

**Dealing with Criminal Conviction Records at and after Sentencing:
Towards a Narrowing of American Criminal Record Exceptionalism?**

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Introduction

People with a felony conviction in the United States account for 8 percent of the overall population (over 20 million people).¹ Individuals with a misdemeanor conviction are likely even more considering that an estimated 10 million misdemeanors are prosecuted each year.² Having a criminal conviction on one's personal record hinders people's lives long after the court-imposed punishment has been served in full. Criminal 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. The piling-up of statutory collateral sanctions and disqualifications is coupled with various forms of discrimination arising from the increased accessibility of criminal records in today's digital age.³

The current moment of criminal justice reform witnesses state legislatures and policymakers trying to protect public safety and promote rehabilitation at the same time. The management of criminal records has become central to this debate. Recent reforms enacted at the state level, and cleverly documented by the two comprehensive reports recently published by the Collateral Consequences Resource Center, provide clear proof of it.

Individual criminal history records are more public in the U.S. than in any other Western country. U.S. criminal records policy represents a striking example of American exceptionalism.⁴ Yet recently enacted reforms seem to suggest the following hypothesis: American criminal record exceptionalism is gradually narrowing and an open discussion on this important, yet long-neglected aspect of the back-end of the criminal justice system is not a taboo anymore. Notably, in the past year across the country "[t]he most frequent type of reform [aimed at reducing barriers faced by people with a criminal record] involves limiting public access to criminal records."⁵

The aim of this paper is to broaden the range of workable solutions to deal with criminal conviction records at sentencing and beyond, and contribute to the current debate on the management of criminal records. In particular, I will focus my attention on the following

four aspects:

(1) Restricting access by third parties to criminal history information based on balancing First Amendment considerations with competing interests (in particular, the need for a proportionate punishment, and the aggregated societal interest to a successful reintegration of ex-offenders);

(2) Introducing judicial rehabilitation procedures rewarding “active” rehabilitation with restoration of rights and expungement of the record of conviction.

(3) Granting a benefit of non-disclosure in case of convictions for first-time nonviolent offenses; and

(4) Taking into account/integrating the increased publicity of conviction records at the sentencing stage.

Part I: The U.S. Criminal Record Infrastructure

Given the complexity of the issue, it seems useful to briefly outline first the criminal records infrastructure in America. All fifty states and the District of Columbia have centralized criminal history record repositories.⁶ Criminal records repositories are made up of criminal records from across the state, including arrest records, criminal court records, correction records, and sex offender state registries. All this information is combined and kept in one criminal record database.

Information included and access to criminal history records varies from state to state. Not all state criminal record repositories allow the general public to access criminal history information for non-criminal justice purposes. Some states are certainly more open than others with respect to how easy it is to access this information and how complete the records are. A distinction can be made between ‘open’ and ‘closed’ state repositories. Open record states allow anyone to have uncontrolled access to criminal history records for any purpose, including commercial dissemination.⁷ In closed record states, in contrast, 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 records.⁸ Furthermore, in closed record states the commercial dissemination of criminal history information obtained through state repositories is generally prohibited.⁹ In some states, disclosure to third parties is allowed contingent upon the subject of the search signing a release authorization form.¹⁰

At the federal level, the fingerprint-based FBI criminal history repository qualifies as a closed record system.¹¹ In addition to federal criminal records, the FBI-maintained Criminal History Record Information (CHRI) 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."¹² 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.¹³

Beyond the dichotomy between open and closed records jurisdictions concerning executive branch record repositories, criminal history information is publicly available from the courts in every state and at the federal level. Any criminal case that is heard in a U.S. court will have a court record and the criminal record of an individual may be viewed and accessed by the public. Any person can go to any courthouse and ask to see the case file of a closed or pending criminal case. It is therefore important to stress that all fifty-two U.S. jurisdictions (the fifty states, the District of Columbia, and the federal government) can be defined as 'open records' jurisdictions when it comes to requesting someone's criminal history information at the court level.

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 role of the private background-checking industry has become especially prominent in the digital age.

Part II: The Challenge of Managing Criminal Records in the Digital Age

The advent of technology and the digitization of government-held records have radically changed the management and use of criminal records. Over the past forty years, state repositories and court records have been gradually reformatted, digitized and transferred to searchable databases. Federal, state and local court records databases as well as digitized criminal history repositories in open-records states have been largely made accessible online upon the payment of reasonable fees. The online availability of criminal history digital databases 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 that over 70 percent of them have broadband Internet service at home (up from one percent in 2000).¹⁴

These factors have contributed to the rapid and exponential growth of the private background checking industry. Commercial providers of 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 information. Then, they make money selling criminal history information to the public online.¹⁵ These companies are not organized at the state level nor have to follow the same laws and regulations that are applicable to government repositories with regard to access and update of criminal records.¹⁶ Background checks services offered by commercial vendors are legally considered consumer reports and operate under the Fair Credit Reporting Act (FCRA) enforced by the Federal Trade Commission (FTC).¹⁷

It is fair to say that criminal history information has never been more widely accessible and disseminated at any point of U.S. history. Mass dissemination of criminal records has become a hallmark of our times.¹⁸ 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' Task Force on the Restoration of Rights and Status After Conviction, this "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."¹⁹

The public's need for disclosure of criminal records was not as pressing an issue four decades ago as it is now in the digital age. Today, criminal records are just 'one click of mouse away.' People are increasingly relying on online background checks not only in the employment setting but also in other everyday life contexts such as dating, neighboring, friendship, and voluntary associations. Technological developments have critically contributed to enhance social anxiety about the risk of dealing with persons who have been convicted of a crime.²⁰

Part III: Are Sealing and Expungement Statutes Still Relevant in the Digital Age?

