

# A PROPOSED SOLUTION TO LIMIT THE COLLATERAL CONSEQUENCES OF ARRESTS WITHOUT CONVICTION IN THE UNITED STATES

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## I. INTRODUCTION

When an individual is arrested and charged with a crime in the United States, that arrest creates a mark on the individual’s criminal record, regardless of whether the charge is later dropped, dismissed, or otherwise resolved in the arrestee’s favor.<sup>1</sup> There will, of course, be no conviction on that individual’s criminal record; however, it is not as though the arrest never happened.<sup>2</sup> “The [United States’] criminal records system is based on arrests,” meaning that even “arrests that [do] not result in a conviction are included in [an individual’s] criminal record . . . .”<sup>3</sup> Therefore, records of arrest can be just as consequential as convictions.<sup>4</sup> In fact, there is a common public belief that if an individual is arrested or charged with a crime, that individual *must* be guilty of violating some law.<sup>5</sup> When an arrestee’s interaction with the criminal justice system does not result in a conviction, many people assume that the arrestee “beat the system.”<sup>6</sup> A presumption of guilt flows from arrests that do

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1. See Kenny Lo, *Expunging and Sealing Criminal Records: How Jurisdictions Can Expand Access to Second Chances*, CTR. FOR AM. PROGRESS, [http://cdn.americanprogress.org/content/uploads/2020/04/23094720/04-23\\_Expunging-and-Sealing.pdf?\\_ga=2.170378210.396687133.1633282993-1341886711.1633282993](http://cdn.americanprogress.org/content/uploads/2020/04/23094720/04-23_Expunging-and-Sealing.pdf?_ga=2.170378210.396687133.1633282993-1341886711.1633282993) (last updated Apr. 23, 2020).

2. *Criminal Records Do Not Go Away on Their Own*, ERIC J. DIRGA, P.A. (Dec. 8, 2018), <http://ejdirga.com/2018/12/08/criminal-records-public-records/>; Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> (“There is a myth that if you are arrested and cleared that it has no impact . . . it’s not like the arrest never happened.”).

3. James B. Jacobs & Dimitra Blitsa, *Sharing Criminal Records: The United States, the European Union, and Interpol Compared*, 30 LOY. L.A. INT’L & COMPAR. L. REV. 125, 130 (2008); Lo, *supra* note 1.

4. Karen Lantz & Lisa Minutola, *Why the American Dream is Out of Reach*, 37 DEL. LAW., Summer 2019, at 12, 12 (“[Arrest records] can be [just] as devastating as conviction[s].”); see Matthew D. Callanan, Note, *Protecting the Unconvicted: Limiting Iowa’s Rights to Public Access in Search of Greater Protection for Criminal Defendants Whose Charges Do Not End in Convictions*, 98 IOWA L. REV. 1275, 1278 (2013).

5. Callanan, *supra* note 4, at 1278.

6. *Id.* at 1279.

not result in conviction, thus, causing innocent individuals to face collateral consequences that may last a lifetime.<sup>7</sup>

To help decrease the aforementioned collateral consequences, policymakers developed legal processes to make an individual's criminal record "invisible" to the public through expungement or sealing.<sup>8</sup> Prior to the advent of the digital age, expungement worked well because once the official documents of an individual's criminal record were *destroyed* by government agencies, the existence of a criminal record could only live on through public memory and printed newspapers.<sup>9</sup> The destruction of official government records is worthless for individuals whose criminal history information is widely available on the internet because expungement orders rarely pertain to criminal history information maintained by unofficial sources.<sup>10</sup> Thus, the complex legal process of expungement is inevitably unrewarding in the digital age because constitutional rights, such as freedom of speech and freedom of the press, prevent "granting individuals [the] right to compel private companies to expunge their records . . . ."<sup>11</sup> Being that the United States' criminal justice system operates under the principle "innocent until proven

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7. Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 997–98 (2019) [hereinafter *Arrests as Guilt*].

The legal consequences of arrest that appear to rely on an assumption of guilt . . . include a permanent record that is accessible to the police and to others, violations of probation and parole, occupational license suspension, civil asset forfeiture, bars on public benefits, and threats to child custody. An arrest on one's record can make one ineligible for jury service. It can also make one ineligible for legal relief, as exemplified by a New York case in which a judge dismissed misdemeanor charges in the interests of justice for those defendants who had no arrest record but declined to dismiss for those who had such a record. Referring to the arrest records as "record[s] of prior unlawful activity," the judge explained his dichotomous decision: dismissal was appropriate where the defendants had previously led "a law abiding life," but in cases "where a defendant previously has had or exercised that opportunity, but has thereafter again disregarded the law, a different matter is presented. Defendants whose criminal records or records of prior unlawful activity thereby present a history of disregard of the law, will not be permitted to benefit" from dismissal.

*Id.* (footnotes omitted).

8. See Eldar Haber, *Digital Expungement*, 77 MD. L. REV. 337, 347–48 (2018).

9. *Id.* at 338.

10. *Id.*; Brian M. Murray, *Newspaper Expungement*, 116 NW. U. L. REV. ONLINE 68, 70 (2021), [http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1311&context=nlr\\_online](http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1311&context=nlr_online). Unofficial sources include background screening companies, newspapers, media outlets, social media, and other internet websites. *Id.*

11. Haber, *supra* note 8, at 338.

guilty,” the system demands a solution that enables the non-convicted to retain their innocence.<sup>12</sup>

Part II of this Comment provides background on criminal records and addresses how the public can access criminal history records in the United States.<sup>13</sup> Additionally, Part II addresses the collateral consequences faced by individuals with an arrest record.<sup>14</sup> Part III of this Comment discusses how individuals can get arrests wiped from their record through the process of expungement and addresses the difference between expungement and sealing.<sup>15</sup> Furthermore, Part III focuses on Florida’s expungement laws and provides suggestions to make the Florida’s expungement process less complex for innocent arrestees.<sup>16</sup> Part III also discusses the ineffectiveness of expungement in the digital age.<sup>17</sup> Part IV compares the United States’ criminal record system to that of the European Union’s (“EU”) and explores possible solutions for the United States to improve the effectiveness of expungement.<sup>18</sup> After Part IV—which addresses that most solutions to improve the effectiveness of expungement conflict with constitutional guarantees—Part V proposes limiting the collateral consequences of arrests by modeling aspects of the United States criminal record system after the EU’s criminal record system—mainly, a system based on convictions, rather than arrests.<sup>19</sup>

## II. CRIMINAL RECORDS IN THE UNITED STATES

A criminal record is a list of an individual’s criminal history, including arrests and convictions, maintained by the criminal justice system.<sup>20</sup> When an individual is arrested, his or her criminal history *should* list the date of the arrest, the charges, and the final disposition.<sup>21</sup> When an individual is

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12. See Callanan, *supra* note 4, at 1278.

The presumption of innocence should last in perpetuity for the unconvicted criminal defendant, and the criminal defendant who was not convicted at trial or via a plea bargain — regardless of the reason for the court’s inability to convict — should not suffer consequences outside of court due to society’s skepticism in the legal outcome.

*Id.*

13. See discussion *infra* Section II.A.

14. See discussion *infra* Sections II.B–C.

15. See discussion *infra* Part III.

16. See discussion *infra* Section III.A.

17. See discussion *infra* Section III.B.

18. See discussion *infra* Section IV.A.

19. See discussion *infra* Sections IV.A.2–V.

20. Lo, *supra* note 1, at 1; *Information About Criminal Records*, LEGAL AID WORK, <http://legalaidatwork.org/factsheet/records/> (last visited Jan. 10, 2022).

21. *Information About Criminal Records*, *supra* note 20.

convicted, his or her criminal history should include “the date of . . . conviction, the charges, the sentence, and [indicate] whether the crime [constitutes] a felony or misdemeanor.”<sup>22</sup>

In Florida, a criminal history record is created when an individual is arrested and fingerprinted and should include the outcome of the charges stemming from the arrest.<sup>23</sup> Generally, Florida’s criminal history records include personal information about the arrested individual, including his or her full name, alias, gender, date of birth, nationality, ethnicity, unique physical attributes, mugshot, full set of fingerprints, misdemeanor and felony offenses, arrest history, indictments, convictions, and pending dispositions.<sup>24</sup>

#### A. *Access to Criminal Records*

Police, prosecutors, courts, and members of the general public can search for, and obtain access, to an individual’s criminal history records.<sup>25</sup> Criminal justice agencies and members of the public can obtain access to an individual’s criminal history information in a variety of ways, including through: Court records, law enforcement, and corrections agency records, registries, watch lists, state criminal record repositories, and the Federal Bureau of Investigation’s (“FBI”) Interstate Identification Index.<sup>26</sup>

Courthouses typically maintain comprehensive criminal records, which include information regarding “criminal charges, . . . convictions, . . . arraignments, trials, pleas, and other dispositions.”<sup>27</sup> Depending on the jurisdiction, county courthouses may require records to be retrieved on-site, but some courthouses make records available online.<sup>28</sup> In Florida, courthouse records can be accessed online by the general public.<sup>29</sup> Law enforcement and corrections agencies maintain “records of complaints, investigations, arrests,

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22. *Id.*

23. *Seal and Expunge FAQ*, FLA. DEP’T L. ENF’T, <http://www.fdle.state.fl.us/Seal-and-Expunge-Process/Frequently-Asked-Questions> (last visited Jan. 10, 2022).

24. *Florida Criminal Records*, STATERECORDS.ORG, <http://florida.staterecords.org/criminal.php> (last visited Jan. 10, 2022).

25. *Lo*, *supra* note 1, at 1.

26. U.S. EQUAL EMP. OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 4–5 (2012), [http://www.eeoc.gov/sites/default/files/migrated\\_files/laws/guidance/arrest\\_conviction.pdf](http://www.eeoc.gov/sites/default/files/migrated_files/laws/guidance/arrest_conviction.pdf) [hereinafter ENFORCEMENT GUIDANCE].

27. *Id.* at 4.

28. *Id.*

29. *Florida Public Records*, STATERECORDS.ORG, <http://florida.staterecords.org/> (last visited Jan. 10, 2022).

indictments, . . . incarceration[s], probation[s], and parole[s].”<sup>30</sup> Depending on the agency, these records may be available on-site or online.<sup>31</sup>

“Most states maintain . . . [a] centralized repository of criminal records” submitted by the criminal justice agencies and courthouses within the state, including Florida.<sup>32</sup> “The FBI maintains the most comprehensive collection of criminal records . . . [as it] compiles records from each of the states’ [own] repositories” in a centralized system known as the ‘Interstate Identification Index’ (“III”).<sup>33</sup> The FBI maintains criminal history information created for criminal justice agency use; however, the FBI’s III database is now accessible to non-government agencies for non-criminal justice purposes.<sup>34</sup> Currently, “access to FBI-maintained criminal history information is governed by . . . state and federal statutes.”<sup>35</sup> The primary means of gaining access to the FBI-maintained databases for non-criminal justice purposes has been through state statutes passed pursuant to Public Law 92-544, a federal law that “allow[s] sharing of FBI-maintained criminal history records” with state and local government agencies for use in certain licensing and employment decisions.<sup>36</sup> Background checks run pursuant to these state statutes are “processed through state record repositories.”<sup>37</sup> They include a check of state records, and the results of these checks are supplied to public agencies.<sup>38</sup> Put simply, the FBI’s III database can be accessed for non-criminal justice purposes by employers in certain state-regulated industries, “such as individuals employed as civil servants, daycare [workers], school [staff], nursing home workers, taxi drivers, [and] private security guards . . . .”<sup>39</sup> Access to FBI-maintained records has also been authorized by federal statutes, which allows employers in certain industries “to go directly to the FBI for . . . employment, licensing, [and] volunteer check[s] without . . . going through state [repositories] and . . . checking state records.”<sup>40</sup> These federal statutes

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30. ENFORCEMENT GUIDANCE, *supra* note 26, at 4.

