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## **Beyond Totem and Taboo: Toward a Narrowing of American Criminal Record Exceptionalism**

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# Beyond Totem and Taboo: Toward a Narrowing of American Criminal Record Exceptionalism



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## I. Introduction

According to a recent estimate, people with a felony conviction in the United States account for 8 percent of the overall population (nearly twenty-five million people).<sup>1</sup> Individuals with a misdemeanor conviction are likely even more, considering that over ten million misdemeanor cases are filed every year.<sup>2</sup> Having a criminal conviction on one's personal record hinders people's lives long after the court-imposed punishment has been served in full. Conviction records activate an increasingly broad range of de jure and de facto disabilities and restrictions that are "collateral" only in the formal sense of the word.<sup>3</sup> The piling up of statutory collateral sanctions and disqualifications is coupled with various forms of discrimination arising from the increased accessibility of criminal history information in today's digital age.<sup>4</sup>

The current widespread availability of criminal history records in the United States is unprecedented in the country's history and unparalleled in any other developed nation of the Western world. It is fair to maintain that U.S. criminal record policy represents a striking example of American exceptionalism.<sup>5</sup> Today's ubiquitous system of access to criminal records—through government databases and websites as well as commercial providers—make it nearly impossible for an individual to leave her criminal history behind. Technological innovations have exponentially increased accessibility, dissemination, and use of criminal history information. The commodification of criminal records has multiplied the negative ramifications of the attachment of the "criminal" label.

Over time, the public availability of criminal records has acquired totemic importance largely derived from an increasing risk aversion toward individuals with a criminal past<sup>6</sup> and an exaggerated symbolic significance attributed to the First Amendment with regard to the openness of court records.<sup>7</sup> Recent signs, however, would seem to suggest that an open discussion on criminal record accessibility and management is no longer taboo. Although the debate on criminal justice reform thus far has tended to stay in safe territory—mostly focusing on low-level, nonviolent offenders—at the same time policymakers increasingly appear willing to consider the adoption of measures aimed at promoting the reintegration of ex-offenders into the community while protecting public safety. The two comprehensive reports on restoration of rights and record-closing

legislation at the state level recently published by the Collateral Consequences Resource Center provide ample proof of it.<sup>8</sup>

My central argument in this article is that the awareness of what having a criminal record means today in the United States calls for the adoption of new policies limiting access to criminal history information by third parties and preventing sealed and expunged records from resurfacing. After briefly describing the U.S. criminal record infrastructure, I will turn my attention to the challenges that the digital age and the Internet have posed to criminal records management policy and practice. I will then proceed to consider and discuss pros and cons of "forgetting" and "forgiving" models, expressing a preference for a third option, which I term "forgetting through forgiving." In the concluding section, I will outline a few policy recommendations to address the problems arising from how criminal records are currently accessed, disseminated, and utilized.

## II. The U.S. Criminal Record Infrastructure

### A. Government Criminal History Repositories

Currently, all fifty states and the District of Columbia have a centralized criminal history record repository.<sup>9</sup> Criminal record repositories are made up of criminal records from across the state, including law enforcement records, criminal court records, corrections records, and sex offender state registries. All this information is combined and kept in one database. Information included and rules of access to criminal history records vary from state to state.<sup>10</sup>

It must be noted that not all states grant the public access to criminal history information maintained in such repositories for non-criminal justice purposes. This is because public access to government-held records is regulated differently from state to state.<sup>11</sup> Although access to government records is an important element that helps keep democratic governments transparent and accountable, public records statutes at the federal and state level that give the public the right to access various government documents "stem from legislative decision, not constitutional command."<sup>12</sup>

A distinction is usually drawn between "open" and "closed" records states. Open records states allow anyone to have unrestricted access to criminal history records for any purpose, including commercial dissemination.<sup>13</sup> In

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contrast, in closed records states access to criminal history information is only available to authorized users—usually law enforcement agencies, volunteer organizations, and certain employers who must comply with federal or state statutory requirements regarding employees’ criminal history.<sup>14</sup> Furthermore, in closed records states the commercial dissemination of criminal history information obtained through state repositories is generally prohibited.<sup>15</sup> In some states, disclosure to third parties is allowed contingent upon the subject of the search signing a release authorization form.<sup>16</sup>

At the federal level, the fingerprint-based FBI criminal history repository qualifies as a closed record system.<sup>17</sup> In addition to federal criminal records, the FBI-maintained Criminal History Record Information (CHRI) system includes criminal records submitted by all states and territories and indexed through the FBI’s Interstate Identification Index (known informally as “Triple I”), “an interstate/federal-state computer network for conducting national criminal history record searches.”<sup>18</sup> The FBI shares criminal history information for purposes of employment, licensing, and other non-criminal justice purposes, provided it is authorized to do so by a federally approved state statute designating specific purposes for which state agencies and users may request and receive FBI-maintained CHRI.<sup>19</sup>

### B. Criminal Court Records

Beyond the dichotomy between open and closed records jurisdictions with respect to executive branch record repositories, criminal history information can be obtained from the court system at the local, state, and federal level. It is often maintained that adult criminal court records are open to the public. This way, all fifty-two U.S. jurisdictions (the fifty states, the District of Columbia, and the federal government) would qualify as “open records” jurisdictions when it comes to requesting someone’s criminal history information maintained at the court level.

In fact, although the U.S. Supreme Court granted the press and public a First Amendment right of access to judicial proceedings in criminal cases,<sup>20</sup> it has “never addressed the question of whether there is a constitutional right of access . . . to court records.”<sup>21</sup> In *Nixon v. Warner Communications, Inc.* (1978), the Court found a common law right of access to judicial records, but also noted that “the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.”<sup>22</sup> From this follows that rules governing access to criminal court records nationwide are not comprehensive, and in many cases judges develop rules on their own.<sup>23</sup>

### C. Private Vendors

Finally, as we shall see in the following section, besides centralized repositories and the court system, private commercial vendors have arisen over the past few decades

to become the “third pillar” of the U.S. criminal record infrastructure. The pace of growth of the private background checking industry, especially since the 1990s, has been no less than staggering.

### III. Conviction Records in the Digital Age

Beginning in the 1970s, state criminal history repositories and court records have been gradually reformatted and transferred to computerized, searchable databases.<sup>24</sup> But that was only the prelude to an even greater shift in criminal records management nationwide. The online availability of criminal history information has been a game changer.