“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.”²¹ Sealing and expungement are, to different degrees, means to implement the ‘re-biography’ of ex-offenders.²² Both practically and symbolically, they are capable of having multiple beneficial implications for ex-offenders, eliminating formal legal restrictions and disabilities arising from a criminal conviction as well as stigma and negative attitudes expressed towards them by society. However, sealing and expunging are not flawless remedies. The process of getting a record expunged or sealed can appear to be overwhelming and difficult. It also usually has non-negligible costs. Furthermore, there is no guarantee that once a record has been sealed or expunged, it will no longer be disclosed.

Inaccurate criminal history information can result in a vast array of adverse consequences, ranging from lost employment opportunities to denial of rights and licenses, just to name a few. The main providers of criminal history information to the public — executive branch criminal history databases and commercial background check companies — face similar limitations with regard to the accuracy of the criminal history information being reported.

In the case of government databases, variations in update frequency often leads to sealed or expunged records to be wrongfully revealed. Yet inaccurate criminal records come primarily from private data aggregators that sell data over the Internet directly to businesses and private individuals. Expunged or sealed criminal records are not infrequently, to employ an understatement, incorrectly reported due to the fact that private vendors do not update their databases regularly.²³ The FCRA requires background check companies to take ‘reasonable steps’ to make sure that the information they provide is complete and accurate.²⁴ Unfortunately, this is not necessarily 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 criminal records inaccuracy problem hard to eradicate.

Furthermore, today it has become standard practice to ‘Google’ somebody in the context of everyday professional and personal relationships, that is typing a person’s name into the Google website search engine and get instantly a list of everything ever posted about that person. The widespread use of the Internet and the described “Google effect,” the ease

and ability of accessing information about other people, too hinder the reentry process of ex-offenders. Old convictions, even if formally sealed or expunged years ago, often resurface in 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 than today."²⁵ The following describes what used to happen: "a person would need to visit a newspaper's offices to peruse its so-called morgue of old issues or visit a local library to search for an article on well-worn, reel-to-reel microfiche machines, replete with their often-scratchy images."²⁶

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,²⁷ in so doing making the criminal justice system for adults more similar to the juvenile justice system in pursuing a rehabilitative goal.²⁸ This reform movement slowed down, or was even reversed, during the tough-on-crime: mercy and forgiveness appeared too soft to be politically feasible.²⁹ Today, legislatures across the country face a bitter irony of our times: on the one hand, criminal justice reform initiatives are paying considerable attention to the issue of management of criminal records with no partisan bias or ideological division;³⁰ on the other hand, however, the outlined technological developments radically question the persisting utility of sealing and expungement statutes as we know them in the digital age.

Over a decade ago, legal commentator Adam Liptak observed, "real expungement is becoming significantly harder to accomplish in the electronic age."³¹ Things have only gotten worse today: criminal records have become much more accessible to potential employers, landlords, and others. Besides, 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.

In what follows, I shall attempt to put forward a few proposals to address the pressing issue of criminal records management.

Proposal No 1: Restricting access by third parties to criminal history information based on balancing First Amendment considerations with competing interests.

My first proposal develops a policy critique of ‘First Amendment absolutism’ in regard to criminal records, especially when confronted with what I term ‘criminal justice exceptionalism.’

Public records are an important element that helps keep democratic governments transparent and accountable. Access to public records is generally seen as fulfilling First Amendment values by facilitating speech about how the government operates. The U.S. Supreme Court has recognized the constitutional right of access to public records and the right to disseminate such records. Criminal convictions are public records, and thereby are made available to members of the general public. In *Paul v. Davis* (1976) the Court held that no constitutional right to privacy exists that prohibits a state from publicizing criminal records.³² The rationale behind this judgment is the following: once criminal history information has been made available to the public, neither the press nor the public can be prevented from accessing and disseminating it. Two years later, in *Nixon v. Warner Communications, Inc.* (1978) the Court recognized a broad common-law right “to inspect and copy public records and documents, including judicial records and documents.”³³ Notably, at the same time, it also observed that the “right to inspect and copy judicial records is not absolute” and access can be denied where court files “become a vehicle for improper purposes.”³⁴

In regard to expunged criminal records, the case law has shown no particular inclination to recognize a legitimate expectation of privacy. This position is essentially based on the idea that “an expungement order does not privatize criminal activity.”³⁵ As it has been noted, “Just as the judiciary cannot suppress, edit, or censor events which transpire in proceedings before it, neither does the legislature possess the Orwellian power to permanently erase from the public record those affairs that take place in open court.”³⁶ In other words, the expungement of a record does not alter the public nature of the underlying event. Accordingly, “[t]he Constitution cannot act as a shield to protect [an individual] from his own previous indiscretions.”³⁷

At first glance, the overall picture does not look particularly encouraging, but that is not it.

