

PRIVATIZING EXPUNGEMENT

Brian M. Murray[†]

Abstract:

Relief from the burdens of public criminal records were introduced in the mid-twentieth century to reward and incentivize rehabilitation for arrestees and ex-offenders and to protect their privacy. Many states have broadened their expungement remedies recently to combat the negative effects of public criminal records on reentry. But the limits of expungement law and other records relief are well-known, especially in an age of digital recordkeeping when it seems truly impossible to remove every last piece of information that has once appeared online. To combat this problem, private actors, like newspapers, have begun to respond to requests to remove harmful and sensitive information about past criminal conduct in news stories appearing online. This has led private entities to create decision-making bodies to determine whether such records should be altered or purged, either in the wake of formally granted expungements or due to the harmful nature of the information.

These actions point to a growing trend of private entities attempting to ameliorate the negative effect of criminal record history information. This phenomenon has occurred on the heels of the “right-to-be forgotten” movement that originated in Europe, drawing from concerns about privacy interests and reputational harms stemming from data appearing in perpetuity. But the right to be forgotten has gained little steam in American law, with norms relating to access and availability of historical information remaining dominant in judicial, scholarly, and professional conversations relating to this topic. Media lawyers and journalists, for the most part, recoil at requiring the erasure of old news stories. And big tech economic actors lead an industry built on the accumulation of information, not its erasure. Coupled with concerns for transparency and inadequate protections for privacy and reputation in existing law, skepticism of the right to be forgotten as it relates to criminal record information is and will remain the status quo.

This Article suggests an alternative rationale is necessary to combat the problem of criminal records that persist even in the wake of expungement. Expungement is connected to the end of punishment, and the continued maintenance and furnishing of public criminal record history information, without constraint, has punitive effects that contradict the goals of punishment. Thus, a punishment-theory foundation is necessary for the right to be forgotten, or something like it, to be considered a serious counterweight to prevailing perspectives on publicity, the right to access, and other First Amendment norms, and to gain the support of private parties. Combating the limits of public expungement law hinges on two interrelated concepts: the limits of the state as punisher and the duties of private actors to not over-punish. Reformulating the right to be forgotten as a right not to be over-punished, and a duty on the part of the state and private actors to not over-punish, offers a stronger legal rationale than can be offered by privacy and reputational interests. Such an approach would permit the privatization of expungement, transcending its current formal limits, while not disturbing legitimate concerns about transparency and the criminal justice system.

[†] Associate Professor of Law, Seton Hall University School of Law.