It has been estimated that today roughly nine-in-ten American adults use the Internet (up from half in 2000) and over 70 percent of them have broadband Internet service at home (up from 1 percent in 2000).<sup>25</sup> The Internet has not only revolutionized access to criminal records, but also the public’s perception of risk associated with people with a criminal past. Digitized criminal history repositories in open records states were gradually made accessible online upon the payment of reasonable fees. The same happened with state and county court system databases.<sup>26</sup> Furthermore, today state and county court system websites generally provide ready access to information regarding pending and closed criminal cases.<sup>27</sup>

These factors have contributed to the rapid and exponential growth of the private background checking industry. Commercial providers of criminal background checks purchase records in bulk from accessible repositories, use data extraction and collection software to harvest databases available online, and send runners to courts to collect additional information. Then, they make money selling criminal history information to the public online.<sup>28</sup> Background checking companies are not organized at the state level nor have to follow the same laws and regulations concerning access to and update of criminal records that apply to public repositories.<sup>29</sup> Commercial vendors of criminal records are legally considered consumer report agencies and are therefore regulated by the Fair Credit Reporting Act (FCRA) enforced by the Federal Trade Commission (FTC).<sup>30</sup>

It is fair to say that conviction information has never been more widely accessible and disseminated at any point in U.S. history. Mass dissemination of criminal records has become a hallmark of our times.<sup>31</sup> The digital revolution in government record-keeping practices, the online availability of court and state criminal history databases, and the proliferation of online commercial vendors have completely transformed the relationship of the public with criminal records. As stressed by the National Association of Criminal Defense Lawyers, the “growing obsession with background checking and commercial exploitation of arrest and conviction records makes it all but impossible for someone with a criminal record to leave the past behind.”<sup>32</sup>

Furthermore, even when no background check is run, the reentry process of ex-offenders can also be hindered by the ability to quickly and easily find information online (the

so-called Google effect). It has become standard practice in the context of everyday professional and personal relationships to google somebody and get instantly a list of everything ever posted about that person, including criminal history information.

#### IV. Are Sealing and Expungement Statutes Still Relevant?

“Expungement aims to wipe the record clean after a sufficient period of law-abiding behavior. Sealing makes the record inaccessible, except to those with statutory authorization or a court order.”<sup>33</sup> Both practically and symbolically, such schemes are potentially capable of having multiple beneficial implications for ex-offenders, eliminating stigma, discrimination, and negative attitudes expressed toward them by society. This said, laws are rarely clear about whether sealing and expungement schemes actually eliminate mandatory restrictions.

Yet the advent of the digital age has also considerably undermined the significance of sealing and expungement schemes as reliable mechanisms to provide eligible offenders with a fresh start and a blank slate. Despite the increasing enactment of record-closing legislation, the following question must be asked: do sealing and expungement laws still have a valuable role to play in the digital age?

Modern technologies have given non-criminal justice actors unprecedented access to criminal history information via the Internet, and this represents the primary threat to the effectiveness of legislation inspired by the “forgetting” model.<sup>34</sup> The process of getting a record expunged or sealed can be difficult and expensive, yet there is no guarantee that, once a record has been set aside, it will no longer be disclosed.

The main providers of criminal history information to the public—state repositories and commercial background check companies—face similar limitations in this regard. In the case of government databases, variations in update frequency often lead to sealed or expunged records being wrongfully revealed. Inaccurate and outdated criminal records, however, come primarily from private data aggregators that sell data to businesses and private individuals. Expunged or sealed criminal records are not infrequently, to employ an understatement, incorrectly reported because private vendors do not update their databases regularly.<sup>35</sup> The FCRA requires background check companies to take “reasonable steps” to make sure that the information they provide is current and accurate.<sup>36</sup> Unfortunately, this is not always the case. Deficiencies of enforcement mechanisms, a certain degree of ambiguity in regulatory guidance, and practical difficulties in constantly keeping databases up to date make the problem of inaccurate and outdated criminal records hard to eradicate. In addition, past convictions, even if formally sealed or expunged, often resurface on the Internet, for example after a local newspaper’s archives have been digitized and made available online. In contrast, in a not-so-distant past, “recovering facts about a conviction from a prior edition of a newspaper required far more time and effort.”<sup>37</sup>

Over a decade ago, legal commentator Adam Liptak observed, “real expungement is becoming significantly harder to accomplish in the electronic age.”<sup>38</sup> Since those words were written, things have only gotten worse. Ex-post remedies seem of little help: a dispute over whether a criminal record had been sealed or expunged after the information has already been disclosed to an employer, a landlord, a volunteer association, or a date is largely pointless. The harm has already been done.

#### V. Facing Challenges in Managing the “Ex-Con” Label in the Digital Age

The unprecedented accessibility to and dissemination of criminal conviction records information have profoundly transformed the experience of being labeled a criminal.<sup>39</sup> It is becoming increasingly apparent that reforms and different approaches are needed to meet the challenges brought about by digital technologies resulting in the enhanced public visibility of convictions. In this section, I first argue that technological developments, coupled with the advent of the “risk society”<sup>40</sup> increasingly preoccupied with safety and crime prevention, fueled the appetite for criminal records. A balancing approach should be adopted and new policies regarding the access to and management of criminal history information developed. I then maintain that privacy is not the most suitable interest to be balanced against pervasive risk prevention concerns. Rather, those interests are to be identified in the aggregated interest of society in the successful reintegration of people who committed a crime and the requirement of a proportionate punishment. Finally, I discuss the viability of a “right to be forgotten online” in the U.S. context.

##### A. Criminal Records, Risk Aversion, and Technological Development

In *Paul v. Davis* (1976), the U.S. Supreme Court held that no constitutional right to privacy exists that prohibits a state from publicizing criminal records.<sup>41</sup> However, in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press* (1989)—a third party’s FOIA request case addressing the refusal to disclose an individual’s personal FBI criminal record—the Court first recognized the doctrine of *practical obscurity*. In light of late 1980s record-keeping practices, the Court held that “plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.”<sup>42</sup> This means that public documents that are difficult or time-consuming to locate essentially become private records, and citizens are entitled to a privacy interest in the practical obscurity of such records. While obscurity is not synonymous with privacy, the Court found that a person possesses a privacy interest in information that is hard to obtain although technically available to the public.

The ruling in *Reporters Committee* was well-grounded so long as practical obscurity of otherwise public records was

the norm. But once an impressive amount of criminal records became readily accessible online as a result of the mass digitization of public records and the rapid spread of the Internet, the privacy interest in the practical obscurity of such records has been deemed superseded.<sup>43</sup>

This line of argument seems to be largely predicated on the idea that technology cannot be stopped. From such a perspective, the hyper-visibility and dissemination of conviction information should be simply regarded as an inevitable reality of our times. In the management of criminal records, over time technology got ahead of us and criminal justice practices have merely adapted to changes brought by the digital revolution in a largely unreflective way. I certainly acknowledge that technology can be extremely useful for criminal justice purposes (from CCTV to electronic monitoring, from police body cameras to advanced risk assessment tools). Yet technology should not dictate the agenda or be passively and uncritically embraced. In other words, the mere fact that technology allows something to happen is simply not a good enough reason to let that happen.