In *U.S. Department of Justice v. Reporters Committee for Freedom of the Press* (1989), a third party’s FOIA request case, the Supreme Court first recognized the doctrine of

“practical obscurity.” The Court held that an individual has a protected privacy interest in her criminal history information because

[P]lainly 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.³⁸

Thus, citizens maintain a privacy interest in the practical obscurity of criminal records. This means that public documents that are difficult or time-consuming to locate essentially become private records.³⁹ While obscurity is not synonymous with privacy, a person possesses a privacy interest in information that is obscure. In *Reporters Committee*, the Supreme Court found a balance between First Amendment consideration and the individual interest in avoiding disclosure of criminal history information in light of late 1980s record keeping practices.

It might be argued that the reasoning of the ruling was well-grounded back then since practical obscurity of otherwise public records was largely the norm, but once criminal records have become electronically available and accessible online following the digital revolution practical obscurity and the related privacy interest have vanished altogether.⁴⁰ Beginning in the 1990s, “in conjunction with the mass digitization of information, for-profit information brokers and local criminal justice agencies increased pressure to grant easier and wider access to criminal history information. As a result, criminal justice information, once difficult to obtain, has become largely automated and widely available.”⁴¹

The advent of digitized records, Big Data, the Internet, and search engines means that criminal history information is more widely available today than ever before. It is a new reality that, apparently, cannot be challenged or regulated differently. Even if a record has been sealed or expunged, criminal convictions may be routinely available not only through private vendors that have accessed to or purchased criminal history information from public databases or other sources, and have not updated their repositories. Online news media have also become a major source of information that can massively amplify having a criminal record and, as previously noted, frustrate the effectiveness of sealing and expungement remedies.

In light of the present situation, are more radical arrangements needed? Is a ‘right to be forgotten’ a more desirable and viable option?

In general terms, a right to be forgotten 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.”⁴² The landmark 2014 Court of Justice of the European Union (CJEU) decision *Google v. Spain* has recently popularized the expression. The ruling allows private citizens in a certain country to make requests that search engines delist information about them that is *inaccurate*, *inadequate*, *irrelevant* or *excessive* for the purposes of the data processing returned by an online search for their full name.⁴³

The facts of the case were the following: in 1998, the printed edition of a Spanish newspaper published two announcements regarding a forced property sale arising from social security debts being undertaken by attorney Mario Costeja González. A decade later, a digitized version of the same newspaper meant that a casual search for the name brought up those notices. Mr. Costeja had not suffered money problems since the two sale announcements were published and found their online availability concerning because they might dissuade clients from using his legal services. For this reason, Mr. Costeja filed a request with the Spanish Data Protection agency asking Google to stop listing links to the newspaper website pages after searches for his name. The case went all the way up to the CJEU that established a right to control how information about you appears online.

Two, in my opinion, are the major takeaways from the *Google v. Spain* judgment for the purposes of the present discussion:

(1) The ECJ ruling only concerns the right to be forgotten regarding search engine results involving a person’s name. Therefore, this does not mean the erasure of any content in its original location on the Internet. It also means that the exact same content can still be retrieved through the same search engine, yet through a different query;

(2) The right to be forgotten established in the CJEU’s judgment is not absolute but will always need to be balanced against other fundamental rights such as, first and foremost freedom of speech, which are not absolute either. Practically speaking, this means that the company running the search engine must assess requests on a case-by-case basis. This assessment must balance the interest of the person making the request and the public interest to have access to the information by retaining it in the list of results.

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 information that is already public, especially in the case of judicial records. However, 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. Shouldn’t new laws and rulings... give people back the privacy that technology has taken away?⁴⁴

This approach brings practical obscurity back into the spotlight. U.S. scholars have already put forward a compelling case for “practical obscurity online.”⁴⁵ The issue of interest to us is whether criminal convictions should be blocked from appearing in search engine results generally, and particularly when they have been sealed or expunged by a court order.⁴⁶

Where do we go from here?

As a general, preliminary point, I disagree with policy-making that blindly embraces latest technological development at the expense of individual interests. From such a perspective, the hyper-publication of criminal records should to be regarded as a completely unavoidable reality of our contemporary age of digital democracy and digital justice. Yet nothing requires something to be done only because technology allows is, especially when other relevant competing interests are at stake. Furthermore, from a First Amendment perspective, it is hard to view bulk selling of digitized criminal records for commercial use as a ‘natural’ evolution of granting access to public records to enable the public to check what the government is up to. In the management of criminal records, technology got ahead of us and criminal justice practices merely adapted to such change in a mostly unreflective way. While technology can be extremely useful for criminal justice purposes (from CCTV to electronic monitoring, from police body cameras to advanced risk assessment tools), it cannot ‘dictate the agenda’ or be passively embraced. Legislatures have the duty to develop policies and not simply to follow suit and adapt to new available technology. While technology cannot be stopped, lawmakers should embrace the pros and reject, or at least attempt to govern, the cons.