31. *See id.*

32. *Id.*; *see also Criminal Justice Information Services*, FLA. DEP’T L. ENF’T, <http://www.fdle.state.fl.us/CJIS/CJIS-Home.aspx> (last visited Jan. 10, 2022).

33. ENFORCEMENT GUIDANCE, *supra* note 26, at 4–5.

34. U.S. DEP’T OF JUST., THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 3 (2006), [http://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ag\\_bgchecks\\_report.pdf](http://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ag_bgchecks_report.pdf) [hereinafter ATTORNEY GENERAL’S REPORT].

35. *Id.* at 4.

36. *Id.*; Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, Pub. L. No. 92-544, 86 Stat. 1109, 1115 (1973).

37. ATTORNEY GENERAL’S REPORT, *supra* note 34, at 4.

38. *Id.*

39. *See id.* at 4–5.

40. *Id.* at 4.

seek to promote national security and public safety by authorizing access to FBI-maintained criminal history information for employers in industries regulated by the federal government, including banking, securities, private security guard industries, and transportation workers.<sup>41</sup>

Florida's Public Records Act provides information on public records, including general information on accessing the records.<sup>42</sup> Pursuant to the Act, "which presumes that all government information and records are available to the public," online sites—such as the Florida Department of Law Enforcement's ("FDLE") website—provide tools for members of the general public to access and obtain public records.<sup>43</sup> Anyone can access another individual's public records through the FDLE's website for only twenty-five dollars.<sup>44</sup>

Criminal records have long been available to the public—since 1849 in the State of Florida<sup>45</sup>—although technological advancements have made accessing criminal records much easier.<sup>46</sup> With wide accessibility to criminal records through a quick, informal internet search or paying a fee to private companies, "everyday citizens, employers, and landlords [can] now routinely consult criminal databases" to conduct background checks.<sup>47</sup> Thus, with a criminal record system based on arrests, "even [arrestees who were] never charged with a crime . . . bear the mark of a criminal record."<sup>48</sup>

## B. *Arrests Generally*

There is a common misconception about when a criminal record starts.<sup>49</sup> A criminal record is an arrest record, as criminal records are created at the moment of arrest.<sup>50</sup> From the moment of arrest and onward, everything that occurs in relation to the arrest is documented on the arrestee's criminal record and made public.<sup>51</sup> Thus, as previously mentioned, both arrests and

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41. *Id.* at 4–5.

42. FLA. STAT. § 119.01(1) (2021).

43. *Id.* § 119.01(2)(f); *Florida Public Records*, *supra* note 29; *see also* FDLE's *Criminal History Search Overview*, FLA. DEP'T L. ENF'T, <http://cchinet.fdle.state.fl.us/search/app/default?3> (last visited Jan. 10, 2022) [hereinafter *Fees*].

44. *Fees*, *supra* note 43.

45. *See Florida Public Records*, *supra* note 29.

46. Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 628 (2014).

47. *Id.*

48. *Id.*

49. *Criminal Records Do Not Go Away on Their Own*, *supra* note 2.

50. *Id.*

51. *Id.*

convictions make up an individual's criminal record.<sup>52</sup> Arrests and convictions, however, are very different things.<sup>53</sup> Convictions are typically sufficient proof that an individual engaged in criminal conduct.<sup>54</sup>

On the other hand, arrests do not establish that criminal conduct occurred and do not serve as proof that an individual engaged in criminal conduct.<sup>55</sup> "Florida arrest records are officially recorded documents" that detail information about a person and his or her suspected crimes.<sup>56</sup> Florida arrest records typically include the arrestee's full name, date of birth, gender, place, and date of arrest, details of the alleged criminal activity, name of the arresting officer, law enforcement agency, name of the holding facility, and the status of the arrestee's case.<sup>57</sup> Conviction records contain similar details along with the sentence received, the nature of the crime, and any prosecutorial information.<sup>58</sup>

Another common misconception about criminal records is that after a criminal case is dropped, dismissed, or otherwise resolved in the individual's favor, the record goes away or never existed.<sup>59</sup> In reality, an arrestee's record remains with the arrestee regardless of the outcome.<sup>60</sup> Thus, individuals arrested for a crime but never charged or convicted face the ill effects of having a criminal record, regardless of the fact that arrests alone are not sufficient proof that criminal conduct occurred.<sup>61</sup>

### 1. Arrests by the Numbers

Someone is arrested every three seconds in the United States; this accounts for nearly 10.5 million arrests every year.<sup>62</sup> To put the vast number of individuals with an arrest record in the United States into perspective:

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52. *See id.*; Lo, *supra* note 1.

53. *See* ENFORCEMENT GUIDANCE, *supra* note 26, at 12–14 (distinguishing between arrests and convictions).

54. *See id.* at 13.

55. *Id.* at 12.

56. *Florida Criminal Records*, *supra* note 24.

57. *Id.*

58. *Id.*

59. *Criminal Records Do Not Go Away on Their Own*, *supra* note 2.

60. *Id.*

61. *See* Uggen et al., *supra* note 46, at 628; ENFORCEMENT GUIDANCE, *supra* note 26, at 12.

62. *Emerging Findings*, VERA, <http://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/findings> (last visited Jan. 10, 2022).

If all arrested Americans were a nation, they would be the world's [eighteenth] largest. Larger than Canada. Larger than France. More than three times the size of Australia. The number of Americans with criminal records today is larger than the entire U.S. population in 1900. Holding hands, Americans with arrest records could circle the earth three times.<sup>63</sup>

## 2. Arrests Are Not Always Carried Out in Response to Crime Commission

Alarming, “non-serious, low-level offenses, such as ‘drug abuse violations’ and ‘disorderly conduct,’ make up over [eighty] percent of [these] arrests . . . .”<sup>64</sup> This results from the criminal justice system being relied upon for social problems unrelated to public safety issues.<sup>65</sup> For instance, “law enforcement is called upon to respond punitively to medical and economic problems unrelated to public safety issues.”<sup>66</sup> Thus, people who need medical care and social services are often arrested and booked when they should not have come into police contact in the first place.<sup>67</sup>

It is estimated that a minimum of 4.9 million people were arrested in 2017, and “at least one in [four] of those individuals” were arrested multiple times.<sup>68</sup> Recidivism rates are related to race, poverty, mental illness, and substance use disorders.<sup>69</sup> “In many cities, arrests are used in predominantly black and Latino neighborhoods as a means of intimidation and social control. ‘Move along,’ the police say, and those who [do not] are brought in for loitering or disorderly conduct.”<sup>70</sup> Cities that saw large protests against police violence in 2020 also saw a large number of arrests, with over ten thousand

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63. Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), <http://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas>.

64. *Emerging Findings*, *supra* note 62.

65. Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails are Misused to Respond to Social Problems*, PRISON POL’Y INITIATIVE (Aug. 26, 2019), <http://www.prisonpolicy.org/reports/repeatarrests.html>.

66. *Id.*

67. *See id.*

68. *Id.*

69. *See id.*

70. Tina Rosenberg, *Have You Ever Been Arrested? Check Here*, N.Y. TIMES, <http://www.nytimes.com/2016/05/24/opinion/have-you-ever-been-arrested-check-here.html> (last updated May 25, 2016).

arrests as early as June 4th, 2020.<sup>71</sup> Many individuals arrested during protests were arrested for low-level offenses such as curfew violations and failure to disperse.<sup>72</sup> Most individuals arrested at protests will not be charged, but their arrest will leave them with a criminal record.<sup>73</sup>

Most arrests generally do not result in charges, and even when they result in charges, many do not result in a conviction.<sup>74</sup> A significant number of individuals arrested are legally innocent and arguably should not have come in contact with the police in the first place, yet they will forever suffer the collateral consequences that flow from their unfortunate interaction with the criminal justice system.<sup>75</sup>

### C. *Invisible Punishments for Innocent Arrestees*

Even a minor, isolated interaction with the juvenile or adult criminal justice system can create a lifetime of barriers.<sup>76</sup> The National Inventory of Collateral Consequences of Conviction—a database created by the Criminal Justice Section of the American Bar Association—catalogs over 1000 explicit legal consequences that can arise from a conviction in the state of Florida, and over 1950 explicit legal consequences that arise when federal statutes are accounted for.<sup>77</sup> “And that is only a tally of explicit barriers—it does not attempt to catalog the continuing stigma around a criminal record that makes . . . applicant[s] with a record, less likely to be successful than one without.”<sup>78</sup>

Arrest records can be just as consequential as convictions.<sup>79</sup> Any individual with an arrest record faces adversity as a result of the collateral consequences that stem from having a criminal record.<sup>80</sup> The state may impose

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71. Margaret Love & David Schlüssel, *Protesting Should Not Result in a Lifelong Criminal Record*, WASH. POST (June 15, 2020, 8:00 AM), <http://www.washingtonpost.com/opinions/2020/06/15/protesters-should-not-get-lifelong-criminal-record/>.

72. *Id.*

73. *See id.*

74. ENFORCEMENT GUIDANCE, *supra* note 26, at 12.

75. *See* Rosenberg, *supra* note 70.

76. *Id.*; Lantz & Minutola, *supra* note 4, at 12.

77. *See Collateral Consequences Inventory*, NAT’L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, <http://niccc.nationalreentryresourcecenter.org/consequences> (choose “Florida” from “Jurisdiction” dropdown) (last visited Jan. 10, 2022); Lantz & Minutola, *supra* note 4, at 12.

78. Lantz & Minutola, *supra* note 4, at 12.

79. *Id.*

80. Haber, *supra* note 8, at 342 (“Sometimes referred to as ‘invisible punishment[s],’ collateral consequences generally refer to any additional penalties outside the

such collateral consequences, including the inability to obtain a professional license and restrictions on obtaining state-based services.<sup>81</sup> On the other hand, society may deny employment, housing, or admission to educational institutions and impose social stigmas.<sup>82</sup>

Employers, understandably, want to employ individuals they can trust.<sup>83</sup> Thus, it is reasonable to assume that applicants without a criminal record would fare better in the employment arena than applicants with, even if an applicant's record consists of a mere arrest with no resulting charges or convictions.<sup>84</sup> In 2019, there were around 10.5 million arrests in the United States.<sup>85</sup> Many of those arrests did not lead to charges being filed, and *millions* of innocent individuals never convicted of a crime now have a criminal record.<sup>86</sup> With so many individuals holding a criminal record, it stands to reason that employers pass over many valuable, competent employees for less competent employees that do not have a criminal record.<sup>87</sup> Also, applicants with arrest records may gravitate toward less selective occupations that do not match their skill set and often pay less.<sup>88</sup> A study conducted in 2014 found that even a single arrest for disorderly conduct that did not result in a conviction, depressed job offers.<sup>89</sup> The study found that individuals with a sole arrest for disorderly conduct, with no resulting charge or conviction, were four percentage points less likely to receive an initial call back from employers.<sup>90</sup> Notably, a single disorderly conduct arrest should be one of the most minimally stigmatizing records because disorderly conduct is a low-level offense, yet even the most minimally stigmatizing record still reduced employer callbacks to legally innocent applicants.<sup>91</sup> This study demonstrated that arrests—at least low-level ones—do not universally disqualify applicants from employment; however, mere arrests *do* limit applicants' ability to acquire

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criminal law realm that individuals with criminal history, and perhaps even their families, incur.”) (footnotes omitted).