It is hard to view bulk selling of digitized criminal records online as the natural evolution of granting access to public records to enable the public to check what the government and the courts are up to. Rather, technological developments have critically contributed to enhance social anxiety about the risk of dealing with persons who have been convicted of a crime, regardless of the seriousness of the offense of conviction. The public's need for disclosure of criminal record information was not as pressing an issue four decades ago as it is today. People increasingly rely on online background checks—just one click of the mouse away—not only in the employment setting but also in many other everyday life contexts such as dating, neighboring, friendship, and voluntary associations.<sup>44</sup>

At the intersection between the risk society and the digital age, the mantra for which “we need to know about a person's criminal history to keep ourselves safe” has become imperative. Technology has enabled and incentivized a hyper-precautionary societal mindset that resulted in new or heightened forms of criminal record discrimination against ex-offenders, “who may be trying to reform themselves or whose offences may in fact be quite mild.”<sup>45</sup> As a result, policies and practices are now too unbalanced on the side of public safety at the expense of any possible competing interest.

### **B. Criminal Justice Exceptionalism and Criminal Records Management**

A balancing approach should be adopted to implement a more just approach to criminal records management. As it has been noted, shifts in law and policy are necessary not only “to avoid staleness and obsolescence in light of new technologies” but also to avoid that new technologies disrupt the delicate balance between equally important interests.<sup>46</sup>

Is the interest protected by the right to privacy the one to invoke to limit access to criminal history information? My

answer is no. The American understanding of privacy is, first and foremost, aimed at protecting individual liberty (i.e., freedom from the government), while other pervasive forms of intrusion in the citizens' everyday life (like, for example, consumer credit reports and criminal background checks) are widely accepted and tolerated. Unlike the United States, Europe embraces a dignity-based notion of privacy, which is mainly focused on the protection of each person's public image.<sup>47</sup> Arguing that U.S. jurisdictions should adopt a European-like notion of privacy to justify the enactment of policies aimed at limiting the disclosure of criminal history information would be at odds with basic principles and values of U.S. law. Therefore, the case for the enhanced confidentiality of criminal history records that are not sealed or expunged should be assessed through different lenses.

My argument is that the criminal justice framework, including the records and information it generates, is different from any other branch of the legal system. People's interests at stake are exceptionally high. The same does not happen in any other area of the law. The hard treatment, stigma, and burdensome collateral consequences that flow from a criminal conviction “are unmatched by even the most serious forms of civil liability.”<sup>48</sup> I refer to this as *criminal justice exceptionalism*.

Criminal justice exceptionalism applies indistinctively on both sides of the Atlantic. This seems to be confirmed by the fact that across Europe criminal records were not publicly available well before the adoption of the 1981 Council of Europe Personal Data Convention<sup>49</sup> and the 1995 European Union Data Protection Directive.<sup>50</sup> Supranational rules simply reflected pre-existing views at the national level, which considered criminal records as especially sensitive information but certainly not for privacy-related reasons. Rather, social reintegration of ex-offenders was the primary concern. The same approach was widely embraced in pre-1980s United States.<sup>51</sup> No claim of American exceptionalism can be put forward.

In today's information society, criminal history records stay with an individual long after the formal punishment has been served, regardless of how minor the crime and whether the ex-offender's rehabilitation efforts were successful. This fact can no longer be neglected in the conversation on how to improve the management of criminal records. Criminal records should not be seen as or treated like any other public record in light of this awareness. Specific rules should be enacted taking into account the exceptionally debilitating consequences flowing from having a criminal conviction on record.

In particular, access to and disclosure of criminal history records should be balanced against the aggregated societal interest to a successful reintegration of ex-offenders after the punishment has been served in full.<sup>52</sup> Social exclusion of ex-offenders has been traditionally identified as a major determinant of recidivism.<sup>53</sup> This comes at a high cost to society not only in terms of public safety but also in terms of taxpayers' money.<sup>54</sup> Therefore, a wider interest exists in

limiting the continuing stigmatization and exclusion from society of those individuals with a criminal record who do not pose a threat to their community and are actively trying to settle back into a law-abiding life. Furthermore, the requirement for which “a criminal deserves to suffer proportionately to the seriousness of the crime committed” should also be taken into account.<sup>55</sup> After all, if “the state has the power to ensure that offenders are not subjected to hard treatment and deprivation at the hands of people who lack lawful authority,” then it should also limit the amount of post-conviction stigma and discrimination imposed on ex-offenders by private parties.<sup>56</sup> Especially for low-level offenses, a criminal record should not be a life sentence.

### C. A “Right to Be Forgotten” Online for the United States?

The advent of digitized records, Big Data, and the Internet means that criminal history information is more widely and readily available today than ever before. Yet enhanced stigmatization and other collateral consequences flow not only from criminal history information obtained online from government databases, court websites, or private vendors. News media, crime watch blogs, and social media also represent major sources of information that can massively amplify the negative ramifications of having a criminal conviction on record.<sup>57</sup> Furthermore, as previously noted, they have the ability to frustrate the effectiveness of sealing and expungement remedies. Should information about criminal convictions be returned in a search for an individual’s name *ad infinitum*? Would the recognition and implementation of a “right to be forgotten” online be a viable option to address this issue?

A right to be forgotten, as originally defined, would allow individuals to “determine the development of their life in an autonomous way, without being perpetually or periodically stigmatized as a consequence of a specific action performed in the past.”<sup>58</sup> A landmark judgment of the Court of Justice of the European Union (CJEU) in the case of *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos and Mario Costeja González* (2014) has recently popularized the expression “right to be forgotten” with specific regard to online search engines. The ruling allows private citizens in European countries to request that search engines delist information about themselves returned by an online search for their full name when that information is “inaccurate, inadequate, irrelevant, or excessive.”<sup>59</sup>

Two are the major takeaways from the case for the purposes of the present discussion. (1) The “right to be forgotten online” (or “right to be delisted”) label has proven somewhat misleading. In practical terms, no content is deleted in its original location on the Internet. A delisted link simply will no longer appear in search results for a person’s name. This means that the exact same content could still be retrieved through the same search engine using a different search query. (2) The right to be forgotten online is not absolute. It will always need to be balanced against other fundamental rights—such as, primarily,

freedom of speech—which are not absolute either. Practically speaking, this means that the company running the search engine must assess requests from users on a case-by-case basis.