Additionally, while both common law and constitutional law endorse and strongly support disclosure of public records, the same fundamental principles also allow for some information to be withheld in the presence of competing interests. This is what is called a “balancing approach.” Exemptions in the Freedom of Information legislation, both at the federal and state level, contemplate a number of competing objectives whose achievement requires the sacrifice of the law’s main goal.⁴⁷ With specific regard to criminal records, the doctrine of practical obscurity achieved precisely that — the availability of criminal records to the public only at the courthouse balanced public access with some privacy because it requires some effort to obtain criminal history information. Yet, “[t]his balance is upset when information is available at the click of a computer mouse.”⁴⁸

A 2006 DOJ’s Report on *Criminal History Background Checks* perfectly captures the conflicting interests at stake when it comes to criminal history information and explains the rationale behind the choice made by closed records jurisdictions across the country:

[C]riminal history record information has been traditionally limited and controlled in large measure to protect the privacy of the individuals to whom the records pertain. Although generally considered to be a public record, in many contexts, a criminal history record can have a stigmatizing affect on an individual. For that reason, dissemination of such records ... has been subject to careful control.”⁴⁹

A balancing approach in U.S. constitutional law should not be characterized as an undue ‘erosion’ of fundamental principles. As it has been noted, shifts in the law 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 important interests. “These shifts require the ebb and flow of certain rights and liberties...while the spirit of the U.S. Constitution remains fixed.”⁵⁰

This said, the notion of individual data privacy in U.S. law is a very slippery concept, which further seems frequently to be on the losing side vis-à-vis First Amendment consideration.⁵¹ This is probably due to the fact that — unlike the European dignity-based notion of privacy, mainly focused on the protection of each person’s public image — 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 consumer credit reports and criminal background checks are widely accepted and tolerated.⁵²

For this reason, I do not believe privacy to be the correct interest to be balanced against First Amendment considerations. Hence, I do not argue that U.S. jurisdictions should adopt a “European-like” expansive notion of privacy at odds with the American First Amendment tradition. The interest in not being endlessly stigmatized and burdened by a criminal conviction record once the court-imposed punishment has been served in full has very little to do with the idea of data privacy and the case for the confidentiality of criminal records should not be assessed through the lenses of individual privacy.

It is not about privacy but rather about *punishment overreach* in the digital age. The combination of large digitized databases and the Internet is the First Amendment on steroids. This fact cannot be neglected in the conversation on how to improve the management of criminal records balancing, on the one hand, access to records and public safety and the need for a proportionate punishment (see Proposal No. 4) and the aggregated societal interest to a successful reintegration of ex-offenders after the punishment has been served in full, on the other one.

My argument is that criminal justice, and accordingly criminal history records, are different. People’s interests at stake are exceptionally high. The same does not happen in any other area of the law. The stigma, hard treatment, and consequences that flow from a criminal conviction “are unmatched by even the most serious forms of civil liability.”⁵³ I term this ‘criminal justice exceptionalism’. It applies indistinctively on both sides of the Atlantic. This is confirmed by the fact that criminal records were not public across Europe well before the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No.108) and the European Union Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 (so-called Data Protection Directive) were adopted. EU rules simply reflected existing views, policies and practices at the national level, which considered criminal records as especially ‘sensitive’ ones but certainly not for privacy-related reason.⁵⁴ Rather, the social reintegration of ex-offenders was the primary goal being pursued. This same approach was widely embraced in pre-1980s United States.⁵⁵ With this in mind, special rules should be adopted taking into account the exceptionally debilitating consequences currently flowing from having a criminal record. 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 that ex-offender's rehabilitation efforts were successful. In light of this awareness, criminal records should not be seen or treated like any other public record. To be clear, I am not advocating for an exception to the 'First Amendment rule' but simply for treating different things differently. Generalized stigmatization and 'repressive control' must be avoided. Therefore, I would suggest the following proposals:

- (a) Processing and management of criminal conviction records for non-criminal justice purposes should be carried out only under the control of official authority;**
- (b) Any comprehensive register of criminal convictions should be kept 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 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 certain exceptional circumstances, especially when ex-offenders apply for certain types of employment (e.g., work vulnerable subjects such as children or the elderly) or when the job is somehow related to the past conviction (e.g., bank robbery in relation to an application for a position as bank cashier; gun law conviction for a position involving the use of firearms);**
- (f) With regard to court records, criminal records should be equated to family court records, which in most U.S. jurisdictions are already treated as confidential. As a second best, they should not be made available online, nor sold in bulk to private entities, but only made accessible via local court administration offices;**
- (g) Last but not least, 'right to be forgotten' regulation should be enacted favoring 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 (see proposal No.2 for more details).**

Proposal No 2: Introducing judicial rehabilitation procedures rewarding “active” rehabilitation with restoration of rights and expungement of the record of conviction.