81. *Id.* at 344.

82. *Id.*

83. Friedman, *supra* note 63.

84. *See id.*

85. *See Emerging Findings, supra* note 62.

86. *See* ENFORCEMENT GUIDANCE, *supra* note 26, at 12. (“Many arrests do not result in criminal charges, or the charges are dismissed.”) (footnotes omitted).

87. Friedman, *supra* note 63.

88. *Id.*

89. *See* Uggen et al., *supra* note 46, at 627.

90. *Id.* at 649.

91. *See id.* at 632.

positions that may best match their skill sets.<sup>92</sup> Ultimately, employers often discredit arrestees by equating a criminal record with low work productivity.<sup>93</sup>

There are many reasons why individuals who have been arrested but never convicted are still affected by their arrest record.<sup>94</sup> One reason is a lack of knowledge by end-users (i.e., individuals inspecting another's criminal record) of criminal history information.<sup>95</sup> For example, an individual searching a criminal record may not understand the legal jargon used to describe the final disposition, such as the term *nolle prosequi*, which means that the prosecutor was unwilling to pursue the case against the arrested individual.<sup>96</sup> Many employers, landlords, and everyday persons may be unfamiliar with legal jargon and may not understand that a particular charge did not result in a conviction.<sup>97</sup> Another reason is that end-users may give greater weight to the arrest itself than to the end result by assuming that an individual arrested for a crime must be guilty of violating some law.<sup>98</sup> Further, arrest records reduce employability; employers want to prevent losses due to theft and protect themselves against negligent hiring lawsuits.<sup>99</sup>

The digital age has only exacerbated the negative effects felt by individuals with an arrest record.<sup>100</sup> The development of electronic databases has made arrest histories much more accessible and highly visible.<sup>101</sup> “[A]rrestees can no longer ‘pass’ as normal, and this stigma colors their

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92. Freidman, *supra* note 63; see Uggen et al., *supra* note 46, at 627, 637.

93. Uggen et al., *supra* note 46, at 630.

94. See ENFORCEMENT GUIDANCE, *supra* note 26, at 6 (“[Employers use criminal history information to] combat theft and fraud, as well as heightened concerns about workplace violence and potential liability for negligent hiring. Employers also cite federal laws as well as state and local laws as reasons for using criminal background checks.”); Rosenberg, *supra* note 70 (stating that a brief interaction with the criminal justice system can create permanent barriers to obtaining a job, housing, education, and an occupational license).

95. See Rosenberg, *supra* note 70.

96. *Id.*

97. *Id.*

98. See *id.*; Callanan, *supra* note 4, at 1293 (“When the average American hears that someone has been arrested or charged with a crime, there is a general feeling that the person has done something wrong and is guilty of violating some law.”) (citing Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1305–07 (2000)); James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 UNIV. ST. THOMAS L.J. 387, 390 (2006) (“Employers often associate a criminal record with unreliability, untrustworthiness, and dangerousness.”).

99. *Employers Are Looking at Your Florida Criminal Background Check: How Your Background Check Affects Your Job*, SEALMYRECORD.COM, <http://sealmyrecord.com/blog/employers-are-looking-your-florida-criminal-background-check> (last visited Jan. 10, 2022) [hereinafter *Florida Criminal Background Check*].

100. See Haber, *supra* note 8, at 338; Uggen et al., *supra* note 46, at 630.

101. Uggen et al., *supra* note 46, at 630.

interactions with employers and others.”<sup>102</sup> With widespread access to criminal records, around nine in ten employers, four in five landlords, and three in five colleges conduct criminal background checks on applicants.<sup>103</sup> Currently, legislation does not regulate employers or other end-users when they access criminal history records on the internet.<sup>104</sup> However, the Equal Employment Opportunity Commission (“EEOC”) issued an Enforcement Guidance on how employers should approach the use of arrest records in their hiring process.<sup>105</sup> The EEOC’s Enforcement Guidance makes it clear that an employer cannot impose a blanket ban on all applicants with an arrest record but may rely on the conduct underlying the arrest to deny applicants from employment.<sup>106</sup> This requires employers to conduct a fact-based analysis of the underlying conduct to justify an adverse employment reaction.<sup>107</sup> However, the Enforcement Guidance still warns that employers should not rely on arrest records in their exclusionary practices because arrest records may not report the final disposition of an arrest or may include inaccuracies.<sup>108</sup> Regardless of the EEOC’s cautions against employers using arrest records in their exclusionary practices, the pervasiveness and easy accessibility of criminal history records in the United States make employers’ use of criminal records nearly obligatory.<sup>109</sup> More than half of employers admitted that their reason for searching an applicant’s criminal background “was to [avoid potential] legal liability rather than to ensure a safe work environment . . . .”<sup>110</sup>

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102. *Id.*

103. Lo, *supra* note 1.

104. Haber, *supra* note 8, at 357.

105. *See* ENFORCEMENT GUIDANCE, *supra* note 26, at 3.

106. *Id.* at 12.

107. *See id.*

108. *Id.* at 13.

109. *See id.* at 12; Michael Klazema, *Are Background Checks Required?*, BACKGROUNDCHECKS.COM (Apr. 11, 2018), <http://www.backgroundchecks.com/blog/are-background-checks-required>.

While most employers technically have the right to skip the background check step when hiring new workers, doing so is always a risk. Employers have an obligation to provide their employees with a safe place to work. They also have an obligation to make sure their company operations—and, by extension, the people they hire—do not pose a risk to customers, clients, or the public. Because of these obligations, a pre-employment background check is usually viewed as due diligence even if the employer is not technically required to run the check.

Klazema, *supra*.

110. Friedman, *supra* note 63 (“According to the Society of Human Resource Management survey, more than half of employers (52 percent) said their primary reason for checking candidates’ backgrounds was to reduce legal liability rather than to ensure a safe work environment (49 percent) or to assess trustworthiness (17 percent).”).

Altogether, arrest records decrease an individual's employment prospects and erect socioeconomic barriers that expand across generations because a parent's criminal record places barriers on their child's long-term well-being.<sup>111</sup> So how can individuals wrapped up in the criminal justice system but never found guilty of anything, keep their criminal records from "poisoning" their future?<sup>112</sup> One way is by "destroying" their record through expungement.<sup>113</sup>

### III. EXPUNGEMENT & SEALING

Expungement in the United States was initially limited and created for individuals whose arrest did not result in a conviction, making an innocent arrestee's criminal history invisible to the public.<sup>114</sup> Expungement is the process by which an individual's criminal record is "eras[ed]."<sup>115</sup> Generally, expungement may be ordered by a judge or court and requires removing a particular incident from an individual's criminal record.<sup>116</sup> Congress has not provided a statute governing the application of expungement at the federal level.<sup>117</sup>

Most expungement proceedings occur in state courts, and the states create their own laws regarding the application of expungement, including who may have their record expunged, the process for expungement, and which offenses are eligible for expungement.<sup>118</sup>

Expunging a record and sealing a record is not the same thing; however, both aim to restrict public access to an individual's criminal record.<sup>119</sup> Sealing does not destroy a criminal record as expungement does;

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111. Lo, *supra* note 1, at 1.

112. See Rosenberg, *supra* note 70.

113. See Haber, *supra* note 8, at 337 ("[E]xpungement: a legal process by which criminal history records are later vacated, reversed, sealed, purged, or destroyed by the state.") (footnote omitted).

114. See *id.* at 346–47.

115. See 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 COMM'LAW CONSP'CTUS 123, 128 (2010); *What Is "Expungement?"*, AM. B. ASS'N (Nov. 20, 2018), [http://www.americanbar.org/groups/public\\_education/publications/teaching-legal-docs/what-is-expungement/](http://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-expungement/).

116. Lo, *supra* note 1, at 1–2.

117. *What Is "Expungement?"*, *supra* note 115; James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN'S L. REV. 73, 80 (1992).

118. *What Is "Expungement?"*, *supra* note 115.

119. See Lo, *supra* note 1, at 1–2 (explaining differences between sealing and expunging).

however, sealing a record makes the record accessible only through a court order.<sup>120</sup> Expungement varies from state to state; therefore, this comment focuses on the State of Florida's expungement process.<sup>121</sup>

A. *Expungement & Sealing in the State of Florida*

In Florida, an individual may have his or her criminal record expunged under certain conditions.<sup>122</sup> An individual who has not been convicted of a crime is eligible to have his or her criminal record expunged if he or she has not had a criminal record sealed or expunged in the past.<sup>123</sup> An individual can only have his or her criminal record expunged one time, making expungement a limited remedy for clearing a criminal record.<sup>124</sup> In Florida, ““expunction of a criminal history record”” is expressly defined as:

[T]he court-ordered physical destruction or obliteration of a record or portion of a record by any criminal justice agency having custody thereof, or as prescribed by the court issuing the order, except that criminal history records in the custody of the department must be retained in all cases for purposes of evaluating subsequent requests by the subject of the record for sealing or expunction, or for purposes of recreating the record in the event an order to expunge is vacated by a court of competent jurisdiction.<sup>125</sup>

In contrast, the “sealing of a criminal history record [is] the preservation of a record under such circumstances that it is secure and inaccessible to any person not having a legal right of access to the record or the information contained and preserved therein.”<sup>126</sup>

For a Florida court to consider an individual's petition for expungement, the individual must fill out an application to receive a Certification of Eligibility (“COE”) from the FDLE.<sup>127</sup> After filling out the application and obtaining supporting documentation, the individual must submit the application and supporting documents to FDLE.<sup>128</sup> If the individual

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120. *Id.*

121. *What Is “Expungement?”*, *supra* note 115.

122. *See* FLA. STAT. § 943.0585(1)(a)–(h) (2021).

123. *Id.* §§ 943.0585(1)(g), 943.059(1)(e).

124. *See id.* §§ 943.0585(1)(g), 943.059(1)(e).

125. *Id.* § 943.045(16).

126. *Id.* § 943.045(19).