As a de facto monopolist, Google has received nearly 700,000 requests to delist over 2.5 million URLs from search results since the judgment was issued, many of them regarding criminal convictions.<sup>60</sup> The company has specifically stated that, in deciding what to delist, they would apply the criteria developed by the CJEU but also look at whether there is a “public interest” in the information remaining available in search results.<sup>61</sup> Criminal convictions are indicated alongside financial scams, professional malpractice, and conduct of government officials as information for which delisting of search results may be denied on such grounds.<sup>62</sup> Examples of delisted links related to criminal convictions published by Google in its transparency report on the implementation of the *Google Spain* judgment suggest the following: search results are likely to be delisted when they refer to convictions for minor crimes pronounced several years earlier and convictions for serious crimes that occurred at least a decade earlier, either when the conviction has been sealed or expunged or when the ex-offender has been deemed rehabilitated under national law and does not appear to pose a threat to others. Delisting will instead almost certainly be denied with regard to recent convictions, generally regardless of the seriousness of the offense.<sup>63</sup>

Most likely, in the United States, the First Amendment would be invoked to protect Google and any online search company that publish, resurface, or otherwise make available criminal history information, especially in the case of information from judicial proceedings and records; and this even when the record has been sealed or expunged.<sup>64</sup> Nevertheless, American scholars have already put forward a compelling case for “practical obscurity online.”<sup>65</sup> As noted by Professor Eric Posner, “Critics of the European right to be forgotten need to explain why they disagree with the balance between free expression and privacy that the law reached until the digital era—when the barrier of the physical search almost always provided adequate protection for privacy.”<sup>66</sup> “Right to be forgotten” online rules would crucially complement much-needed reforms addressing the public availability of criminal history information through government-held databases and background check companies. They would effectively tackle the Internet’s ability to emphasize the past and Google’s contribution to the growth of the bias against ex-offenders “even years or decades after completing their sentence.”<sup>67</sup>

### VI. Restoration of Rights and Status: Beyond the Binary Approach

When rehabilitation was in its ascendancy, state and federal legislatures started to pass laws introducing or expanding the possibility of sealing or expunging adult convictions,<sup>68</sup> in so doing making the criminal justice system for adults more similar to the juvenile justice system.<sup>69</sup> This reform

movement completely lost momentum during the tough-on-crime era: mercy and forgiveness appeared too soft to be politically feasible.<sup>70</sup> In today's penal climate, criminal justice reform initiatives are paying non-negligible attention to the issue of criminal records management,<sup>71</sup> especially if compared to the recent past.

Recent state legislation has shown a clear preference for the “forgetting” model in which criminal records are expunged or sealed and kept from disclosure, and thereby forgotten. Notably, in 2017 the “most frequent type of reform” passed by the states with the goal of reducing barriers to reentry faced by ex-offenders involved “limiting public access to criminal records.”<sup>72</sup> State legislatures are leaning toward statutes that “rewrite” history, though extremely carefully. Typically, only misdemeanors or minor nonviolent felonies can be sealed or expunged, and often only after substantial waiting periods.<sup>73</sup> Therefore, currently not only are such remedies available to a relatively small number of ex-offenders long after the sentence has been served, but the described technological developments also radically question the persisting utility of sealing and expungement statutes.

#### A. Forgiving

The preference of the collateral consequences provisions of the *Model Penal Code: Sentencing* project for the “forgiving” model has been dictated in part by this very practical concern: sealing and expungement laws may not work anymore in the digital age. A person trying to hide her criminal history by means of those legislative tools would likely fail and be labeled a felon *and* a liar. Even if a conviction cannot be sealed or expunged, an ex-offender may still be able to achieve relief through a certificate of rehabilitation removing all mandatory collateral consequences to which the petitioner would otherwise be subject under the law.<sup>74</sup>

The *Model Penal Code: Sentencing* proposes a detailed test that differs depending on the seriousness of the offense. For minor felonies and misdemeanors, the court shall “issue the certificate whenever the individual has avoided reconviction during the period following completion of his or her past criminal sentences.” When the individual has been convicted of a serious felony, the court (or the designated agency) “may issue a certificate of restoration of rights if, after reviewing the record, it finds by a preponderance of the evidence that the individual has shown proof of successful reintegration into the law-abiding community.” In making this determination, the court shall consider a series of factors, including the amount of time that has elapsed since the individual's most recent conviction and the person's progress toward rehabilitation.<sup>75</sup>

The following are my main concerns about the “forgiving” model. First, even if pardons and certificates of rehabilitation were always systematically included in a person's criminal record, they might not show up when a background check is run on an ex-offender when government repositories and private vendors' databases are outdated. Second, issues of interpretation and relevance may also

arise especially in non-criminal justice contexts: are pardons and certificates of rehabilitation compelling and clear enough to convey to broader audiences the message that an ex-offender is to be considered as rehabilitated? Finally, yet importantly, how are documents certifying rehabilitation evaluated? To what degree are they “trusted”? “Forgiving without forgetting” seems to trust people to be fair in their decisions after becoming aware of a person's eventual successful journey through the criminal justice system. In this regard, legitimate doubts arise concerning the consistency of outcomes of delegating the decision-making power on whether to impose “informal” collateral consequences<sup>76</sup> to private individuals who are not necessarily in the best position to make these decisions.

#### B. Forgetting

Turning to the “forgetting” model,<sup>77</sup> although from a policy perspective I tend to favor this solution, I am extremely suspicious of “forgetting” systems merely involving “passive redemption,” that is, allowing sealing or expungement of conviction records after the lapse of a certain crime-free period and nothing more than that. Although a dated conviction not followed by another gradually loses its value as an indicator of how an ex-offender will act in the future, being crime-free is not necessarily synonymous with evidence of good behavior and productive reentry.

Critics of the “forgetting” model often contend that expungement and record-sealing laws rewrite history at the expense of historical truth, something that is “hard to square with a legal system founded on the search for truth.”<sup>78</sup> I do not find this criticism particularly compelling. In the case of sealing and expungement procedures, what is rewritten is the historical legal truth of the past conviction. This erasure is aimed at giving the ex-offender a “fresh start” free of social disabilities arising from the record of conviction. Rewriting history and legal fictions are all but unknown to the criminal justice system. For example, the plea bargaining process allows and often involves the creation of legal facts that differ from historical facts (i.e., the facts constituting the offense actually committed by the defendant). This should be regarded as a threat by supporters of transparent and open justice for, as a rule, “decisions by prosecutors as to the facts of a case and a proposed determination should coincide as closely as possible . . . to the history.”<sup>79</sup> Nonetheless, practical and policy considerations—respectively, judicial economy from the judge's angle; rational use of limited resources from the prosecutor's perspective, and the opportunity to have a less serious offense listed on one's criminal record and receive a lighter sentence from the defendant's standpoint—make plea bargaining an acceptable and necessary option at both the federal and state level.<sup>80</sup>

#### C. Forgetting through Forgiving

Scholars are generally engaged in the binary debate between “forgiving” and “forgetting.” Yet there is also a third way that could be termed “forgetting through

forgiving” by means of an ad hoc procedure of judicial rehabilitation.<sup>81</sup> This model recognizes a “right to reintegration” for all convicted individuals under which rehabilitation is not automatic but rather merit-based. The mere passage of time is not enough: the expungement of the record of conviction and the restoration of rights is earned through positive actions.<sup>82</sup>

To grant judicial rehabilitation, the court should require the following conditions to be satisfied: (a) a crime-free period (ideally, three to eight years depending on the seriousness of the offense of conviction and the offender’s criminal history) after the sentence has been completed; and (b) evidence of effective rehabilitation (e.g., completing designated treatment programs, furthering one’s education, steady employment history, voluntary work in the community, letters of reference, etc.).