In the binary debate between forgiving and forgetting models, I would like to suggest a third way. Forgiving and forgetting are not necessarily alternative concepts. Rather, I see forgiving and forgetting as the opposite poles of a policy continuum.

The following are my main concerns regarding to the ‘forgiving’ pole of the spectrum: first, even if pardons and certificates of rehabilitation were always systematically ‘integrated’ within the person’s criminal record, there would still exist the issue of how frequently both government repositories and private vendors’ databases are updated; a pardon or certificate of rehabilitation that has been granted might not show up when a background check is run on an ex-offender. Second, legibility issues may also arise especially in non-criminal justice contexts: are pardons and certificates of rehabilitation compelling/clear enough to convey to broader audiences the message that an ex-offender is to be considered as rehabilitated? Last but not least, ‘forgiving without forgetting’ models seem to trust people to be fair in their decisions after becoming aware of a person’s journey through the criminal justice system, though eventually successful. From a policy perspective, I potentially see problems concerning the consistency of the outcomes (i.e., how documents certifying rehabilitation are evaluated and to what degree they are ‘trusted’) in delegating the decision-making power on whether imposing informal collateral consequences (first and foremost, denied employment but also prolonged stigmatization) to private individuals who are not necessarily in the best position to make certain decisions.⁵⁶ After all, the current American criminal records exceptionalism is characterized by devolving a big portion of the work to the general public and private actors.

Turning to the other pole of the spectrum, 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. While an ‘aging’ conviction not followed by another gradually loses its value as an indicator of how the ex-offender will act in the future, being crime free is certainly not synonym with good-behavior and productive reentry.

My proposal is to adopt a system that could be termed *forgetting through forgiving* by means of an ad hoc ‘judicial rehabilitation’ procedure. In order to achieve a ‘rehabilitation order,’ the ex-offender should satisfy three conditions:

- (a) A crime-free period ranging from two to seven years (depending on the offense of conviction and the offender’s overall criminal history) after the sentence has been completed.
- (b) Payment in full of reparations ordered by the court at sentencing (if any);
- (c) Effective proof of the ex-offender’s rehabilitation (e.g., completing designated treatment programs, performing good work in the community, volunteering in nonprofit organizations, etc.).

The one described is an active model of judicially certified redemption. Rehabilitation is “earned” through positive actions. The mere passage of time is not enough. The legal consequences of judicial rehabilitation would be twofold:

(A) The full restoration of the ex-offender’s rights through the ‘expiration’ of collateral consequences of conviction; and

(B) The expungement of the conviction from the rehabilitated ex-offender’s criminal record for criminal and non-criminal justice purposes. In this regard, the conviction would retroactively disappear as if it never existed. So, this conviction shall not be counted in calculating the recidivist premium at sentencing in case of a new conviction in a distant future. Similarly, if the person is asked if he has ever been convicted in the employment context, he could reply: “No, I have never been convicted of a crime.” Nonetheless, this court-ordered rehabilitation and its effects should be revoked by the same court that ordered it in case the person, within seven years from the date the rehabilitation is obtained, commits a felony or a misdemeanor for which jail time is imposed.

This model of active redemption would “provide a ‘goal’ for individuals in the early stages of release, who want to reintegrate into society (want to find employment, be given a second chance) to strive for.”⁵⁷

Despite widespread criticism of criminal expungement and record-sealing laws as tools aimed at *rewriting history* at the expense of truth, it should be noted that the rewriting of history is all but unknown to the criminal justice system, as we know it today. For example,

the plea bargaining process allows, and often involves, the creation of legal facts that differ from historical natural 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.”⁵⁸ 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 for a lighter sentence and to have fewer, or less serious, offenses listed on one’s criminal record from the defendant’s standpoint) make plea-bargaining an acceptable and necessary option at the federal and state level.⁵⁹

In the case of sealing and expungement procedures, what is being rewritten is the historical legal truth of the past conviction.⁶⁰ In balancing ex-offenders’ interest in a ‘fresh start’ and the government’s interest in granting access to (in the case of sealing) or retaining (in the case of expungement) criminal history records, legislatures and policymakers should carefully consider the hardships and disabilities burdening persons with a criminal record. Although not entitled to the weight of a fundamental right, the individual’s interest in having her standing in society and in the labor market restored may well outweigh other governmental interests.⁶¹

Proposal No 3: Granting a benefit of non-disclosure in case of convictions for first-time nonviolent offenses

Under the current regime of criminal records disclosure, an automatically granted order of nondisclosure for first-time non-violent offenders should be understood as an indeterminate suspension of the main triggering factors of formal and informal ‘collateral’ consequences of a criminal conviction. This way, a conviction is not entered into one’s record available to third parties but only into the record accessible by law enforcement agencies and judicial authorities.

If the concerned person commits another offense after the first conviction, the benefit of nondisclosure shall be (a) automatically revoked in case of a felony conviction; and (b) revoked at the discretion of the sentencing judge in case of a misdemeanor conviction or violation.

