.²⁷⁰ According to certain scholars, the fact of “[w]ithholding a lesser punishment from a pre- or post-final judgment defendant is contrary to consequentialist and retributivist justifications for punishment because the ameliorative legislative change reflects the legislature’s assessment that the prior penalty is no longer an adequate deterrence or an appropriate penalty.”²⁷¹ According to modern utilitarian theories of punishment, treatment or punishment of criminals should serve one or more of three different ends: (1) deterrence, which would serve to discourage future criminal activity; (2) incapacitation, which would serve to confine the offender to prevent societal harm; and (3) rehabilitation, which would serve to reform the offender.²⁷² Thus, if legislation does not serve any of these goals of punishment or treatment, a change in the law is necessary.²⁷³

While amelioration may be difficult to define, a typology offered almost fifty years ago remains valid and could include decriminalization or reclassification of conduct or a reduction in sentence.²⁷⁴ This typology recognizes that amelioration can take various forms. For example, some legislatures have ameliorated the penalty of marijuana possession by “decriminalizing” and “reclassifying” the conduct, “redefining the criminal responsibility,” or reducing the sentencing for the drug crime.²⁷⁵

Consequently, the U.S. judicial system has allowed retroactive application of new criminal laws to prior convictions, particularly when formerly proscribed

266. *Id.* at 336.

267. *See id.* at 336, 340.

268. *Id.* at 337–38.

269. *See generally* Editors, *supra* note 262. While various theories dispute which purposes of punishment are legitimate, they generally agree fundamentally that criminal law and its accompanying punishment should have some purpose; if no purpose exists, then arguably there is no point to the punishment. A repealed law in the context of someone who was convicted under that law often only serves a retributive purpose of continued punishment, which is generally discredited as a legitimate goal. *Id.* at 149 (citing J. MICHAEL & H. WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* 10–11 (1940)).

270. S. David Mitchell, *In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1, 10, 12 (2010).

271. *Id.* at 12.

272. *Id.* at 13.

273. *Id.* at 10, 13.

274. *Id.* at 18.

275. Morrison, *supra* note 263, at 338 (describing ways that a legislature can ameliorate penalties).

conduct has been decriminalized.²⁷⁶ Moreover, the extent to which criminal convictions constrain a person's life has been extensively documented.²⁷⁷ Specifically, courts were willing to recognize that individuals can have privacy interests in their criminal past (for example, in mugshots), potentially even when the personal information was once public, and some courts even offered remedies aligned with recognizing the potential risks of disclosing that information.²⁷⁸ These rulings suggest that courts believe that U.S. citizens should be able to keep their past histories private under certain conditions, a right correlated with the intentions of retroactive legality.²⁷⁹ That is, when a legislature redefines the extent to which a particular behavior should be considered "dangerous" or "criminal," such reconsideration has direct effect on our understanding of one's previous past and we should de facto and de jure allow her the ability to reflect the legislative intent to start fresh. This can only be fully achieved by removing any reminiscence of past criminal behavior. Legislators are willing to do so through expungement and vacatur regimes. Newspapers should follow.

Indeed, in the modern era, retroactive legality has been defined as a framework in which the judicial system "seek[s] to restore those convicted of [] crimes to the rights and civic status they would have had if their conduct had never been illegal."²⁸⁰ Vacating and expunging criminal convictions for those criminalized for selling sex, including survivors of sex trafficking, fits well within that framework, and is also intended to restore those individuals' civic status as if they have never

276. Mitchell, *supra* note 270, at 7–8. See *Holiday v. United States*, 683 A.2d 61, 80 (D.C. 1996) (analyzing differences between state courts' and federal courts' reasonings to either apply or deny retroactive amelioration); *State v. Cummings*, 386 N.W.2d 468, 472 (N.D. 1986) (inferring change indicated legislature's intent for lesser punishment and finding exception to allow for retroactive application of ameliorating penal legislation); *State v. Von Geldern*, 638 P.2d 319, 322 (Haw. 1981) (demonstrating situation where court reduced sentence for drug crime in light of legislative change regarding mandatory–minimum sentences). See generally *Edwards v. Vannoy*, 141 S. Ct. 1547, 1551 (2021) (deciding whether new criminal procedure rule may retroactively apply to overturn certain final convictions). The Supreme Court's recent decision held in *Edwards* that the new *Ramos* rule did not apply retroactively. *Id.*

277. See generally Tara Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, *YALE L.J. F.* 759, 760, 762 (Feb. 25, 2019), <https://www.yalelawjournal.org/forum/transcending-the-stigma-of-a-criminal-record> (explaining how criminal convictions' ubiquity prevents others from acquiring life necessities such as housing and employment as well as how it affects those pursuing legal careers in context of Character and Fitness reviews); Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 *MICH. L. REV.* 519, 529–30 (articulating how Americans with felonies are impacted by their convictions and cannot exercise certain rights, such as voting).