The legal consequences of judicial rehabilitation would be twofold: (1) the full restoration of the ex-offender’s rights through the “expiration” of automatic collateral consequences of conviction; and (2) the expungement of the conviction from the ex-offender’s criminal record for criminal and non-criminal justice purposes. In this regard, the conviction would disappear as if it never existed. Therefore, this conviction shall not be counted in calculating the recidivist premium at sentencing in case of a new conviction. Similarly, if an individual has no other criminal history, when asked if s/he has ever been convicted of a criminal offense—for example, in the employment or housing context—the existence of the expunged conviction could be legally denied. Nonetheless, the court-ordered rehabilitation and its effects will be revoked and vacated by the same court that granted it in case the person, within five years from the date the rehabilitation was obtained, commits a felony or a misdemeanor for which jail time is imposed.

It must be noted that many state sealing and expungement laws incorporate a requirement that the court find rehabilitation. Sealing may be automatic where non-conviction records are concerned, or where a person has completed the terms of a diversion or deferred adjudication agreement, but it is by no means automatic in most cases involving adult convictions. Generally, state laws require the court to apply a test, though it may be fairly general. For example, in Vermont courts must seal most convictions for certain crimes committed prior to age 21 two years after final discharge, if “the person’s rehabilitation has been attained to the satisfaction of the court.”<sup>83</sup> In Kansas, to seal certain adult convictions, a court must find that “the petitioner has not been convicted of a felony in the past two years and no proceeding involving any such crime is presently pending or being instituted against the petitioner,” “the circumstances and behavior of the petitioner warrant the expungement,” and “the expungement is consistent with the public welfare.”<sup>84</sup>

Though promising, these provisions are limited in scope, generally covering only low-level offenses. A desirable, though ambitious, reform would be to give every ex-

offender, regardless of the seriousness of the offense of conviction, a chance to demonstrate his or her rehabilitation potential and, if successful, reward this effort with restoration of rights and the erasure of the conviction.<sup>85</sup>

## VII. Conclusion and Policy Recommendations

Treating all ex-offenders, with no distinction whatsoever, as a suspect class represents an unreasonable policy overshooting bearing enormous social and economic costs for the community at large. In today’s society, enhanced visibility of convicted persons as well as restrictions and disabilities arising from the proliferation and hyper-dissemination of criminal records have reached new heights that seemed unimaginable as recently as the mid-1990s. An agenda of reform is needed, aimed at reducing harm while not jeopardizing public safety.

The background check lobby and the press would certainly not welcome reforms of this nature, to say the least. Nevertheless, pessimism must not prevail: “evidence of the existence of vested interests should not be construed as evidence that change is impossible.”<sup>86</sup> In recent years polls have consistently shown a growing bipartisan support for criminal justice reform initiatives departing substantially from the policies of the tough-on-crime era.<sup>87</sup> It should also be borne in mind that from the 1980s through at least the mid-2000s voices advocating for limiting access to criminal history records and restoring rights to ex-offenders were a clear minority.<sup>88</sup> On the contrary, although it is certainly hard to put the genie back into the bottle with criminal records now at anyone’s fingertips, in the currently ongoing discussion on the restoration of rights to ex-offenders no option seems *a priori* off the table.

Though encouraging, recent signs of narrowing of American criminal records management exceptionalism do not seem to predict a tectonic shift anytime in the immediate future. Yet declining crimes rates and a more cooperative political discourse on criminal justice reform at local and state levels provide an exceptional opportunity for developing more just and considerate criminal records disclosure and management systems. States are leading the way on criminal justice reform and have wide latitude to experiment and borrow ideas. Unfortunately, no magic formula exists when it comes to the management of criminal records in the digital age. This said, fully reintegrating into the polity and the labor market individuals who have served their sentence in full and do not pose any particular risk should represent a primary policy goal nationwide. From a normative perspective, the right of the individual to have a fair shot at rehabilitation should trump the right to easy access to and commercialization of criminal history records.

The discussion in this article leads to the formulation of the following policy recommendations:

- (a) Any comprehensive register of criminal convictions should be kept only under the control of official authority.



- (b) Processing and management of criminal conviction records for non-criminal justice purposes should be carried out only under the control of official authority.
- (c) With the exceptions of approved private providers helping official authorities to process authorized requests, access to criminal history information by third parties, especially for purposes of commercial re-dissemination, should be prohibited.
- (d) Consent of the individual for disclosure of criminal history records to third parties for authorized non-criminal justice purposes should always be required.
- (e) Criminal convictions should be disclosed in specified exceptional circumstances, for instance when ex-offenders apply for certain types of employment (e.g., jobs involving contact with vulnerable subjects such as children or the elderly) or when the job is somehow related to the past conviction (e.g., a bank robbery conviction in relation to an application for a position as bank cashier; gun law conviction for a position involving the use of firearms).
- (f) A certain level of education on how to assess criminal records should be required for those persons, such as employers and landlords, who are likely to make business-related decisions based on criminal history information at some point.
- (g) With regard to court records, criminal records should be equated to family records, which in many U.S. jurisdictions are already treated as confidential. As a second best, criminal court records should not be made available online, nor sold in bulk to private entities, but only made accessible in person in court administration offices.<sup>89</sup>
- (h) Judicial rehabilitation procedures available for all offenses should be enacted rewarding “active” rehabilitation with restoration of rights and expungement of the record of conviction.
- (i) “Right to be forgotten” regulation should be adopted to favor practical obscurity online. It should cover search engine results involving a person’s name with regard to convictions that have been sealed or expunged or when an ex-offender has been deemed judicially rehabilitated.

**Notes**

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<sup>1</sup> See Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 *Demography* 1795 (2017).

<sup>2</sup> See Alexandra Natapoff, *Misdemeanors*, 85 *S. Cal. L. Rev.* 1313 (2012). Megan T. Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 *B.U. L. Rev.* (forthcoming 2018) estimate that 13.2 million misdemeanor cases are filed

in the United States per year. It is estimated that nearly 80 million Americans—or as many as one in four—have a criminal record (arrest or conviction). State criminal history record repositories of all fifty states reported that at year-end 2016, there were as many as 110,235,200 people with a criminal history record on file. This figure, however, is generally regarded as inflated due to individuals with records in more than one state. See U.S. Dept. of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2016*, at tbl. 1 (2018), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf>.

<sup>3</sup> See Margaret Colgate Love, Jenny Roberts, & Cecelia Klingele, *Collateral Consequences of Criminal Conviction: Law, Policy and Practice* ch. 2 (2d ed. 2016).

<sup>4</sup> See, e.g., Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 *Minn. L. Rev.* 1871 (2015).