The theory behind this proposal is rooted in the one off-discount for first-time non-

violent offenders endorsed by the scholarship on recidivism and previous convictions at sentencing. As noted by Professor Julian Roberts, the leading authority on the subject matter, all sentencing theories would endorse a one-off discount of this type for first-time nonviolent offenders. In particular, this type of offenders generally “present a better prospect for rehabilitation, and hence need little further hard treatment.”⁶² The same rationale may be extended to long-term punitive effects of having a criminal record, that is enhanced stigmatization and the plethora of legal disabilities imposed by legislatures on the basis of conviction.

Proposal No 4: Taking into account/integrating the increased publicity of conviction records at the sentencing stage.

Criminal law is quintessentially tied to the idea of social stigma. Besides, this branch of law is historically unique within the legal system for its peculiar feature of impressing marks that have the potential of becoming indelible.

In ancient times, criminal convictions were often inscribed onto the offender’s body by branding or mutilation. This was considered an integral part of the punishment. Beyond retribution, it was also aimed to achieve deterrence by threatening would-be criminals. Furthermore, marking the convict signaled to the members of the community that a certain individual was an outlaw to be regarded as disgraced and dangerous. Public punishments inflicting injuries to the offender’s reputation as well as to her body were common in the American colonial period. Punitive spectacles “were intended as dramatic examples of the consequences of a crime.”⁶³

The lightest possible punishment for minor crimes committed by first time offenders was admonition, consisting in verbal discipline by a magistrate or a clergyman and a public apology to the community.⁶⁴ Sometimes, convicted individuals “were exposed, that is required to stand in front of crowds for a designated period of time, usually an hour, and forced to hold a sign describing one’s transgression, issue public apologies, or to do some form of labor intended to attract attention to themselves.”⁶⁵ Pillories, stocks, branding, and maiming were used to punish serious crimes prior to the use of imprisonment.⁶⁶

In today’s society, even in the context of inherent stigmatization typical of the criminal law, is making criminal convictions readily available at anyone’s fingertips meant to be part of the punishment for committing a crime? I believe the answer is no.

Dissemination of CCRs that perpetually or periodically stigmatize ex-offenders produces “serial injuries” that go well beyond the implementation of the penalty imposed at sentencing.⁶⁷ Making a conviction permanently public produces harms at times that are temporally distinct from the announcement of a punishment in court at the moment when censure is expressed. Allowing criminal convictions to continue to stigmatize and haunt offenders for an indefinite time after the sentence has been fully served, irrespective of the gravity of the underlying offense—be it a felony or a misdemeanor, a violent or nonviolent crime—makes the punishment inconsistent with the fundamental principle of proportionality in sentencing from both a retributivist and consequentialist standpoint.

The publication of the judgment of convictions should therefore be integrated into the criminal process as a separate and distinct additional penalty to be imposed only when deemed appropriate in connection with the offense being sentenced, in any case for a limited period of time.⁶⁸

Conclusion: Narrowing American Criminal Record Exceptionalism?

Treating ex-offenders, with no distinction whatsoever, as a ‘suspect class’ represents an unreasonable policy overshooting bearing enormous social and economic costs and doing more harm than good to the community at large. Enhanced visibility of convicted persons as well as restrictions and disabilities arising from the proliferation and hyper-dissemination of criminal records in today’s society have reached new heights that seemed out of reach in the past. An agenda of reform is needed, aimed at reducing harm while, at the same time, not jeopardizing public safety. Declining crimes rates⁶⁹ and a more cooperative political discourse on criminal justice reform at the local and state level⁷⁰ provide an exceptional opportunity for developing smarter 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.

Endnotes

¹ 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).

² See Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, SLATE, Apr. 17, 2012, http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html?wpisrc=newsletter_tis.

³ See, e.g., Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, (2015).

⁴ See JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 159 (2015); Kevin Lapp, *American Criminal Record Exceptionalism*, 14 OHIO ST. J. CRIM. L. 303 (2016).

⁵ Collateral Consequences Resource Center, *Second Chance Reforms in 2017. Roundup of New Expungement and Restoration Laws*, December 14, 2017, at 1, <http://ccresourcecenter.org/wp-content/uploads/2017/12/Second-Chance-Reforms-in-2017-CCRC-Dec-2017.pdf>.

⁶ At year-end 2014, state repositories of 49 reporting states (all but Wisconsin) plus the District of Columbia contained as many as 105,569,200 persons in their criminal history files. See U.S. Department of Justice, *Survey of State Criminal History Information Systems, 2014* (Washington D.C., December 2015), p. 2, available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf>.

⁷ Florida is the paradigmatic example of open record state. See s. 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.”). Pursuant to § 119.071(2)(c)(1), “Active criminal intelligence information and active criminal investigative information from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.”

⁸ On the website of the California Department of Justice, the authority mandated to maintain the statewide criminal record repository, it is clearly stated 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 <https://oag.ca.gov/fingerprints/record-review> (accessed December 23, 2017).

⁹ 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).