127. FLA. STAT. § 943.0585(2).

128. *Id.*

qualifies for expungement, FDLE will respond with a COE.<sup>129</sup> To qualify for expunction of an arrest record in Florida, the charges against the individual seeking expungement must have been dropped, dismissed, or the individual must have been acquitted of the charges by a judge or jury.<sup>130</sup> Further, the individual seeking expungement must have never been convicted of a criminal offense in Florida and never have sealed or expunged another arrest record in Florida.<sup>131</sup> To qualify for sealing an arrest record in Florida, the individual must have entered a guilty or no contest plea, or the court must have withheld the adjudication of guilt.<sup>132</sup> Further, the individual seeking to seal their arrest record must never have been convicted of a criminal offense in Florida and never have sealed or expunged another arrest record in Florida.<sup>133</sup> Finally, the individual must petition the court, and the COE issued by the FDLE must accompany the petition.<sup>134</sup>

Florida law provides that “any request for [expungement] of a criminal history record may be denied at the sole discretion of the court.”<sup>135</sup> Florida courts, however, have consistently found that the discretion is not completely unconstrained, meaning that a court may not use its *sole* discretion to arbitrarily deny petitions for expungement.<sup>136</sup>

The courts may not deny a petition for expungement based solely on the nature of the crime and must look to all the facts and circumstances.<sup>137</sup> Thus, to properly exercise its discretion, a court must provide a reason for denying a petition for expungement.<sup>138</sup>

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129. *Id.* § 943.0585(2)(a).

130. *Id.* § 943.0585(1)(a)–(b).

131. *Id.* §§ 943.0585(1)(c)–(d), (1)(g).

132. FLA. STAT. § 943.059(1)(b).

133. *Id.* §§ 943.059(1)(b), (1)(e).

134. *Id.* § 943.0585(3)(a).

135. *Id.* § 943.0585(4)(e).

136. *E.g.*, *Anderson v. State*, 692 So. 2d 250, 253 (Fla. 3d Dist. Ct. App. 1997) (“Obviously, the words ‘sole discretion’ as used in section 943.058, Florida Statutes (1989), do not permit arbitrary, capricious or whimsical denial of expunction. Instead, this court must decide whether the trial judge used reasonable discretion in denying expunction.”) (citation omitted).

137. *Baker v. State*, 53 So. 3d 1147, 1149 (Fla. 1st Dist. Ct. App. 2011) (per curiam) (“The court’s discretion must be exercised based on the Sectionicular facts and circumstances surrounding the records at issue, and not solely on the nature of the charge.”); *Harman v. State*, 12 So. 3d 898, 899 (Fla. 2d Dist. Ct. App. 2009) (“A trial court has the discretion to deny a petition ‘if there is a good reason for denial based on the facts and circumstances of the individual case.’”) (quoting *Anderson*, 692 So. 2d at 252); *Godoy v. State*, 845 So. 2d 1016, 1017 (Fla. 3d Dist. Ct. App. 2003) (reversing the trial court’s denial of petition based solely on the nature of the charge).

138. *VFD v. State*, 19 So. 3d 1172, 1175 (Fla. 1st Dist. Ct. App. 2009) (finding the trial court must articulate an evidence-based reason for denying expungement).

Many states are taking steps to make record expungement more accessible by adopting laws that streamline the process for expungement in certain situations and by “making more . . . records eligible for expungement [or] sealing . . . .”<sup>139</sup> Florida adopted legislation providing for automatic sealing in cases where charges were either not filed, dropped, or dismissed prior to trial, and in cases where the trial resulted in an acquittal or a verdict of not guilty.<sup>140</sup> Florida’s administrative sealing does not require an individual to take any action in sealing his or her record.<sup>141</sup> The clerk is supposed to forward all records eligible for administrative sealing to FDLE to be processed for a seal.<sup>142</sup> However, Florida’s automatic sealing process only seals criminal history information maintained by FDLE—it does not seal records at the local level.<sup>143</sup> This process may benefit some individuals; however, some may still have to go through the expungement process to *destroy* their entire criminal record, including mugshots and other information on the sheriff’s office website.<sup>144</sup>

Florida also offers administrative expungements, exclusively for mistaken arrests and non-judicial records.<sup>145</sup> Administrative expungements do not require destruction of records by the arresting agency and do not seal court records.<sup>146</sup> Further, the arresting agency must apply to FDLE to have an arrest administratively expunged, or the individual who was mistakenly arrested can apply for an administrative expungement if “the application is supported by the endorsement of the head of the arresting agency or his or her designee or the state attorney of the judicial circuit in which the arrest occurred or his or her designee.”<sup>147</sup> Getting the arresting agency to file the application for an

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139. Lo, *supra* note 1.

140. FLA. STAT. § 943.0595(a)(1)–(4).

141. *Auto-Seal Under Section 943.0595*, SAMMIS L. FIRM, <http://criminaldefenseattorneytampa.com/seal-and-expunge-criminal-record/auto-seal/> (last updated Apr. 7, 2020); *see also* FLA. STAT. § 943.0595(3)(b).

142. *Auto-Seal Under Section 943.0595*, *supra* note 141; FLA. STAT. § 943.0595(3)(a).

143. *See* FLA. STAT. § 943.0595(3)(b).

144. *See Auto-Seal Under Section 943.0595*, *supra* note 141 (further explaining automatic sealing under Florida law).

145. *Administrative Expungements*, ERIC J. DIRGA, P.A., [http://ejdirga.com/florida-expungement/expungement-options/administrative\\_expungements/](http://ejdirga.com/florida-expungement/expungement-options/administrative_expungements/) (last visited Jan. 10, 2022) (“Administrative expungements: Are only for mistaken arrests. They do not replace the standard adult expungement. They do not provide the same benefits as standard adult expungement.”).

146. *Id.*; FLA. STAT. § 943.0581(1) (stating that administrative expungements apply to nonjudicial records of arrest).

147. FLA. STAT. § 943.0581(2)–(3).

administrative expungement as a result of a mistaken or unlawful arrest can be difficult and often requires court involvement.<sup>148</sup>

For example, on a Tuesday afternoon in April 2016, a sixty-year-old Florida resident (“Plaintiff”) was riding his bike on Meridian Avenue in Miami Beach when he approached a Florida Power and Light construction area.<sup>149</sup> The area was closed to motor vehicle traffic but remained open to pedestrian traffic.<sup>150</sup> Pedestrians were walking in the street, as well as on the sidewalks.<sup>151</sup> Plaintiff rode his bike another block and then exited the construction area by lifting up the single piece of yellow tape that strung across the roadway, as other pedestrians in front of Plaintiff had just done.<sup>152</sup> As Plaintiff walked his bike out of the construction area, he passed a Miami Beach police car parked outside the construction site.<sup>153</sup> The Miami Beach police officer (“Officer-Defendant”) did not ask any other passing pedestrians questions, but got out of his police car to ask Plaintiff one question, “[w]here are you coming from?”<sup>154</sup> Plaintiff responded, “[f]rom up the road,” then rode his bike away after the Officer-Defendant took no further action to speak with Plaintiff.<sup>155</sup> For reasons unknown, Officer-Defendant got back into his police car and began following Plaintiff without using sirens or the PA system to alert Plaintiff, who was completely unaware that Officer-Defendant was following him.<sup>156</sup>

Plaintiff turned onto a narrow road which, under Florida law, was “too narrow for a bicycle and another vehicle to [ride] safely side by side . . . .”<sup>157</sup> Despite this law, Officer-Defendant drove his vehicle alongside Plaintiff, then proceeded to intentionally turn his vehicle into Plaintiff, placing Plaintiff in “significant danger of serious physical injury and even death.”<sup>158</sup> As a result of the Officer-Defendant striking Plaintiff with the police car, Plaintiff “lost control of his bicycle and crashed into a steel picket fence enclosure, . . .” which caused Plaintiff to hit his head and suffer wounds above and below his left eye.<sup>159</sup> The crash also broke Plaintiff’s sunglasses, which left small

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148. *Administrative Expungements*, *supra* note 145.

149. *Halmu v. Beck*, No. 20-21410, 2021 WL 980912, at \*1 (S.D. Fla. Mar. 15, 2021).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Halmu*, 2021 WL 980912, at \*2.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Halmu*, 2021 WL 980912, at \*3.

wounds with glass fragments embedded into Plaintiff's face.<sup>160</sup> Officer-Defendant proceeded to demand Plaintiff's I.D., and Plaintiff complied with no resistance.<sup>161</sup>

Despite having no reason to arrest Plaintiff, Officer-Defendant handcuffed Plaintiff and placed him under arrest.<sup>162</sup> Officer-Defendant made no report about his "use of excessive force to stop [Plaintiff] . . .", and did not issue Plaintiff any civil citations or a notice to appear for violating any statute or ordinance.<sup>163</sup> Instead, Officer-Defendant informed Plaintiff, he was "being arrested for resisting . . . commands."<sup>164</sup> A Fort Lauderdale officer then arrived at the scene and was ordered to transport Plaintiff to jail, rather than the Miami Beach Police Department ("MBPD").<sup>165</sup> Plaintiff was transferred from MBPD to Miami-Dade County Jail around 9:30 PM, and despite posting bail at 1:30 AM, was not released until 11:30 AM the next morning.<sup>166</sup> Plaintiff was charged with two criminal misdemeanors, including: (1) "[r]esisting an officer without violence . . .", and (2) "willful failure or refusal to comply with any lawful order or direction of any law enforcement officer . . .".<sup>167</sup> A *nolle prosequere* was filed as to the first charge, and the second charge was dismissed.<sup>168</sup> As a result of Plaintiff's overnight jail stay, Plaintiff became ill with a severe case of pneumonia.<sup>169</sup> Plaintiff also suffered from "severe psychological and emotional trauma, including insomnia and nightmares," "[a]s a direct consequence of the unlawful arrest [and] excessive force" used against him.<sup>170</sup>

Plaintiff brought claims against Officer-Defendant—for false arrest, excessive force, and malicious prosecution—and sought injunctive relief for the expungement of his arrest records.<sup>171</sup> Officer-Defendant moved to strike or dismiss Plaintiff's request for injunctive relief, and Plaintiff's responded that the court had the authority to order the Miami Beach Police Department to apply for an administrative expungement upon the court's entry of a final order that Plaintiff's arrest was made contrary to law.<sup>172</sup> The court explained that an administrative expungement did not apply to Plaintiff's arrest records

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160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Halmu*, 2021 WL 980912, at \*3.

165. *See id.*

166. *Id.* at \*4.

167. *Id.*

168. *Id.*

169. *Halmu*, 2021 WL 980912, at \*4.

170. *Id.*

171. *Id.*

172. *Id.* at \*5; FLA. STAT. § 943.0581(2) (2021).

because Plaintiff failed to allege that a law enforcement agency or a court had determined the arrest was made contrary to law.<sup>173</sup> Further, Plaintiff's complaint sought injunctive relief against the Officer-Defendant to expunge records in his individual capacity, rather than the Miami Beach Police Department, for which there was no precedent.<sup>174</sup> The court granted Officer-Defendant's motion to strike and directed Plaintiff to amend his complaint.<sup>175</sup> As this incident illustrates, administrative expungements are difficult to obtain and do not replace the standard adult expungement.<sup>176</sup>

### 1. A Proposed Solution to Improve the Expungement Process in Florida

Florida has recently enacted legislation making more individuals eligible for expungement, however it should follow Delaware's new legislation providing expungement for all charges and arrests that do not result in conviction through the submission of an application to the State Bureau of Identification.<sup>177</sup> In Florida, this would mean that eligible individuals are automatically granted an expungement after they apply for and receive a COE from the FDLE without petitioning the courts.<sup>178</sup>

On the other hand, even with easier access, expungement in the digital age does not ensure that the arrested and accused will be restored their "innocent" status.<sup>179</sup>

### B. *Pitfalls of Expungement in the Digital Age*

Individuals that successfully get their criminal record expunged obtain certain benefits, such as the ability to deny the existence of that record.<sup>180</sup> Giving an innocent person the ability to deny that their arrest ever occurred can have a positive impact; however, the positive impact of expungement

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173. *Halmu*, 2021 WL 980912, at \*5–6; FLA. STAT. § 943.0581(2).