278. See, e.g., *Detroit Free Press, Inc. v. U.S. Dep't of Just.*, 829 F.3d 478, 484–85 (6th Cir. 2016) (reversing a previous decision and finding that "individuals enjoy a non-trivial privacy interest in their booking photos"); *Times Picayune Publ'g Corp. v. U.S. Dep't of Just.*, 37 F. Supp. 2d 472, 482 (E.D. La. 1999) (holding that disclosure of a mugshot could reasonably be expected to be an invasion of personal privacy). For a discussion of remedies see *Taha v. Bucks Cnty.*, No. 12-6867, 2021 WL 534464, at *2 (E.D. Pa. Feb. 12, 2021) (requiring Mugshots.com to pay \$150,000 in damages for publishing a mugshot of a defendant with expunged criminal records; Mugshots.com did not respond to the claim and a motion for default judgment was granted.); *Hartzell v. Cummings*, 2015 Phila. Ct. Com. Pl. LEXIS 313, at *18–19 (C.P. Ct. Phila. Cnty. Nov. 4 2015) (discussing an individual's privacy rights as a private figure and requiring a removal of information from online website, including information that was once public, while allowing the website to continue).

279. See Mitchell, *supra* note 270, at 8.

280. Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 *J. CRIM. L. & CRIMINOLOGY* 379, 379 (2020).

done anything that can be considered criminal. To some, this can also be an alteration of “history,” as these individuals were once convicted. However, the principles of the amelioration doctrine teach us that some history could, and probably should, be challenged following social and legal changes.

The First Step Act of 2018 could serve as one formal illustration of the movement in criminal law towards retroactive leniency.²⁸¹ The First Step Act made changes established by Congress—which narrowed the gap between the punishment imposed on powder and crack cocaine offences—retroactive, and gave “certain crack offenders an opportunity to receive a reduced sentence.”²⁸² The First Step Act made “[a]n offender [] eligible for a sentence reduction . . . only if [the offender] previously received ‘a sentence for a covered offense.’”²⁸³ Likewise, the Fair Sentencing Act modified the statutory penalties for offenses triggering mandatory minimum penalties based on drug quantities. With the recommendation of the United States Sentencing Commission, the act was applied retroactively, based on the argument that those charged with the same conduct today would not face the same penalties imposed prior to 2010.²⁸⁴

In cases such as *Lynce v. Mathis*,²⁸⁵ the Supreme Court has affirmed that the “Ex Post Facto Clause bars retroactive application of legislation that either criminalizes conduct that was legal when undertaken or extends the punishment for those who have previously committed criminal acts.”²⁸⁶ The Supreme Court’s decision on this subject “is consistent with a surprising body of case law rigorously protecting criminal defendants from retroactive alteration of the terms and conditions of their sentences.”²⁸⁷

Courts can, and de facto do, “consider ameliorative changes in context to analyze whether the legislature desired retroactive application.”²⁸⁸ General savings statutes,²⁸⁹ applicable both in civil and criminal cases, are one way by which

281. Hassan Kanu, *The Most Significant Piece of Justice Reform in Decades is Flaming Out*, REUTERS (May 7, 2021 11:36 AM), <https://www.reuters.com/business/legal/most-significant-piece-justice-reform-decades-is-flaming-out-2021-05-07/>. The First Step Act received “skepticism” from the United States Supreme Court; specifically, a majority of the Supreme Court was unsure whether the Act actually covered some offenders. *Id.* (noting the Act “makes the Fair Sentencing Act retroactive”).

282. *Terry v. United States*, 141 S. Ct. 1858, 1860 (2021).

283. *Id.* at 1862.

284. *Id.* at 1861–62. See also U.S. SENT’G COMM’N, FINAL CRACK RETROACTIVITY DATA REPORT FAIR SENTENCING ACT, (Dec. 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf.

285. 519 U.S. 433, 440–41 (1997).

286. Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 35 (1997). See *Cal. Dep’t of Corr. v. Morales*, 514 U.S. 499, 501–02, 504 (1995) (holding parole review was not per se violation of Ex Post Facto Clause). The Court looked at precedent when analyzing *Lynce*, finding again the Ex Post Facto Clause also applies to any retroactive loss on the prisoner’s part for not only parole, but also any opportunities to gain parole. *But see Smith v. Doe*, 538 U.S. 84, 105–06 (2003) (holding non-punitive requirements regarding registration and notification could be retroactively applied because those were deemed not punitive in the case’s situation).

287. Krent, *supra* note 286, at 36.

288. Morrison, *supra* note 263, at 342.

289. Saving statutes are defined by Merriam-Webster dictionary as “a statute explicitly excepting certain proceedings, remedies, penalties, rights, or liabilities from the effect of a repeal, amendment or law.” *Saving*

legislatures signal to courts their desires to make ameliorative changes only “prospectively.”²⁹⁰ However, they do not necessarily ban ameliorative retroactive changes all together. De facto, however, courts have mostly opted for rejecting the application of the common law amelioration doctrine and also reject applying ameliorative changes retroactively whenever general saving statutes were enacted.²⁹¹ By doing so, courts might have failed to identify that historically, the goal of general savings statutes was to avoid “unintended pardons” in limited contexts.²⁹²

Given the legislatures’ willingness to ameliorate said penalties, whether through decriminalization or expungement regimes, an important question regarding the application of these changes arises: should retroactive legality be applied to the crime of prostitution, as it has been for other crimes such as marijuana?²⁹³ Whatever the answer may be, the spirit of the amelioration doctrine—when juxtaposed with recent legislation and policies that recognize the harsh and unjust treatment of individuals who were charged with prostitution for selling sex received from the criminal legal system over the years and the need to offer solutions to delete the outcomes of that unjust treatment—provides another justification for the adoption of the right to social expungement.

Thus far, the Article provides two main justifications for recognizing the right to social expungement that will allow individuals to request media outlets to remove information concerning past interactions with the criminal legal system regarding offenses—like prostitution and drug possession—that were legalized, decriminalized, vacated, or expunged over time. The first justification goes beyond the specifics of criminal law, and it calls to close the gap between official decisions to legalize, decriminalize, expunge or vacate particular offenses and the social stigma and condemnation that still exists for those who were convicted before legislative changes. The second justification lies well within the boundaries of the criminal law doctrine itself and represents an extension of policy decisions to decriminalize these offenses or delete them from criminal records: the amelioration doctrine.

To be clear, the right to social expungement cannot be justified solely based on official expungement or vacatur decisions. It is a right that reflects deeper socio-cultural shifts, particularly recognition that some offenses no longer carry the moral blameworthiness that justifies criminal punishment. As such, and for the purposes of illustration, an individual who was indicted for homicide—which is considered one of the most severe offenses—cannot enjoy the protection of the right, even if that individual was ultimately released from prison. This is because that

Statute, MERRIAM-WEBSTER DICTIONARY <https://www.merriam-webster.com/legal/savings%20statute> (last visited Jan. 21, 2023).

290. Morrison, *supra* note 263, at 342.

291. *Id.*

292. *Id.*

293. *See id.* at 342–43.

individual cannot establish an argument of social recognition and cultural shift with regard to homicide.²⁹⁴

As discussed earlier, the majority normative view among scholars is unsympathetic to these justifications given the sanctity of the First Amendment and the freedom of the press. According to this view, the main critique of the right to social expungement is that it represents an inherent collision between First Amendment rights and the right to privacy where the former should prevail.²⁹⁵ Moreover, an inherent fear of losing our democratic values is often presented if privacy will be prioritized.

The context the Article discusses challenges the dichotomous balance between the right to social expungement and the freedom of the press often raised by scholars. In fact, the Article argues, somewhat counterintuitively, that in the paradigmatic cases advanced in this Article, not only does the right to social expungement not clash with First Amendment rights and the freedom of the press, it in fact sits comfortably within an interpretation that is aligned with the freedom of the press and contributes to our democracy. The next Part elaborates on this argument.

III. THE RIGHT TO SOCIAL EXPUNGEMENT CAN SIT COMFORTABLY WITH FIRST AMENDMENT RIGHTS

As discussed earlier, the majority view considers the RTBF, and likely the right to social expungement as well, to be an imminent threat to free speech and freedom of the press.²⁹⁶ However, assessing such delicately balanced countervailing rights requires a deeper dive into the root questions about what the press wishes to achieve. That is, what values should be protected through a constitutional regime that allows a broad freedom of the press.