¹⁰ 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 <https://www.nh.gov/safety/divisions/nhsp/ssb/crimrecords/index.html>.

¹¹ Both Pub. L. 92-544 (1972) and Title 28, Code of Federal Regulations (CFR), Section 20.33 provide that dissemination of FBI criminal history record information (CHRI) outside the receiving governmental department or related agency is prohibited.

¹² See SEARCH, National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Criminal Backgrounding of America*, at 6, fn 20 (2005), <http://www.search.org/files/pdf/ReportofNTFCBA.pdf> (“III uses an index-pointer approach to tie together the criminal history record databases of state central repositories and the FBI”). Cf. also Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 593-594 (2016).

¹³ 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.

¹⁴ See PEW RESEARCH CENTER, *Internet/Broadband Fact Sheet* (January 12, 2017), <http://www.pewinternet.org/fact-sheet/internet-broadband/> (accessed December 31, 2017).

¹⁵ The following quote is taken from one of the major background check websites: “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> (accessed December 23, 2017).

¹⁶ 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 and David F. Weiman eds., 2007).

¹⁷ 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).

¹⁸ Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 15 (2016).

¹⁹ NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *COLLATERAL DAMAGE: America’s Failure to Forgive or Forget in the War on Crime - A Roadmap to Restore Rights and Status after Arrest or Conviction* (214), at 9, <https://www.nacdl.org/restoration/roadmapreport/>.

²⁰ Cf. Bill Heberton & Toby Seddon, *From Dangerousness to Precaution*, 49 BRIT. J. CRIMINOL. 343 (2009).

²¹ JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 4, at 131.

²² SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES 165 (2001).

²³ See Marina Duane et al., *Criminal Background Checks: Impact on Employment and Recidivism*, Urban Institute: Washington D.C. (March 2017) at 3, https://www.urban.org/sites/default/files/publication/88621/2017.02.28_criminal_background_checks_report_finnalized_blue_dots_1.pdf. Cf. also Noam Weiss, *Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act*, 78 BROOK. L. REV. 271 (2012).

²⁴ This should involve going to the courthouse and reviewing a current copy of the court file.

²⁵ 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 CONSPPECTUS 123, 135 (2010).

²⁶ *Id.*

²⁷ See Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, WASH. U. L.Q. 147 (1966); Alessandro Corda, *supra* note 18, at 29-30.

²⁸ The need to keep criminal records private was one of the main reasons for the creation of the juvenile courts where criminal records would be confidential. See JACOBS, THE ETERNAL CRIMINAL RECORD, *supra* note 4, at 180-185.

²⁹ See generally JONATHAN SIMON, GOVERNING THROUGH CRIME 100 (2006) (effectively summarizing the approach of political actors during the tough-on-crime era: “Simply put, to be for the people, legislators must be

for victims and law enforcement, and thus they must never be for (or capable of being portrayed as being for) criminals or prisoners as individuals or as a class.”).

³⁰ *E.g.*, in December 2017 New Jersey Republican Governor Chris Christie, as one of his last actions in office, signed into law a package of bills changing the state’s expungement system. *See* Dustin Racioppi, *Christie Signs Criminal Record Expungement Bills, Calling Them ‘Life-saving’ Measures*, Dec. 20, 2017, <http://www.northjersey.com/story/news/new-jersey/governor/2017/12/20/christie-signs-criminal-record-expungement-bills-calling-them-legislation-heart/969850001/> (““These bills represent second chances that will now be even more meaningful for folks going through our criminal justice system,” Christie said. “Expungement has to be an option that’s available for those who have earned it and deserve it, and this legislation will allow people to get that.””).

³¹ Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES, Oct. 17, 2006, at A1, available online at <http://www.nytimes.com/2006/10/17/us/17expunge.html>.

³² *Paul v. Davis*, 424 U.S. 693, 713 (1976).

³³ *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

³⁴ *Id.* at 598.

³⁵ *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir.1995).

³⁶ *Eagle v. Morgan*, 88 F.3d 620, 626 (8th Cir. 1996).

³⁷ *Id.* at 627.

³⁸ *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 764 (1989).

³⁹ Although open and available for public access, the public actually had to physically go to a government building and figure out how to access the records.

⁴⁰ *See* Nancy S. Marder, *From “Practical Obscurity” to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441, 456–57 (2009) (“The Web, with its unlimited reach across time and place, can bring information to people’s fingertips, which they can use for good or ill . . . Information that was public but practically obscure will no longer be practically obscure on the Web, and the question with each new issue is whether this matters.”).

⁴¹ Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403, 411-12 (2015).

⁴² 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).

⁴³ *Google Spain SL v Agencia Española de Protección de Datos*, Case C-131/12. Court of Justice of the European Union (Grand Chamber), 13 May 2014, par. 93.

⁴⁴ Eric Posner, *We All Have The Right to Be Forgotten*, SLATE, May 14, 2014, 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.

⁴⁵ *See* Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CAL. L. REV. 1, 21 (2013) (calling practical obscurity “a recognized, yet undeveloped, concept in privacy doctrine.”).