174. *Halmu*, 2021 WL 980912, at \*6.

175. *Id.*

176. *See Administrative Expungements*, *supra* note 145.

177. *See* FLA. STAT. § 943.0585; Lantz & Minutola, *supra* note 4, at 14.

178. *See* Lantz & Minutola, *supra* note 4, at 14 (stating that cutting out the process of petitioning the courts for individuals whose charges or arrests did not terminate in conviction would minimize the difficulties faced by the innocent in Florida's expungement process); Calvert & Bruno, *supra* note 115, at 142 (describing the difficulties that even individuals with dismissed charges face when seeking expungement in Florida).

179. *See* Haber, *supra* note 8, at 338 (Prior to the digital age, "if one's records were expunged, one would have largely been treated by the public as if one never had a record in the first place.").

180. *See* FLA. STAT. § 943.0585(6)(b).

statutes is severely limited in the digital age.<sup>181</sup> Expungement orders do not pertain to news reports, social media posts, blogs, or other internet sites with user-generated content.<sup>182</sup> While consumer reporting agencies (“CRA”) are required to update their criminal record databases (i.e., exclude expunged records in their reports) under the Fair Credit Reporting Act (“FCRA”), this “requirement” is not often enforced.<sup>183</sup> Thus, even after expungement, an individual’s arrest information can still be visible to employers, landlords, and educational institutions.<sup>184</sup> As a result, even those entitled to deny their arrest might refrain from doing so, so as not to appear untruthful to an employer, landlord, or educational institution.<sup>185</sup>

The digitization of public records has greatly changed the nature of expungement.<sup>186</sup> With the advent of electronic databases and digital technology, information regarding an individual’s interactions with the criminal justice system has become widely available online and, thus, the internet poses a great threat to the effectiveness of expungement.<sup>187</sup> When records were held solely in paper form within a courthouse or law enforcement agency, it took a great effort to obtain criminal history information because individuals had to take a trip to the courthouse or arresting agency to obtain

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181. See Haber, *supra* note 8, at 338.

182. *Id.*; Murray, *supra* note 10, at 70.

183. Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 How. L.J. 1, 25 (2016) (“[N]either the Federal Trade Commission nor courts considering lawsuits for willful and negligent noncompliance with the Fair Credit Reporting Act (FCRA) have historically been willing to relentlessly control or sanction disclosure of inaccurate conviction data.”); see also Logan Danielle Wayne, Comment, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253, 270 (2013) (“[C]ourts have interpreted the responsibilities of data brokers under the FCRA’s accuracy provisions to be so minimal that plaintiffs rarely prevail in such suits.”).

184. Haber, *supra* note 8, at 338.

185. *Id.* at 353 n.108 (stating that denying an arrest that an employer can simply search for, and find, on Google may be detrimental for applicants with expunged records):

Some employers might not even mind the criminal record, but rather the fact that a candidate was untruthful. That could occur when candidates have denied having a criminal record, as the record was sealed or expunged and therefore they are entitled to say they do not have a criminal record, and are perceived as lying to the employer.

*Id.*

186. See *id.* at 338, 356.

187. Alessandro Corda, *Beyond Totem and Taboo: Toward a Narrowing of American Criminal Record Exceptionalism*, 30 FED. SENT’G REP. 241, 241–43 (2018) [hereinafter *Beyond Totem and Taboo*].

criminal records.<sup>188</sup> When criminal records were only kept physically within these buildings, the records could easily be destroyed, making expungement much more effective.<sup>189</sup>

Today, records are also kept on electronic databases available to the general public via the internet.<sup>190</sup> Thus, criminal records must not only be physically destroyed but they must be electronically destroyed as well.<sup>191</sup> However, deleting a criminal record from an agency's database does not *undo* the fact that the information was "widely available [on the internet] for several years."<sup>192</sup> Destroying an individual's criminal record from an electronic database does not completely erase all evidence of the arrest because "[i]n the age of Google and social media, there is no way to eliminate all traces of the underlying event . . . ."<sup>193</sup> "The fact that the internet is capable of remembering everything makes expungement statutes ineffective in the digital era."<sup>194</sup>

## 1. Criminal History Information on the Internet

Criminal history information makes its way onto the internet in several ways, including governmental databases, courthouse online records, data brokers' online databases, news stories, social media posts, blogs, for-profit mugshot websites, and police blotter sites to name a few.<sup>195</sup> Thus, in the digital age, accessing criminal history information on the internet is easy.<sup>196</sup>

### a. *Consumer Reporting Agencies/Data Brokers*

Before the digital age, even non-expunged records were hard to access.<sup>197</sup> Instead of going to the courthouse or governmental agencies, employers, landlords, and educational institutions often relied on third-party

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188. See Haber, *supra* note 8, at 338; Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 328 (2015) (discussing that prior to the digital age, "employer[s]", "landlord[s]", [and] "neighbor[s]" interested in an individual's "criminal [history] record had to go to the . . . courthouse to view the physical file . . . .").

189. See Haber, *supra* note 8, at 348–49.

190. See *id.* at 349–50.

191. See Corda, *supra* note 183, at 22.

192. *Id.* at 25.

193. Joshua D. Carter, *A Practitioner's Guide to Expunging and Sealing Criminal Records in Illinois*, 100 ILL. B.J. 642, 644 (2012).

194. Haber, *supra* note 8, at 338.

195. See *id.* at 351, 356–57.

196. Corda, *supra* note 183, at 3.

197. See Roberts, *supra* note 188, at 328; James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 183 (2008).

background screening businesses, such as data brokers, to prepare a criminal history report on an individual.<sup>198</sup> Data brokers are individuals or companies that collect personal data from public records and sell that information to third parties such as employers, landlords, and educational institutions.<sup>199</sup> To prepare a report, the background screening companies would send a *runner* to the courthouse and other governmental agencies to compile criminal history information on an individual.<sup>200</sup> Expunged records would not show up in an individual's criminal history because the state and federal agencies had destroyed the record, and the record was not accessible on the internet.<sup>201</sup> As the governmental agencies began using digital technology, these background screening companies were able to buy criminal records in bulk from government agencies and create their own criminal record databases.<sup>202</sup> Thus, obtaining vast amounts of criminal records, including criminal records that would later be expunged.<sup>203</sup> These data collection companies conducting background checks and selling criminal history information as *consumer reports* to third parties are considered CRAs under the FCRA.<sup>204</sup>

CRAs do not only make criminal history information more accessible but they also make expunged criminal records more accessible.<sup>205</sup> With infrequent updates, data brokers' databases contain inaccurate records that include expunged records.<sup>206</sup>

To remedy issues caused by the outdated records maintained by CRAs, the FCRA imposed obligations on CRAs to adopt reasonable measures to obtain maximum possible accuracy of criminal history information.<sup>207</sup> The obligations imposed on CRAs by the FCRA, however, are insufficient because the FCRA does not impose affirmative duties on CRAs to update their records.<sup>208</sup> Instead, the FCRA places the duty of ensuring CRA compliance with the FCRA on individuals by granting a private right of action to individuals who must demonstrate that, due to the CRAs' practices, they

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198. Haber, *supra* note 8, at 352; Jacobs & Crepet, *supra* note 197, at 185.

199. See Haber, *supra* note 8, at 352 (describing work of data brokers).

200. *Id.*

201. *See id.*

202. *Id.*

203. *See id.* at 352–53.

204. ENFORCEMENT GUIDANCE, *supra* note 26, at 5.

205. See Haber, *supra* note 8, at 353.

206. *See id.*

207. 15 U.S.C. § 1681e.

208. Wayne, *supra* note 183, at 268 (“[T]he FCRA does not impose any affirmative duties on data brokers to update their records, and its enforcement provisions still put the onus of ensuring compliance on individual persons.”).

suffered an injury in fact.<sup>209</sup> Plaintiffs rarely win in such suits.<sup>210</sup> Further, CRAs have a few incentives to not update their criminal history databases.<sup>211</sup> First, frequent updates of these massive databases would be costly and time consuming.<sup>212</sup> Second, there is a demand for un-updated records because employers, landlords, and educational institutions want to know an applicant's complete criminal history, including expunged records.<sup>213</sup> Further, the FCRA also imposed regulations on employers, including the obligation to inform and obtain consent from applicants before the employer obtains an applicant's criminal history report from a CRA.<sup>214</sup> These FCRA regulations are also insufficient because employers can simply conduct an informal background check using other internet sources, rather than requesting a report from a CRA, because current legislation does not regulate employers' access to criminal history records through the internet.<sup>215</sup>

b. *For-Profit Websites, Social Media Posts, and Online News Stories*

Internet sources that encumber the effectiveness of expungement in the digital age include “for-profit mugshot websites, police blotter websites, social media posts, and online news stories.”<sup>216</sup> For-profit mugshot websites collect mugshots and arrest information from police departments to later charge a remove fee for such content.<sup>217</sup> These sites sometimes charge hundreds of dollars for mugshot removals, placing another economic barrier upon individuals who successfully expunged their records.<sup>218</sup> Mugshots and arrest information typically remain on these for-profit websites even after an individual is granted expungement unless a payment is made for its removal.<sup>219</sup> Police blotter websites often retain information regarding arrests and suspected criminal activity, regardless of whether an arrest is expunged.<sup>220</sup>

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209. *Id.* at 268, 270; Haber, *supra* note 8, at 355.

210. Wayne, *supra* note 183, at 270.

211. Haber, *supra* note 8, at 362.

212. *Id.* at 353–54, 362.

213. *Id.* at 354, 361–62.

214. *Id.* at 355.

215. *Id.* at 355, 357.

216. Elizabeth Westrope, Comment, *Employment Discrimination on the Basis of Criminal History: Why an Anti-Discrimination Statute is a Necessary Remedy*, 108 J. CRIM. L. & CRIMINOLOGY 367, 373–74 (2018).

217. *Id.* at 374.

218. *Id.* (“Fees to remove mug shots or other information pertaining to an arrest can be as much as \$400.”).

219. Haber, *supra* note 8, at 356.

220. Westrope, *supra* note 216, at 374.

Therefore, employers, landlords, and educational institutions may still have easy access to expunged arrests through mugshot websites and police blotter sites.<sup>221</sup>

Social media posts may also contain information about expunged arrests, and court expungement orders certainly do not require individuals to delete old posts that reveal information about an individual's expunged arrest.<sup>222</sup>

Finally, another serious limitation on expungement in the digital age is news stories published by journalists.<sup>223</sup> Local media reports may provide information about individuals and their alleged criminal activity, which may remain available online after the expungement is granted.<sup>224</sup> The First Amendment's guarantee of freedom of the press and freedom of speech ensures the public's right to publish stories regarding criminal events, including arrests.<sup>225</sup> Thus, journalists are not legally obligated to edit their articles containing alleged criminal conduct and arrest information after a court issues an expungement order.<sup>226</sup> Therefore, an individual's arrest information may remain indefinitely in articles on the internet, traceable with just a few keystrokes via an internet search engine.<sup>227</sup>

States like Florida have begun to take step in the right direction to limit online exposure of arrest information for individuals whose arrests resulted in no charges being filed or the charges being dropped.<sup>228</sup> In 2019, the FDLE's criminal history database stopped showing results for "arrests that result[ed] in no charges being filed or . . . charges being dropped."<sup>229</sup> This information, however, can still be obtained from private background checking companies and may posted online by nongovernmental sources.<sup>230</sup> Further, Florida made it illegal for websites to require payment for removing

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221. *See id.*; Haber, *supra* note 8, at 357.