As discussed earlier, the press itself is torn with regard to the issue of unpublishing, recognizing a clash between values that stand at the core of journalistic ethics. According to some, the main clash is between values of *accuracy* and *objectivity*,²⁹⁷ while others argue it is between the privacy of individuals and the newsworthiness of the story.²⁹⁸ More precisely, the balance between the two former values is a balance between the need to preserve historical records and the press' loyalty to the public expressed, *inter alia*, through the commitment to minimize harm to individuals.²⁹⁹ Dwyer and Painter's study discussed this tension and revealed the need to balance between the pursuit of truth, the need to minimize harm to

294. This is not to suggest that the individual who was released from prison should not be also given the opportunity to reenter society. But a remedy for such an individual will likely not be found within the borders of the right to social expungement.

295. See *supra* Part I.A.1.a.

296. *Id.*

297. Dwyer & Painter, *supra* note 7, at 214–26. Similar arguments have been raised by journalists opposing the processes of unpublishing. See, e.g., Goldberg, *supra* note 56; Vore, *supra* note 68.

298. See Gajda, *supra* note 16, at 263–64.

299. See Dwyer & Painter, *supra* note 7, at 220.

individuals, and loyalty to society at large.³⁰⁰ All these principles are vague and can carry different normative weights.

For example, how should we define accuracy or “truth” in the context of those individuals whose main (if not only) fault was that they were involved in some activity that was once considered criminal? Or if we now understand, as a society, that these individuals should not have been considered criminals but rather victims? Should we consider the “truth” to be representing current values and social norms about who is “dangerous” and should thus be criminalized, particularly if the criminal legal system itself offers to wipe her past clean? Isn’t it plausible to argue that the information that currently exists in newspaper archives which categorizes one’s behavior as criminal is no longer “true,” as was decided by policy makers?

This is clearly the case in situations where legislation has allowed courts to officially vacate or expunge criminal records, but it is also true for situations in which criminal legal system officials have declared those actions to be non-criminal or recognized additional social factors which suggest that the individual involved is not a criminal (but, for example, a victim).³⁰¹ Isn’t preserving the criminalization tag above one’s head in fact a diversion from the “truth,” if corrected?

Moreover, one of the reasons our society so diligently protects the freedom of the press is to allow the press to advance its democratic role to inform the public.³⁰² In the context of the criminal legal system, one of the main commitments of the press is not only to provide the public with accurate information about current policies but also to reflect on how past practices have affected particular groups in society, including across racial and gender lines.³⁰³ The refusal to unpublish information about people who were once implicated with criminal-related behavior, when it is now clear that they should not have been, goes directly against both goals.

First, it ignores official recognition of the rights of those individuals to clear their past and thus maintains connections between their past behavior and criminality in ways that no longer represent the reality of crime and punishment. And second, it preserves the power structures that allowed the criminalization of those individuals, despite the press’ commitment to contribute to the advancement of social change.³⁰⁴

300. See *id.* at 217–18. With this focus in mind, one can see the overlap between the two balancing propositions: questions of privacy of individuals are captured by the harm to individuals, and questions of newsworthiness are captured by the loyalty to society at large. See *id.* at 220 (illustrating the convergence in conversations about the values to be balanced).

301. Under each of the categories discussed earlier: the lack of moral blameworthiness due to the offense or due to the characteristics related to the offender.

302. Dwyer & Painter, *supra* note 7, at 220.

303. See *Lights. Camera. Crime.: How a Philly-born Brand of TV News Harmed Black America*, PHILA. INQUIRER (Mar. 29, 2022) <https://www.inquirer.com/news/inq2/more-perfect-union-action-eyewitness-news-tv-racism-crime-20220329.html> (illustrating a recent instance of the media’s commitment to accuracy in reporting crime stories while telling “a fuller story of communities, one that more accurately captures the humanity and dignity of all who live there”).

304. Greenberg, *supra* note 19. Note the Globe’s policy, directly connecting a commitment to tackle entrenched racially unequal practices and their “Fresh Start” initiative.

Besides, protecting the public record, by itself, is hardly a justification *per se*, unless one can prove the information has “ongoing value that justifies its protection.”³⁰⁵ Information about individuals whose past behavior is no longer considered criminal, and thus, in the eyes of the criminal legal system either does not pose any public safety threat to society or who were in fact victims of consistent oppressing reality, cannot claim such ongoing value.³⁰⁶ This is also clearly the case for individuals whose records were vacated or expunged. What is the value that justifies the decision to prioritize the sanctity of historical data over other journalistic values that aim to advance the public interest? I am not convinced that there is any.