⁴⁶ *Cf.* Christopher Stacey, *Rehabilitation in the Internet Age: The Google-effect and the Disclosure of Criminal Records*, 64 PROB. J. 269, (2017). Sarah E. Lageson, *Crime Data, the Internet, and Free Speech: An Evolving Legal Consciousness.* 51 LAW & SOC’Y REV. 8, 14 (2017).

⁴⁷ The number and kinds of exemptions vary from state to state. State and federal laws usually have exemptions for (1) personal privacy; (2) law enforcement and investigative files; (3) commercially valuable information; (4) national security; (5) Attorney-client communications and attorney work product.

⁴⁸ Sharon Dietrich, *Expanded Use of Criminal Records and Its Impact on Reentry* (Paper for the American Bar Association Commission on Effective Criminal Sanctions, March 3, 2006), p. 4, available at https://www.reentry.net/library/item.98152-Expanded_Use_of_Criminal_Records_and_Its_Impact_on_Reentry_Sharon_M_Dietric.

⁴⁹ U.S. Department of Justice, *The Attorney General's Report on Criminal History Background Checks 95* (Washington, D.C.: June 2006)

⁵⁰ 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).

⁵¹ See Bilyana Petkova, *Towards an Internal Hierarchy of Values in the EU Legal Order: Balancing the Freedom of Speech and Data Privacy*, 23 MAASTRICHT J. EUR. & COMP. L. 421, 423-427 (2016) (noting that over time, the Supreme Court has strengthened the protection of commercial speech and failed to establish an internal hierarchy of values within the First Amendment framework for balancing competing rights and interests).

⁵² James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1195 (2004).

⁵³ Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity"*, 66 STAN. L. REV. 987, 996 (2014).

⁵⁴ The debate in 19th century France (the country where modern criminal records and criminal record repositories were invented) on the issue of public disclosure of criminal records is revealing.

⁵⁵ See Corda, *supra* note 18, 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).

⁵⁶ See Margaret Colgate Love, *The Debt that Can Never Be Paid*, 21 CRIM. JUST. 16, 21-22 (2006) (endorsing for the time being the need for an effective expungement process, though with some reservations: "On balance, at least until there is a sea change in public attitudes, the expungement or sealing of a conviction may offer the most effective form of relief from the collateral consequences of conviction. Certainly the fear generated in employers and others by a criminal record makes it convenient to indulge in the fiction that it does not exist. And, the courts as decision makers offer the necessary accessibility, reliability, and respectability to make their relief at least as effective as an executive pardon. On the other hand, the limited and/or uncertain legal effect of expungement in some jurisdictions, the general unreliability of criminal record systems and the additional uncertainties introduced by new information-sharing technologies, and the anxiety necessarily produced by a system built upon denial, all combine to raise questions about the usefulness of expungement as a restoration device."). For a radical critique, *cf.* Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 749 (1981) (harshly criticizing 'forgetting' models for the dishonesty and secrecy they entail: "The expungement model attempts to rewrite history: it denies reality. This deliberate deception of the public violates our longstanding and generally unquestioned preference for truth over falsity."); Bernard Kogon, Donald L. Jr. Loughery, *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 the following solution: "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.").

⁵⁷ Shadd Maruna, *Judicial Rehabilitation and the 'Clean Bill of Health' in Criminal Justice*, 3 EUR. J. PROBAT. 97, 107 (2011).

⁵⁸ Peter Alldridge, *Some Uses of Legal Fictions in Criminal Law*, in LEGAL FICTIONS IN THEORY AND PRACTICE 382 (Maksymilian Del Mar and William Twining eds., 2015).

⁵⁹ Some ninety percent of convictions today result from pleas of guilt.

⁶⁰ The term “historical legal fact” too could be used to refer to the past conviction. This is for a conviction constitutes the judicial ascertainment of a “natural fact” (the offense of conviction). Cf. HANS KELSEN, REINE RECHTSLEHRE 245 (2 ed., 1960).

⁶¹ Cf. Linda S. Buethe, *Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma*, 58 NEB. L. REV. 1087, 1108 (1979).

⁶² Julian V. Roberts, *First-Offender Sentencing Discounts: Exploring the Justifications*, in PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 17, 32 (Julian Roberts and Andreas von Hirsch eds. 2010).

⁶³ BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660 50 (1983) (noting “English and colonial punishment were all public.”).

⁶⁴ Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880 1912-13 (1991).

⁶⁵ Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications For the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2168 (2001).

⁶⁶ *Id.* at 2169.

⁶⁷ Cf. Sarah E. Lageson & Shadd Maruna, *Digital Degradation: Stigma Management in the Internet Age*, 20 PUNISHMENT & SOC’Y 113 (2018).

⁶⁸ See Corda, *supra* note 18, at 59.

⁶⁹ Since 1991, the violent crime rate has consistently dropped — with a few exceptions in the mid-2000s — until seeing modest increases again in 2015 and 2016. The murder rate for 2014, for example, was about 4.4 per 100,000, which was the lowest it has been in decades.

⁷⁰ See, *ex multis*, MICHAEL TONRY, SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975-2025 4-7 (2016).