222. *See* Westrope, *supra* note 216, at 374–75.

223. *See id.* at 375.

224. *See* Haber, *supra* note 8, at 356–57.

225. *See* Westrope, *supra* note 216, at 375.

226. *See id.*; Calvert & Bruno, *supra* note 115, at 137 (“[N]ewspapers . . . cannot be in the business of erasing the past. Corrections, yes. Obliterations, no.”).

227. *See* Westrope, *supra* note 216, at 375.

228. *See Florida Expungement Qualification*, ERIC J. DIRGA, P.A., <http://ejdirga.com/florida-expungement/expungement-qualification/> (last visited Jan. 10, 2021) (“As of October 1, 2019, FDLE’s criminal history will not show arrest information on arrests that result in no charges being filed or all charges being dropped.”).

229. *Id.*

230. *See id.* (stating that individuals whose arrest resulted in no charges being filed or charges being dropped must obtain their arrest information from private background checking companies, rather than the FDLE, as of October 1, 2019).

mugshots.<sup>231</sup> Due to the market demand for this information, however, operators of for-profit websites found legal ways to make a profit.<sup>232</sup> Instead of requiring payment for the removal of mugshots, these companies switched to an ad-based operation model.<sup>233</sup> After these for-profit websites found a loophole in the Florida law by switching to an ad-based model of operation, Florida's Governor signed a new piece of legislation that extends to "[f]or-profit website[s] generating ad revenue for the sole purpose of embarrassing people."<sup>234</sup> The Florida law took effect on October 1, 2021, and allows individuals to make a written request, sent via registered mail, to the for-profit website to have their mugshot removed from the site.<sup>235</sup> The for-profit site will then have ten days to respond to the request, and failure to respond will result in a \$1,000 fine per day.<sup>236</sup> Merely restricting the practice of charging a fee for mugshot removals does not mean that these companies cannot publish mugshots and arrest information; it just means they cannot profit from publishing that information.<sup>237</sup> Therefore, the Florida bill is a step in the right direction, but it will not eliminate the mugshot industry.<sup>238</sup> Eliminating the ability of mugshot websites to publish this information altogether would likely invoke constitutional concerns because such a restriction may violate the First Amendment's protection of free speech and freedom of the press.<sup>239</sup> Therefore, regulating the initial dissemination of mugshots, such as preventing the Sheriff's office from posting mugshots online, may be the only way to eliminate the mugshot industry.<sup>240</sup> On the other hand, the public places a high

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231. Mike Vasilinda, *Mugshot Websites Under New Scrutiny After Florida Law Signed*, NEWS4JAX, <http://www.news4jax.com/news/local/2021/06/22/florida-mugshot-websites-under-new-scrutiny-after-law-signed/> (last updated June 22, 2021, 6:30 PM).

232. See Haber, *supra* note 8, at 370.

[E]ven upon regulating direct profits of these websites, it is rather intuitive that as long as there will be a market demand for this information, their operators will find a legal way to still make profits. Subsequently, these restrictions could perhaps lead to the formation of grey or black markets for this type of information.

*Id.*

233. Vasilinda, *supra* note 231.

234. *Id.*

235. See *id.*

236. *Id.*

237. See Haber, *supra* note 8, at 369–70.

238. Vasilinda, *supra* note 231.

239. See Haber, *supra* note 8, at 370 (“[P]roscribing this practice altogether might be difficult, if not almost constitutionally impermissible as such restrictions could raise First Amendment concerns . . . .”) (footnote omitted).

240. See Vasilinda, *supra* note 231.

value on their right to be informed, even when it comes to alleged criminal activity.<sup>241</sup>

Ultimately, innocent individuals who successfully go through the complex and costly process of expungement will likely continue to face the stigma and barriers associated with a criminal record because the digital age has made expungement more of a symbolic gesture rather than a solution to eliminating the barriers faced by the arrested and accused.<sup>242</sup> Under Florida law, once a record is expunged or sealed, state and federal agencies generally cannot disclose the record to the public.<sup>243</sup> However, once the information is public (i.e., on the internet), there are generally no laws that prohibit disclosure and circulation of that information.<sup>244</sup> Thus, expungement statutes do not provide a sufficient solution to innocent individuals arrested for offenses they did not commit.<sup>245</sup> These innocent individuals deserve a proper solution that emulates one of the core principles of the United States criminal justice system: the presumption of innocence.<sup>246</sup>

#### IV. POSSIBLE SOLUTIONS TO THE INEFFECTIVENESS OF EXPUNGEMENT IN THE DIGITAL AGE

##### A. *Comparing the European Union and United States Criminal Record Systems*

The EU views criminal history information as private, personal information.<sup>247</sup> The EU's criminal record system is based on convictions rather than arrests.<sup>248</sup> Each EU country maintains its own registers that are generally not accessible to the public.<sup>249</sup> Judicial authorities—and sometimes police and other public authorities—may be able to access an individual's criminal record, which only includes convictions, but private individuals, such as employers, generally cannot obtain another individual's criminal conviction

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241. See Corda, *supra* note 183, at 5.

242. *Id.* at 25.

243. FLA. STAT. § 943.0585(6)(a) (2021).

244. See FLA. STAT. § 943.0585(6)(d); Haber, *supra* note 8, at 355, 357.

245. See Haber, *supra* note 8, at 384.

246. See Callanan, *supra* note 4, at 1308 (“The U.S. criminal justice system was founded on the principle of ‘innocent until proven guilty,’ and the only way to properly respect that sentiment is to create additional safeguards to protect criminal defendants from the collateral consequences of a criminal charge lacking a conviction.”).

247. Haber, *supra* note 8, at 359.

248. Jacobs & Blitsa, *supra* note 3, at 136.

249. *Id.* at 136, 142–43.

record.<sup>250</sup> EU nationals can also obtain access to their criminal history records, and some EU countries do not require individuals to specify their reason for requesting their criminal record.<sup>251</sup> Thus, employers may bypass the strict privacy laws by indirectly obtaining criminal records through applicants themselves.<sup>252</sup> Still, applicants' criminal conviction records do not contain information about arrests, and the EU's General Data Protection Regulation ("GDPR") prevents data-processing companies from processing personal data regarding criminal convictions; thus, strict regulations and the EU criminal record system itself make it difficult for employers to bypass restrictive privacy laws in the EU.<sup>253</sup> In the EU, information regarding arrests and suspects taken into custody is maintained by the police.<sup>254</sup> The information kept by police is not included in criminal conviction records and is not disseminated to the public,<sup>255</sup> which altogether allows innocent individuals to avoid collateral consequences stemming from their interaction with the criminal justice system.<sup>256</sup> In compliance with Article 6 of the Convention of Human Rights, which requires that individuals receive a fair and public hearing, EU court records are public, but restrictions are placed on press reports regarding cases and court records, sometimes providing anonymity to defendants.<sup>257</sup>

In contrast, the United States views criminal history information as a public record,<sup>258</sup> and the United States criminal record system is based on arrests.<sup>259</sup> The United States generally does not have restrictive privacy laws that prevent arrest records from being published on the internet because

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250. *Id.* at 142–43.

251. *Id.* at 143; James B. Jacobs & Elena Larrauri, *European Employment Discrimination Based on Criminal Record II – Discretionary Bars*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 13, 2015), <http://ccresourcecenter.org/2015/01/13/european-discretionary-employment-discrimination-based-criminal-record/>.

252. Jacobs & Larrauri, *supra* note 251.

253. See Aaron Schildhaus, *EU's General Data Protection Regulation (GDPR): Key Provisions and Best Practices*, 46 INT'L L. NEWS, Winter 2018, at 11, 11 (explaining background on GDPR); Jacobs & Blitsa, *supra* note 3, at 142–43.

254. Jacobs & Blitsa, *supra* note 3, at 137.

255. See *id.* (explaining that EU police keep their own intelligence information, which is not integrated with the judicial system's conviction information).

256. See Sarah E. Lageson et al., *Privatizing Criminal Stigma: Experience, Intergroup Contact, and Public Views About Publicizing Arrest Records*, 21 PUNISHMENT & SOC'Y 315, 318 (2019) (explaining that negative consequences stemming from even minor interactions with the criminal justice system are exacerbated when criminal history information is publishable online).

257. Haber, *supra* note 8, at 359.

258. *Id.* at 351; Jacobs & Blitsa, *supra* note 3, at 142 (“In the United States, criminal records are effectively public, either by law or in practice.”).

259. Jacobs & Blitsa, *supra* note 3, at 130.

criminal records are considered public records.<sup>260</sup> Thus, even if an individual is granted an expungement order, that order only pertains to the destruction of official government documents, not arrest information published by journalists or other internet users.<sup>261</sup> The United States does not have restrictions that prevent employers and other internet users from conducting an informal background check by searching an applicant's name on Google.<sup>262</sup> Once official government documents are destroyed following an expungement order, “digital memory . . . prevents society from moving beyond the past because it cannot forget the past.”<sup>263</sup> Proposed solutions to the digital memory problem include the right to be forgotten.<sup>264</sup>

### 1. Recognizing the Right to be Forgotten

The EU recognizes the “right to be forgotten,” which grants individuals the right to control their personal data by deleting information on the internet that meets certain criteria.<sup>265</sup> Thus, while it is less likely for sensitive information, such as criminal history records, to surface on the internet in the EU because of Europe's restrictive privacy laws, the recognition of the right to be forgotten ensures that EU citizens and residents can remove sensitive personal information that does end up on the internet.<sup>266</sup> Recent case decisions in Europe made it clear that data authorities in Europe can compel data controllers, such as Google, to remove offending material for users located in Europe.<sup>267</sup> While France's data authority, the Commission Nationale de l'Informatique et des Libertés (“CNIL”), could not compel Google to remove links to the offending material worldwide, CNIL could

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260. See Haber, *supra* note 8, at 373 (addressing that regulations restricting the use and dissemination of public records, such as criminal records, would be considered unconstitutional).

261. See *id.* at 371; Murray, *supra* note 10, at 70.

262. See Murray, *supra* note 10, at 70.

263. See Edward J. George, Note, *The Pursuit of Happiness in the Digital Age: Using Bankruptcy and Copyright Law as a Blueprint for Implementing the Right to Be Forgotten in the U.S.*, 106 GEO. L.J. 905, 908 (2018) (quoting MEG LETA JONES, CTRL+Z: THE RIGHT TO BE FORGOTTEN 11 (2016)); Murray, *supra* note 10, at 70.