<sup>5</sup> See James B. Jacobs, *The Eternal Criminal Record* 159 (2015).

<sup>6</sup> Rod Earle, *Convict Criminology: Inside and out* 94 (2016) (speaking of “fetishization” of criminal records as people have become persuaded that they possess a predictive power “far beyond their actual material potential”).

<sup>7</sup> See *infra* Part II.B.

<sup>8</sup> Margaret Love, Joshua Gaines, & Jenny Osborne, *Collateral Consequences Resource Center, Forgiving and Forgetting in American Justice: A 50-State Guide to Expungement* (Apr. 2018, rev. ed.), <http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Jan-2018.pdf>; Collateral Consequences Resource Center, *Second Chance Reforms in 2017: Roundup of New Expungement and Restoration Laws* (2017), <http://ccresourcecenter.org/wp-content/uploads/2017/12/Second-Chance-Reforms-in-2017-CCRC-Dec-2017.pdf>.

<sup>9</sup> Nevada was the last state to establish a centralized state criminal history repository in 1986. For a state-by-state survey, see Corporation for National and Community Service (CNCS), *Designated Statewide Criminal History Repositories and Alternatives* (updated Nov. 22, 2017), [https://www.national-service.gov/sites/default/files/documents/table-of-designated-state-repositories-and-alternates-11-22-2017\\_508.pdf](https://www.national-service.gov/sites/default/files/documents/table-of-designated-state-repositories-and-alternates-11-22-2017_508.pdf).

<sup>10</sup> U.S. Dept. of Justice, *supra* note 2, at viii.

<sup>11</sup> See Daniel J. Solove, *Access and Aggregation: Privacy, Public Records, and the Constitution*, 86 *Minn. L. Rev.* 1137, 1168 (2002) (“[S]tates vary significantly in what information they make publicly available. . . . Decisions as to the scope of access—whether one must obtain a record by physically going to a local agency office, by engaging in correspondence by mail, or by simply downloading it from the Internet—are often made by local bureaucrats.”).

<sup>12</sup> Eugene Volokh, *First Amendment Right of Access to Judicial Proceedings*, *Wash. Post*, Mar. 18, 2014, [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/18/first-amendment-right-of-access-to-judicial-proceedings/?utm\\_term=.b81984e34991](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/18/first-amendment-right-of-access-to-judicial-proceedings/?utm_term=.b81984e34991).

<sup>13</sup> Florida is the paradigmatic example of open records state. See § 24(a), Art. I of the State Constitution (“Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.”); Fla. Stat. Ann. § 119.01(1) (“It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.”).

- <sup>14</sup> On the website of the California Department of Justice, the authority mandated to maintain the statewide criminal record repository, it is stated clearly that access to criminal history records is “restricted by law to legitimate law enforcement purposes and authorized applicant agencies. However, individuals have the right to request a copy of their own criminal history record from the Department to review for accuracy and completeness. Requests from third parties are not authorized and will not be processed.” See Criminal Records—Request Your Own, <https://oag.ca.gov/fingerprints/record-review>.
- <sup>15</sup> See, e.g., Texas Gov’t Code § 411.085 (making it a felony offense to obtain, use, or disclose, or employ another to obtain, use, or disclose, criminal history record information for remuneration or for the promise of remuneration).
- <sup>16</sup> In New Hampshire, for example, “For non-criminal justice purposes, no CHRI [Criminal History Record Information] is released without the permission and knowledge of the individual of whom the request is being made. Anyone can request their own New Hampshire CHRI, or with permission of the record owner, can request the New Hampshire CHRI of another.” See New Hampshire Department of Safety, *Criminal Records Unit*, <https://www.nh.gov/safety/divisions/nhsp/ssb/crimrecords/index.html>.
- <sup>17</sup> See Frank Campbell, *Proposals to Improve Criminal Background Checks Through New Rules of Access to Criminal Justice Information Repositories*, in Love et al., *Collateral Consequences*, *supra* note 3, at § 5:32 et seq. Both Pub. L. 92-544 (1972) and Title 28, Code of Federal Regulations (CFR), Section 20.33, provides that dissemination of FBI criminal history record information (CHRI) outside the receiving governmental department or related agency is prohibited.
- <sup>18</sup> See Search, The National Consortium for Justice Information and Statistics, Report of the National Task Force on the Criminal Backgrounding of America 6 n.20 (2005) (“III uses an index-pointer approach to tie together the criminal history record databases of state central repositories and the FBI.”).
- <sup>19</sup> The Code of Federal Regulations (CFR) Title 28 indicates the FBI may exchange records, if authorized by a state statute approved by the Director of the FBI. The standards used to approve state statutes for access to CHRI under Pub. L. 92-544 and related regulations show a concern for the proper use, security, and confidentiality of such information.
- <sup>20</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (observing that “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.”). See also *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982) (“[T]his right of access to criminal trials is not explicitly mentioned in terms in the First Amendment. But we have long eschewed any “narrow, literal conception” of the Amendment’s terms, for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.”).
- <sup>21</sup> David S. Ardia, *Court Transparency and the First Amendment*, 38 *Cardozo L. Rev.* 835, 840 (2017).
- <sup>22</sup> *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).
- <sup>23</sup> E.g., the Massachusetts Supreme Court held that records of closed criminal cases may be sealed by a court only if there has been an individualized finding that sealing is necessary to effectuate a compelling state interest. *Commonwealth v. Doe*, 420 Mass. 142, 648 N.E.2d 1255 (1995). Two decades later, the Massachusetts High Court held that a lower standard of “good cause” was more appropriate in light of the concerns expressed by the legislature in intervening years about “the negative impact of criminal records on the ability of former criminal defendants to reintegrate into society.” See *Commonwealth v. Pon*, 469 Mass. 296, 297 (2014).
- <sup>24</sup> See U.S. Dept. of Justice, Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update*, at 26 (2001), available at <https://www.bjs.gov/content/pub/pdf/umchri01.pdf>.
- <sup>25</sup> Pew Research Center, *Internet/Broadband Fact Sheet*, <http://www.pewinternet.org/fact-sheet/internet-broadband/>.
- <sup>26</sup> In 1998, the judicial branch of the federal government took the lead with the release of a Web-based version of the PACER system (Public Access to Court Electronic Records) providing complete access to docket information and case files from appellate and district courts. Many state and local governments soon followed suit. See Jacobs, *supra* note 5, at 57–58.
- <sup>27</sup> See, e.g., State of Connecticut Judicial Branch, *Criminal/Motor Vehicle Case Look-up*, <https://www.jud.ct.gov/crim.htm>.
- <sup>28</sup> The following quote is taken from one of the major background check websites, BackgroundChecks.com, claiming to have a database with 550 million criminal records and run over twenty-five million background checks per year: “We strive to collect all electronically available data from statewide repositories, including state offender registries, the departments of corrections and the administrative office of courts. In addition, we strive to acquire and update our database with as many county and municipal court records as possible. . . .” See <https://www.backgroundchecks.com/ourdata>.
- <sup>29</sup> Shawn Bushway et al., *Private Providers of Criminal History Records: Do You Get What You Pay For?*, in *Barriers to Reentry?*, in *The Labor Market for Released Prisoners in Post-Industrial America* 174, 192 (Shawn Bushway, Michael A. Stoll, & David F. Weiman eds., 2007). See also SEARCH, The National Consortium for Justice Information and Statistics, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information 7 (2005) (describing the background check business as consisting of “a few large industry players” and “hundreds, perhaps even thousands, of regional and local companies”).
- <sup>30</sup> 15 U.S.C. § 1681 et seq. On the FCRA and credit reporting agencies (CRAs), see generally Pauline T. Kim & Erika Hanson, *People Analytics and the Regulation of Information under the Fair Credit Reporting Act*, 61 *St. Louis U. L.J.* 17, 20–26 (2016). A few states have passed their own supplemental laws, in some cases stricter than the federal legislation. See Sharon Dietrich, *FCRA Preemption of State Claims*, in Love et al., *Collateral Consequences*, *supra* note 3, at § 5:31.
- <sup>31</sup> Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 *How. L.J.* 1, 3–4, 15–17 (2016).
- <sup>32</sup> Nat’l Ass’n of Criminal Def. Lawyers, *Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime* 9 (2014).
- <sup>33</sup> Jacobs, *supra* note 5, at 131. It must be noted that the terminology used is frequently an unreliable guide to the actual functionality of these relief mechanisms. “Sealing” and “expungement” are often used interchangeably. For a summary of which states delete or destroy records after expungement and which do not, see Restoration of Rights Project, *50-State Comparison: Expungement, Sealing, and Set-Aside*, <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/>; see also Love et al., *Forgiving and Forgetting*, *supra* note 8, at 27 ff.
- <sup>34</sup> See Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *Fordham Urb. L.J.* 1705, 1726 (2003) (“[T]he expungement concept ignores the technological realities of the information