Such an understanding of the values the press intends to advance sheds new light on the balance between privacy and freedom of the press. In the context of individuals who were once implicated in criminal activity that is now legalized, decriminalized, expunged, or vacated, recognizing the right to social expungement not only will not clash with freedom of the press but will also contribute to advancing such freedom and will allow the press to fulfill its important role in U.S. democracy. The recent initiatives mentioned earlier that were adopted by newspapers, suggest that indeed at least some representatives of the press are willing to accept such a balance. Ultimately, the core value of the press is to advance truth and accuracy.³⁰⁷ By refusing to unpublish stories like M’s, the press denies many individuals the right to their own truth and position in a society whose values are ever-changing.

IV. POTENTIAL MODELS OF IMPLEMENTING THE RIGHT

Being cognizant of the fact that some, even many, will disagree with this Article’s normative stance about the need to recognize the right to social expungement, the Article will now move to its prescriptive part and offer different models of implementation of that right, that take into account some of the concerns raised by opponents to the recognition of the RTBF on American soil, predominantly the balance of that right with freedom of speech and other compelling state interests. As mentioned earlier, the right to social expungement can be of different shapes and forms, from a federal constitutional right to a state-level law based right. Its exact formulation could be left for future work. This Article, however, has not only advanced several justifications for that right, but will also lay the foundation to some potential models of implementing the right to social expungement.

Clearly, the most immediate outcome of recognizing the right to social expungement in its most complete sense will be the ability of individuals to request newspapers to delete past information about their involvement in crime, so long as it

305. Dwyer & Painter, *supra* note 7, at 225.

306. *See id.* at 225 (“Societal shifts such as the expungements of low-level marijuana arrests described earlier should prompt additional discussion, especially related to equity; if one individual’s expunged arrest is deleted from the news record, should the countless others who will never contact the organization be similarly absolved?”).

307. *See id.* at 220.

falls under the suggested narrowly defined right. As mentioned, some newspapers are indeed willing to consider this remedy. However, as discussed earlier, newspapers can decide on different, more nuanced methods to address this problem, and not all necessarily require taking down (unpublishing) stories. There are potentially other methods to appease the requestor besides unpublishing; for example, the publication could make an offer to revise or update the article, turn the individual anonymous in the article, use a code to hide the article from online search results, or add an editor's note that reflects recent legal changes and requester's status.³⁰⁸ All these suggestions will likely offer a different balance between the individual's right to social expungement and the First Amendment, and not all of them will necessarily offer similar protections to these individuals. The exact mechanism, and the application of remedies for violation of the right, is beyond the scope of this Article, but there is no doubt that recognizing the right is the first step in advancing any of these potential models.

Moreover, in thinking about additional potential remedies that go beyond the immediate discretion of newspapers, we can consider other methods suggested by scholars in different contexts that can also offer alternative modes of implementing the right to social expungement. For example, the creation of a "Search Results Removal Test" which would be "specifically tailored to the objective at hand, preventing it from exponentially interfering with freedom of speech rights."³⁰⁹ That is, to offer individuals real chances to start fresh without carrying the heavy load of criminality and without giving up on the press' freedom. The test is intended to protect individuals by narrowing the applicability of the law to specific crimes, require evidence for a direct connection of the crime and an individual in the search results, and utilize a "reasonable person" standard to assess the claims (in this context, proving that a reasonable person would be emotionally or physically affected through the information).³¹⁰ In the context of the right to social expungement, legislators can, for example, limit the type of offenses that can justify the application of the test based on the categories discussed in this Article, require a connection between the individual requesting the removal of the story (or the search result more broadly), and the offense, and apply the considerations and data related to the effects of publishing the stories on these individuals.

Another possibility would be to frame the right to social expungement as a publicity right due to the innate economic interest in the commercial use of an individual's name or image, a method that could "make[] the right more palatable to the U.S. legal system" that sympathizes with monetary injustice more than emotional distress.³¹¹ Such framing could potentially justify the unpublishing request, not only because the individual has more control over his right to publish or unpublish the story, but also because the newspapers has already benefited financially from

308. *Id.* at 215–16.

309. Cooper, *supra* note 40, at 206.

310. *Id.*

311. Lavelle, *supra* note 40, at 1133–34.

the use of the story, and thus should be more attentive to unpublishing requests. This is particularly true for the type of stories that fall under the right to social expungement; typically, old stories about ordinary individuals with a limited—or less than limited—levels of newsworthiness, and consequently little to no financial value to the newspaper.