264. *Id.*

265. See Council Regulation 2016/679, art. 17, 2016 O.J. (L 119) 1 (EU) (“The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay . . .”).

266. Haber, *supra* note 8, at 338–39, 359–60.

267. See Case C-507/17, *Google LLC v. Comm'n nationale de l'informatique et des libertés*, ECLI:EU:C:2019:772, ¶73 (Sept. 24, 2019).

certainly control accessibility to the material within Europe.<sup>268</sup> Further, the court did not rule out the possibility for future worldwide injunction orders compelling data collectors, like Google, to remove listings globally.<sup>269</sup>

Currently, the United States does not guarantee a right to be forgotten that allows individuals to request the delisting of internet search results concerning their private life, such as information pertaining to expunged arrests.<sup>270</sup> Many Americans view the right to be forgotten as a form of censorship that would chill speech and conflict with democratic values.<sup>271</sup> Further, many Americans believe that the right to be informed outweighs the right to privacy, at least in the context of the right to be forgotten.<sup>272</sup>

While the United States does not guarantee a right to be forgotten, some scholars have asserted that the right to be forgotten has judicial precedence in American law.<sup>273</sup> For instance, in a 1931 case, California's Fourth District Court of Appeals held in favor of a woman, formerly named Gabrielle Darley, who claimed that a movie connecting her to her previous interactions with the criminal justice system violated her privacy rights.<sup>274</sup> Darley was previously a prostitute who was tried, but acquitted of murder.<sup>275</sup> Following her trial, Darley abandoned her life as a prostitute and got married, took her spouse's name, and lived an honorable life with friends who did not know the details of her past life, until the film connected Darley's married name to her maiden name.<sup>276</sup> The court found that Darley "should have been permitted to continue [the] course without having her reputation and social

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268. *See id.*

269. *See id.* at ¶72; Andrew Keane Woods, *Three Things to Remember from Europe's 'Right to Be Forgotten' Decisions*, LAWFARE (Oct. 1, 2019, 10:11 AM), <http://www.lawfareblog.com/three-things-remember-europes-right-be-forgotten-decisions#>.

While the court said that EU law does not give France express authority to compel Google to remove listings worldwide, 'it also does not prohibit such a practice.' The Court of Justice suggested that, even absent any new statutory authority from the EU, regulators—though it is unclear which ones—might nonetheless have good reason to order a global injunction, as long as they balance privacy with freedom of information.

Woods, *supra*.

270. *See Woods, supra* note 269; George, *supra* note 263, at 907.

271. George, *supra* note 263, at 909–10.

272. David Zax, *Will There Ever Be an "Internet Erase Button"?*, MIT TECH. REV. (Apr. 27, 2011), <http://www.technologyreview.com/2011/04/27/259428/will-there-ever-be-an-internet-erase-button/> ("Sometimes the right to information ought to outweigh the right to privacy. What incentive will there ever be for a journalist to rake muck if the information can simply be taken down upon request?").

273. George, *supra* note 263, at 913.

274. *See Melvin v. Reid*, 297 P. 91, 91, 94 (Cal. Ct. App. 1931).

275. *Id.* at 91.

276. *Id.*

standing destroyed by the publication . . . .”<sup>277</sup> The court in the *Melvin* case set the precedent to be the first instance of the right to be forgotten in the United States, even though the court did not actually allow Darley a right to be forgotten.<sup>278</sup> The court included in its opinion that if the film only depicted the events that were on the public record from Darley’s trial, there would have been no violation of a right of privacy.<sup>279</sup> Thus, Darley’s privacy rights would not have been violated had the film only portrayed details available to the public in Darley’s trial records.<sup>280</sup> The court does not suggest that individuals like Darley have a right to compel the media to erase criminal history information about them.<sup>281</sup>

Today, courts in the United States overwhelmingly agree that the publication of true information concerning an individual’s criminal history is unlikely to constitute a violation of privacy, even if the record is later expunged.<sup>282</sup> Thus, it is unlikely that the United States would recognize a right to be forgotten that requires journalists, along with other members of the public, to delete information about expunged arrests because such a requirement is likely to infringe upon constitutional guarantees, such as freedom of the press, freedom of speech, and freedom of expression.<sup>283</sup>

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277. *Id.* at 93.

278. *Id.*; George, *supra* note 263, at 913.

279. *Melvin*, 297 P. at 93.

Had respondents, in the story of ‘The Red Kimono,’ stopped with the use of those incidents from the life of appellant which were spread upon the record of her trial, no right of action would have accrued. They went further, and in the formation of the plot used the true maiden name of appellant. If any right of action exists, it arises from the use of this true name in connection with the true incidents from her life together with their advertisements in which they stated that the story of the picture was taken from true incidents in the life of Gabrielle Darley, who was Gabrielle Darley Melvin.

*Id.*

280. *Id.*

281. *Id.* Darley could not have compelled the filmmakers to refrain from using the information contained in Darley’s trial record in the plot. *Id.* A right of privacy is different from right to be forgotten, as a right of privacy is the “‘right to live one’s life in seclusion, without being subjected to unwarranted and undesired publicity.’” *Melvin*, 297 P. at 92 (citation omitted). While a right to be forgotten gives the data subject the “‘right . . . to obtain from the operator the deletion of the personal data regarding him or her.’” Eugen Chelaru & Marius Chelaru, *Right to Be Forgotten*, 16 ANNALES UNIVERSITATIS APULENSIS SERIES JURISPRUDENTIA 26, 31 (2013).

282. Haber, *supra* note 8, at 366–67.

283. See *Spanish Claim “Right to be Forgotten” on Web*, CBS NEWS (Apr. 20, 2011, 12:34 PM), <http://www.cbsnews.com/news/spanish-claim-right-to-be-forgotten-on-web/> (“‘In the United States we have a very strong tradition of free speech freedom of expression. We would strongly caution against any interpretation of the right to be forgotten that infringes upon that . . . .’”). The constitutional guarantees that would likely be infringed upon would be the freedom of the press, freedom of speech, and freedom of expression. *Id.*

## 2. Exploring Narrowly Tailored Solutions for the United States

A right to be forgotten that allows Americans to request the removal of internet search results concerning information about their private lives that is inadequate, irrelevant, or no longer relevant may be too broad to conform with existing American values.<sup>284</sup> However, a narrower approach, such as allowing exonerated arrestees to request that search results concerning their arrest be delisted from search engines, may be more plausible.<sup>285</sup> One scholar suggested narrowly tailoring a right to be forgotten that allows only individuals with expunged criminal history records the right to compel online providers to remove the expunged information from their site, making the information inaccessible to the public.<sup>286</sup> Nevertheless, the scholar explained that even this narrowly tailored solution might be an unconstitutional infringement on the First Amendment because requiring online sites to erase information from their site may constitute censorship of speech and censorship of the press.<sup>287</sup>

It has also been suggested that state legislators and governors could further limit state and local agencies' initial dissemination of data.<sup>288</sup> To accomplish this, the government could stop selling criminal history information in bulk and, instead, return to a case-by-case request paradigm by selling each record separately.<sup>289</sup> Thus, the effectiveness of expungement would improve because records expunged before a record request is made will not appear in the criminal history information that is sold to data brokers by the government.<sup>290</sup> However, this solution would not increase the effectiveness of expungement for individuals whose arrest information was already sold to data collection companies before they were expunged.<sup>291</sup> It has also been argued that because the open approach to criminal records can be overcome by showing that "closure is essential to preserve higher values and is narrowly tailored to serve those values," making only expunged criminal

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284. See Haber, *supra* note 8, at 371.

285. See *id.* at 372 ("If Congress were to impose restrictions based on the content of criminal history, those restrictions must be narrowly tailored to serve a state interest of the highest order and be the least restrictive means available to further the articulated interest.") (footnote omitted).

286. *Id.* at 370.

287. *Id.* at 371.

288. *Id.* at 368.

289. Haber, *supra* note 8, at 364.

290. See *id.* at 352 (discussing that these reports would exclude expunged records as long as the database of the public office was updated).

291. *Id.* at 364.

records private could be a narrowly tailored solution.<sup>292</sup> This solution would greatly decrease the public's ability to disseminate expunged arrest information because once the information is deemed *private*, publishing the information may be considered an invasion of privacy.<sup>293</sup> However, this approach only affects the dissemination of arrest information after it is expunged, which could take years.<sup>294</sup> Thus, until the record is expunged, the information contained in the record can still be legally disseminated and published on the internet.<sup>295</sup>

Once the information is on the internet, it is difficult to erase all traces of it.<sup>296</sup> Further, erasing all traces of the expunged information by requiring nongovernmental sources, such as news outlets, journalists, or other members of the public, to erase or alter internet publications containing expunged information likely conflicts with constitutional guarantees.<sup>297</sup>

Thus, not only is expungement completely ineffective, but most solutions to improve the effectiveness of expungement are legally impractical solutions in the United States.<sup>298</sup> Therefore, alternative solutions for decreasing the collateral consequences of an arrest record for innocent individuals *must* be explored.<sup>299</sup>

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292. *Id.* at 381 (quoting *Press-Enter. Co. v. Superior Ct. of Cal., Riverside Cnty.*, 464 U.S. 501, 510 (1984)).

293. *See id.* at 377–78 (stating if criminal records were considered private information, that information would not be of public concern); Haber, *supra* note 8, at 377. The media can be held liable for publishing true information if that information is not of concern to the public. *See* George, *supra* note 263, at 916.

294. *See* Brian M. Murray, *Retributive Expungement*, 169 U. PA. L. REV. 665, 695 (2021) (stating that some states have begun decreasing waiting periods, Sectionicularly for non-conviction records correlating to different types of public criminal records); *How Long Does a Florida Expungement Take*, ERIC J. DIRGA, P.A., <http://ejdirga.com/2018/11/06/florida-expungement-how-long/> (last updated Aug. 2020) [hereinafter *Length of FL Expungement*] (explaining the Florida expungement process will take around seven to ten months once the application process begins, if no delays occur).

295. *See* Haber, *supra* note 8, at 357 (discussing that publishing criminal records online is lawful even if a record is expunged because criminal records are considered public information).

296. *See* *Nunez v. Pachman*, 578 F.3d 228, 229 (3d Cir. 2009) (holding that expunged information is “never truly private” because the criminal record is publicly available prior to expungement).

297. Haber, *supra* note 8, at 338 (“It might be technically impossible to effectively expunge information in the digital age, and expungement is legally challenging, as granting individuals a right to compel private companies to expunge their records is a constraint on freedom of speech, freedom of information, and the freedom of the press.”).

298. *Id.*

299. *See* Callanan, *supra* note 4, at 1278.