- age; a process whose benefits depend upon secrecy will surely be frustrated by the trend toward broader public posting and private dissemination of criminal history information.”).
- 35 See Marina Duane et al., *Criminal Background Checks: Impact on Employment and Recidivism* 3 (2017).
- 36 This should involve going to the courthouse and reviewing a current copy of the court file.
- 37 Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 *CommLaw Conspectus* 123, 135 (2010).
- 38 Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. Times, Oct. 17, 2006, at A1.
- 39 See Sarah E. Lageson & Shadd Maruna, *Digital Degradation: Stigma Management in the Internet Age*, 20 *Punishment & Soc’y* 113 (2018).
- 40 See Ulrich Beck, *Risk Society: Towards a New Modernity* (1992); Anthony Giddens & Christopher Pierson, *Conversations with Anthony Giddens: Making Sense of Modernity* (1998).
- 41 *Paul v. Davis*, 424 U.S. 693, 713 (1976).
- 42 *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 764 (1989). The court held that FOIA exemption 7(c)—providing protection for law enforcement information the disclosure of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy”—applied.
- 43 Cf. Nancy S. Marder, *From “Practical Obscurity” to Web Disclosure: A New Understanding of Public Information*, 59 *Syracuse L. Rev.* 441, 456–57 (2009) (“Information that was public but practically obscure will no longer be practically obscure on the Web.”).
- 44 See David Garland, *The Culture of Control* 12 (2001) (“Today, there is a new and urgent emphasis upon the need for security, the containment of danger, the identification and management of any kind of risk. Protecting the public has become the dominant theme of penal policy.”).
- 45 Pat O’Malley, *Crime and Risk* 4 (2010).
- 46 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, 1331 (2017) (noting “These shifts require the ebb and flow of certain rights and liberties . . . while the spirit of the U.S. Constitution remains fixed.”).
- 47 James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *Yale L.J.* 1151, 1195 (2004).
- 48 Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity”*, 66 *Stan. L. Rev.* 987, 996 (2014).
- 49 Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, CETS No. 108, 28 Jan. 1981 (Article 6 reads: “Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions.”).
- 50 European Union Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 (Article 8(5) reads: “Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority.”).
- 51 See Corda, *supra* note 31, at 27–30. *But see* James B. Jacobs & Elena Larrauri, *Are Criminal Convictions a Public Matter? The USA and Spain*, 14 *Punishment & Soc’y* 3, 12–14 (2012) (emphasizing the role of the right to personal data protection with regard to how criminal history is handled in continental Europe).
- 52 Cf. Jeremy Travis, *but They All Come Back* 343 (2005) (calling for the creation of an “architecture that supports a jurisprudence of reintegration”).
- 53 See, e.g., Thomas S. LeBel & Shadd Maruna, *Life on the Outside: Transitioning from Prison to the Community*, in *The Oxford Handbook of Sentencing and Corrections* 657 (Joan Petersilia & K.R. Reitz eds., 2012).
- 54 See, e.g., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 314 (Jeremy Travis, Bruce Western, & Steve Redburn eds., 2014).
- 55 Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* 16 (2004). See *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (“The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution’s ban on cruel and unusual punishments is the ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’”) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). On retributive and utilitarian notions of proportionality, see Richard S. Frase, *Theories of Proportionality and Desert*, in *The Oxford Handbook of Sentencing and Corrections*, *supra* note 53, 131, at 132–133, 139–141.
- 56 Douglas Husak, *“Already Punished Enough”*, in *The Philosophy of Criminal Law: Selected Essays* 433, 441 (2010).
- 57 See Sarah E. Lageson, *Crime Data, The Internet, and Free Speech: An Evolving Legal Consciousness*, 51 *Law & Soc’y Rev.* 8 (2017).
- 58 Alessandro Mantelero, *The EU Proposal for a General Data Protection Regulation and the Roots of the “Right to Be Forgotten”*, 29 *Computer L. & Security Rev.* 229, 231 (2013).
- 59 *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEDP) and Mario Costeja González*, Case C-131/12. Court of Justice of the European Union (Grand Chamber), 13 May 2014, par. 93. The new EU General Data Protection Regulation (GDPR) 2016/679 replacing the 1995 Data Protection Directive has started to be enforced on May 25, 2018. It contains a specific provision (Article 17) on the right to erasure (“right to be forgotten”).
- 60 Google, Inc., *Transparency Report*, <https://transparencyreport.google.com/eu-privacy/overview> (accessed Apr. 25, 2018).
- 61 Google, Inc., *EU Privacy Removal*, [https://www.google.com/webmasters/tools/legal-removal-request?complaint\\_type=rtbf](https://www.google.com/webmasters/tools/legal-removal-request?complaint_type=rtbf). For an overview, see Caitlin Dewey, *Want to Remove Your Personal Search Results from Google? Here’s How the Request Form Works*, Wash. Post. (May 30, 2014), [https://www.washingtonpost.com/news/the-intersect/wp/2014/05/30/want-to-remove-your-personal-search-results-from-google-heres-how-the-request-form-works/?utm\\_term=.745f6b570775](https://www.washingtonpost.com/news/the-intersect/wp/2014/05/30/want-to-remove-your-personal-search-results-from-google-heres-how-the-request-form-works/?utm_term=.745f6b570775).
- 62 Google, Inc., *EU Privacy Removal*, *supra* note 61.
- 63 Google, Inc., *Transparency Report*, *supra* note 60.
- 64 See, e.g., *Martin v. Hearst Corporation*, 777 F.3d 546, 551 (2d Cir. 2015) (a defamation case involving several online news outlets in which the Court of Appeals for the Second Circuit ruled that a state criminal erasure statute, while effective in the context of the judicial and law enforcement systems, “does not and cannot undo historical facts or convert once-true facts into falsehoods.”).
- 65 See Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 *Cal. L. Rev.* 1 (2013).
- 66 Eric Posner, *We All Have the Right to Be Forgotten*, *Slate*, May 14, 2014, available at [http://www.slate.com/articles/news\\_](http://www.slate.com/articles/news_)