Another option could be granting Internet users control of their online personal data through clickwrap contracts by including in those contracts a provision that “expressly recognize[s] data subjects as the controller of their online personal information”³¹² setting a new standard in industry practice. Such a method would have to be voluntarily followed by data controllers.³¹³ To a certain extent, this method corresponds with Jones’ conceptualization that the ability to delete past information online reflects a recognition in one’s right to transform public information “into private information.”³¹⁴

An additional method could be a Tailored Balancing Test that would regulate search engine delisting criteria as potentially enacted through Congress and imposed on search engine providers.³¹⁵ The proposed balancing test would have search engine providers weigh the values of individual privacy against the value of the data taking into account a number of factors: 1) the identity of the requestor: whether they are a public or a private individual; 2) the source of the information: whether the requestor is the original source of the information as opposed to a third party including journalistic sources; 3) legal limitations on the information, particularly whether removal can be achieved based on liability claims or unlawfulness; 4) the effects on the requester, particularly the harm or the “unfair prejudice” the requester will likely suffer from should the story remain in the public domain; and 5) the public value of the information, particularly whether the information has “serious literary, artistic, political, or scientific value.”³¹⁶ However, given some of the professional knowledge required to apply such balancing test, any model following this path should include a participation of media representatives in early stages of the assessment.

In sum, the multiple methods discussed above offer a host of potential models that balance the compelling interests of individuals, like M and others like her, with additional interests, including those protected by the First Amendment. If anything, these methods indicate that the recognition of the right to social expungement offered in this Article might not pose the threats to free speech that so many fear—at least not in their most radical Orwellian form. At the same time, however, such a right will finally give individuals haunted by their past involvement with the criminal legal

312. Gallinucci-Martinez, *supra* note 40, at 22.

313. *Id.* at 20–23.

314. JONES, *supra* note 14, at 9.

315. Webb, *supra* note 18, at 1325.

316. *Id.* at 1325–26. It should also be mentioned that there are additional legal mechanisms that can allow one to “control or limit” information once released, including those originating in intellectual property, contracts, defamation, or privacy torts. These existing mechanisms, however, do not seem to offer remedy to individuals like M.

system the ability to limit the public exposure of the online information about them and regain their ability to once again reenter as equal members of society.

CONCLUSION

This Article is about responsibility and forgiveness. The responsibility of a nation that for too long used the long hand of the criminal legal system to punish individuals that we now believe should not have been punished and to mark them with the criminal scarlet letter that will define who they are, practically forever. Such responsibility calls for that nation to recognize that it should correct its past doings. To ensure that future individuals will not be similarly marked but also recognize the harm already done and act to correct it.

Indeed, the Article suggests that in recent years multiple states and the federal government were willing to take some responsibility by adopting policies to correct these past decisions, mostly through the remedies of expungement and vacatur. However, the Article has shown this is not enough. While states directed their efforts at official records, private records, such as newspaper publications, did not offer similar solutions. Ironically, these private records are similarly a product of the nation's past doings and harsh punishments. That is, these records would not have existed had the state not arrested or convicted these individuals. However, due to the superiority of the First Amendment and freedom of the press in our legal system, these private entities—and this Article focused on newspapers—are not required to contribute to the success of the official initiatives to correct for the past and allow individuals to fully reintegrate into society. Those individuals are left with very limited remedies to challenge the existence of these past records. Under these circumstances, the interests reflected in the sweeping legislation to expand expungement regimes simply cannot be achieved. Resolving this paradox is also the responsibility of the nation and should not be left in the hands of these private entities.

Surprisingly, this absurd situation, in which the nation is willing to delete past information about involvement with crime and allow individuals to start fresh, but private entities can stand in the way, has not received meaningful scholarly attention. This Article bridges that gap and calls for the recognition of a new right that can better protect the shared interest of individuals, and the nation itself—the right to social expungement. Such a right, that is built on the shoulders of the RTBF but offers a unique, narrower version of that right, is one of the missing pieces in the puzzle that is criminal legal reform.

The Article suggests adopting the right to social expungement for individuals whose offenses were legalized, decriminalized, expunged, or vacated. The Article addresses potential critiques of that right but also offers a preliminary prescriptive lens on how it could be implemented moving forward.

Recognizing this right will not only increase the nation's accountability for its harsh penal policies but will also allow some space for forgiveness; these individuals might start forgiving us for all we have done to wrong them.