- and\_politics/view\_from\_chicago/2014/05/the\_european\_right\_to\_be\_forgotten\_is\_just\_what\_the\_internet\_needs.html.
- 67 Brian Hamilton, *No Second Chances*, U.S. News, Feb. 5, 2018, available at [https://www.usnews.com/opinion/civil-wars/articles/2018-02-05/former-inmates-should-have-a-way-to-expunge-records-from-google-results?context=amp&src=usn\\_tw&\\_twitter\\_impression=true](https://www.usnews.com/opinion/civil-wars/articles/2018-02-05/former-inmates-should-have-a-way-to-expunge-records-from-google-results?context=amp&src=usn_tw&_twitter_impression=true).
- 68 See Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, Wash. U. L.Q. 147 (1966). Sealing and expungement statutes were originally only available for non-conviction records (e.g., dismissed charges and not guilty findings).
- 69 The need to keep criminal records private was one of the main reasons for the creation of juvenile courts where criminal records would be confidential. See Jacobs, *supra* note 5, at 180–85. But see now Joy Radice, *The Juvenile Record Myth*, 106 Geo. L.J. 365 (2018) (documenting that, as penal policies became more punitive beginning in the 1980s, the treatment of juvenile records gradually started to mirror that of adult criminal histories).
- 70 See Jonathan Simon, *Governing Through Crime* 100 (2007) (effectively summarizing the approach of political actors during the tough-on-crime era: “[T]o be for the people, legislators . . . must never be for (or capable of being portrayed as being for) criminals or prisoners as individuals or as a class.”); Love, *supra* note 34, at 1713–17.
- 71 There seems to be no evidence of a partisan bias on this matter. For example, in December 2017, former New Jersey Republican Governor Chris Christie, as one of his last acts in office, signed into law a package of bills expanding the state’s expungement system, calling them “life-saving” measures.
- 72 Collateral Consequences Resource Center, *supra* note 8, at 1 (noting, however, that “there is remarkably little consistency among state record-closing schemes”).
- 73 Love et al., *Forgiving and Forgetting*, *supra* note 8, Appendix B, at 84–112.
- 74 See Model Penal Code: Sentencing, Article 7 (“Collateral Consequences of Criminal Conviction”) (Am. Law Inst., Official Statutory Text, adopted May 24, 2017) [hereinafter MPC: Sentencing]. The draft provisions on collateral consequences were initially approved by the American Law Institute in 2014 and subsequently revised in 2017.
- 75 MPC: Sentencing, Article 7.06(3)(a)(b).
- 76 First and foremost, denied employment and housing but also prolonged stigmatization.
- 77 For a radical critique of the “forgetting” model, see Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 Hofstra L. Rev. 733, 749 (1981) (emphasizing the dishonesty and secrecy the “forgetting” model entails); Bernard Kogon & Donald L. Loughery Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. Crim. L. Criminology & Police Sci. 378, 380 (1970) (arguing against sealing and expungement and advocating for “leaving the record alone while constantly striving to improve its quality, and mounting an educational program, with statutory supports, designed to liberalize public attitudes toward offenders.”).
- 78 Love, *supra* note 34, at 1726.
- 79 Peter Alldridge, *Some Uses of Legal Fictions in Criminal Law*, in *Legal Fictions in Theory and Practice* 367, 382 (Maksymilian Del Mar & William Twining eds., 2015).
- 80 More than 90 percent of convictions result from guilty pleas.
- 81 I describe this third way as “forgetting through forgiving” since forgiving comes first in time. Nevertheless, from a different perspective, the model could also be described as “forgiving through forgetting” since the greatest benefit of being forgiven is the expungement of the record (with all that follows in terms of collateral consequences, formal and informal, that will no longer be applicable to the rehabilitated offender).
- 82 On active redemption, see, in particular, Shadd Maruna, “*Virtue’s Door Unsealed is Never Sealed Again*”: *Redeeming Redemption and the Seven-Year Itch*, in *Contemporary Issues in Criminal Justice Policy* 53 (Natasha A. Frost, Joshua D. Freilich, & Todd R. Clear eds., 2009); Shadd Maruna, *Judicial Rehabilitation and the “Clean Bill of Health” in Criminal Justice*, 3 Eur. J. Probat. 97 (2011).
- 83 Vt. Stat. Ann. Tit. 33, § 5119(g).
- 84 Kansas Stat., § 21-6614(h). See generally materials on state relief laws collected and analyzed by the Restoration of Rights Project, <http://restoration.ccresourcecenter.org/>.
- 85 This is the approach taken by the several states that provide for expungement following an executive pardon; see Restoration of Rights Project, *supra* note 33. It could be incorporated into the judicial forgiveness model of the MPC: *Sentencing*.
- 86 Katherine Beckett, *The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration*, 1 Ann. Rev. Criminology 235, 241 (2018).
- 87 See Inimai M. Chettiar, *The “Tough on Crime” Wave Is Finally Cresting*, Brennan Center for Justice (Jan. 16, 2018), <https://www.brennancenter.org/blog/tough-crime-wave-finally-cresting> (citing polls showing that currently ninety-one percent of Americans support criminal justice reform).
- 88 Love, *supra* note 34, at 1716 (noting that, as of the mid-1980s, “the official government position would be that criminals were to be labeled and segregated for the protection of society, not reclaimed and forgiven.”).
- 89 In *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), the Supreme Court held that a Vermont statute that restricted the sale, disclosure, and use of records that revealed the prescribing practices of individual doctors violated the First Amendment. The Court did broaden the protection of commercial speech failing to recognize or establish any internal hierarchy within the First Amendment framework. However, the Court never established a right to access to online databases or the right to download digital databases and datasets.