V. A PROPOSED SOLUTION TO LIMIT THE COLLATERAL  
CONSEQUENCES OF ARRESTS

Ultimately, it is difficult to retract or eliminate information once it is disseminated to the public via the internet because (1) the internet remembers everything<sup>300</sup> and (2) requiring the press to retract or remove information would likely infringe upon First Amendment rights.<sup>301</sup> Thus, solutions for limiting the collateral consequences faced by arrested individuals—later found to be innocent—must focus on the initial dissemination of arrest records, rather than eliminating traces of the information after it circulates on the web.<sup>302</sup>

Therefore, the best solution would be to model the United States' criminal record system after the EU's criminal record system by basing the United States' criminal record system on convictions rather than arrests.<sup>303</sup> Doing so would help decrease the collateral consequences faced by innocent individuals arrested for crimes that they did not commit and will bolster the American value of the presumption of innocence.<sup>304</sup>

In the United States, individuals accused of a crime are supposed to be innocent until proven guilty.<sup>305</sup> Yet, plenty of innocent individuals have a criminal record.<sup>306</sup> Having a criminal record for a mere arrest imposes a punishment upon innocent individuals by erecting obstacles they must face for the rest of their lives.<sup>307</sup> By making arrest information available only to government agencies, it will cease to be disseminated to the public, which will advance protections for innocent arrestees and uphold the presumption of

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300. Haber, *supra* note 8, at 338.

301. *Id.* at 338, 371.

302. *See id.* at 380–81 (mentioning that there is precedent in the United States for limiting initial disclosure of criminal history information as a few states regulate the initial dissemination of criminal history records).

303. *See Jacobs & Blitsa, supra* note 3, at 136–37 (explaining the European Union's criminal record system).

304. *See Fields & Emshwiller, supra* note 2 (explaining that lingering arrest records can ruin chances for securing employment, loans, and housing for people who have never even faced charges or conviction); Uggen et al., *supra* note 46, at 627 (explaining that the presumption of innocence has been at the foundation of Anglo-American criminal law since the eighteenth century, yet criminal records can haunt the accused).

305. Uggen et al., *supra* note 46, at 627.

306. *See Alexandra Natapoff, Misdemeanors*, 85 S. CAL. L. REV. 1313, 1334 (2012) (discussing police tactics that generate arrests of innocent people thus leaving innocent people with a criminal record); Callanan, *supra* note 4, at 1278.

307. *See Arrests as Guilt, supra* note 7, at 997–98 (explaining that there are numerous legal consequences from arrests that rely on an assumption of guilt).

innocence by putting an end to arrests being considered an indication of guilt.<sup>308</sup>

#### A. *Public Safety*

Criminal records should be based on criminal convictions rather than arrests because arrests are not always carried out in response to the commission of a crime.<sup>309</sup> Police are relied on to deal with social and medical issues causing many individuals—who in some cases should have received an alternative form of help—to end up in the criminal justice system.<sup>310</sup> Further, individuals are arrested at very high rates in the United States for reasons other than guilt or dangerousness.<sup>311</sup> For example, police may face pressures to increase their volume of arrests to meet quotas<sup>312</sup> or police may also need to rely on arrests to obtain control of a situation.<sup>313</sup> Since many arrests do not result in criminal charges, basing criminal records on convictions is necessary to adequately protect innocent arrestees from a lifetime of adversity, resulting from the presumption that individuals arrested for a crime must be guilty of something.<sup>314</sup> Potential opposition to basing criminal records on convictions, rather than arrests, may involve public safety concerns.<sup>315</sup> The public should be aware of all criminal activity including alleged criminal activity, regardless of the outcome.<sup>316</sup> However, the government and local police typically do not

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308. *See id.* at 997 (“[T]he concepts of arrest and guilt often appear to be fused.”).

309. Natapoff, *supra* note 306, at 1331.

A growing literature indicates that urban police routinely arrest people for reasons other than probable cause, that high-volume arrest policies such as zero tolerance and order maintenance create a substantial risk of evidentially weak arrests, that mechanisms for checking whether arrests are based on probable cause are sporadic, and finally that, if those mechanisms do kick in, police sometimes lie about whether there was sufficient evidence for an arrest.

*Id.*

310. Jones & Sawyer, *supra* note 65.

311. *See* Friedman, *supra* note 63 (“Regardless of race or gender, researchers estimate that by age [twenty-three] nearly one in three Americans will have been arrested.”).

312. Natapoff, *supra* note 306, at 1332; *see Arrests as Guilt, supra* note 7, at 992 (“[F]actors other than a belief in guilt incentivize police officers to arrest. Law enforcement officers may experience pressure—external and/or internal—to increase the volume of their arrests for job advancement (or job preservation.)”) (footnotes omitted).

313. *Arrests as Guilt, supra* note 7, at 992–93.

314. Callanan, *supra* note 4, at 1277–78.

315. *See* Haber, *supra* note 8, at 377.

316. *See id.* (“Criminal activity is perceived as a legitimate concern to the public. Such legitimate concerns extend to any public records and documents. Even alleged criminal activity falls within this public safety argument . . .”).

name those accused of crimes until after they have been arrested, at which point the public safety concerns have been satisfied with the arrest itself.<sup>317</sup> Thus, the public can still be informed about local criminal activity because police departments can still send out alerts warning the public about criminal activity in their area.<sup>318</sup> Once the individuals are taken into custody, police departments can still update the public that an individual has been taken into custody without specifying who the individual is.<sup>319</sup> For example, the Boca Raton Police Department maintains a Twitter account that sends out alerts to residents such as, “DIXIE HWY temporarily closed in both directions between Camino Real & SW 18<sup>th</sup> St due to @bocapolice activity in the immediate area.”<sup>320</sup> The Boca Raton Police Department later follows alerts with updates such as, “@BocaPolice were assisting @browardsheriff with an arrest warrant. The suspect barricaded himself in an apartment along the 100 blk of SW 15th St. Our crisis negotiators responded & the suspect . . . walked out unarmed and was taken into custody.”<sup>321</sup> This shows it is possible to keep the public safe by informing them about criminal activity in the area without releasing the name of the arrestee.<sup>322</sup>

To minimize problems that arise from affording all suspects and arrestees anonymity, exceptions can be made to account for the fact that naming a suspect may lead to more victims coming forward or to the discovery of more evidence.<sup>323</sup> Thus, in the interest of justice, a judge could allow identification of arrestees or suspects in cases where their identification may: (1) “lead to additional [victims or] complaint[s] coming forward,” (2) “lead to information that assists [in] the investigation of the offence,” or (3) “lead to information that assists [in] the arrested [individual’s defense].”<sup>324</sup>

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317. Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 802 (2005).

318. *See id.* (discussing that the accused is typically not named until after his or her arrest, but, if the accused is named before his or her arrest, it is rarely “because the suspect is dangerous and at large . . .”).

319. *See id.* (explaining that once an arrest has been made, the public safety concern has been satisfied with the arrest itself, thus naming the individual after arrest does not advance public safety).

320. Boca Raton Police (@BocaPolice), TWITTER (July 12, 2021, 6:30 AM), <http://twitter.com/bocapolice/status/1414532640061992962?s=21> [hereinafter Boca PD Alert].

321. Boca Raton Police (@BocaPolice), TWITTER (July 12, 2021, 9:55 AM), <http://twitter.com/BocaPolice/status/1414584275572297731> [hereinafter Boca PD Update].

322. *See id.*

323. David Malone, *At the Cliff Edge...Should Defendants Remain Anonymous Pre-Charge?*, LAW. MONTHLY, <http://www.lawyer-monthly.com/2018/08/at-the-cliff-edge-should-defendants-remain-anonymous-pre-charge/> (last updated Sept. 3, 2018).

324. *Id.*

Also, employers, landlords, and other members of the public should be warned about *potential* offenders before employing them, leasing to them, or befriending them.<sup>325</sup> However, an arrest is not a clear indicator that an individual engaged in criminal conduct or is a potential offender.<sup>326</sup> Non-conviction records are “irrelevant” to the public because arrests do not establish that criminal conduct occurred and are not proof of guilt.<sup>327</sup> Further, many arrests that lead to criminal charges result in the charges being dropped, dismissed, or otherwise resolved in the defendant’s favor.<sup>328</sup> Ultimately, the public does have a legitimate concern regarding actual criminal activity, but access to arrest information that did not involve an adjudication of guilt does not make the public safer since the subject of the information was legally innocent.<sup>329</sup> Further, more than half of employers admitted that their reason for searching an applicant’s criminal background is to avoid potential “legal liability rather than to ensure a safe work environment.”<sup>330</sup> With the wide availability of arrest and conviction records, employers that fail to do a criminal history screening on applicants open themselves up to negligent hiring lawsuits for failing to perform their *due diligence* before hiring an applicant.<sup>331</sup> As long as employers have access to criminal history information, they will seek it to avoid legal liability.<sup>332</sup> Once employers obtain criminal history information, the mere knowledge of a criminal past, even a mere arrest, plays a role in an employer’s decision-making process.<sup>333</sup> Thus, basing the United States’ criminal record system on convictions rather than arrests will limit end-users’ exposure to outdated, incorrect, and expunged

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325. Haber, *supra* note 8, at 377 (discussing that this public safety argument illustrates the stigmatizing effects of an arrest by indicating that employers, landlords, and members of the public classify non-convicted arrestees as potential offenders).

326. ENFORCEMENT GUIDANCE, *supra* note 26, at 12; *see also* Natapoff, *supra* note 306, at 1331 (“[P]olice arrest people for a variety of reasons that may or may not involve probable cause.”).

327. Haber, *supra* note 8, at 377.

328. *See* ENFORCEMENT GUIDANCE, *supra* note 26, at 12.

329. Haber, *supra* note 8, at 377.

330. Friedman, *supra* note 63 (“According to the Society of Human Resource Management survey, more than half of employers, [fifty-two] percent, said their primary reason for checking candidates’ backgrounds was to reduce legal liability rather than to ensure a safe work environment, [forty-nine] percent, or to assess trustworthiness, [seventeen] percent.”).

331. Jacobs & Crepet, *supra* note 197, at 178 (“Private information service companies warn employers, landlords, hotels, and other businesses that failure to conduct criminal background checks could result in significant tort liabilities. Consequently, the market for criminal background checks has increased dramatically.”).

332. *See* Haber, *supra* note 8, at 344 n.44, 351–52, 361.

333. *See id.* at 369 (explaining that “mere knowledge of [a] criminal history [record] could . . . play an important role in the employer’s [hiring process],” as the employer may “fear potential tort liability for negligent hiring”).

arrest records and limit employers' ability to make employment decisions based on that exposure.<sup>334</sup>

### B. *Public Oversight of the Judiciary*

Basing criminal records on convictions, rather than arrests, promotes the presumption of innocence by ensuring that only guilty individuals obtain a criminal record.<sup>335</sup> Innocent individuals should not have a criminal record or suffer negative effects in their personal and professional lives for a crime they did not commit.<sup>336</sup>

Potential opposition to basing criminal records on convictions, rather than arrests or non-convictions, may involve governmental transparency concerns.<sup>337</sup> “[A]ny government records deemed public are accessible [to the public through] the Freedom of Information Act (“FOIA”).”<sup>338</sup> If criminal records were based on convictions, not arrests, then arrests would not be considered public information, which some fear could lead to a lack of public oversight allowing for corruption and more unlawful arrests.<sup>339</sup> However, there would still be public oversight and transparency for a few reasons.<sup>340</sup> First, there would still be governmental transparency through the court system because, just like in the EU, court records in the United States would still be open to the public.<sup>341</sup> In the EU, even though both arrest history and conviction information is private information, court records are still public to allow for “fair and public trials.”<sup>342</sup> While the United States government likely could not restrict press reporting regarding these public trials like the EU,<sup>343</sup>

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334. *See id.* at 368 (discussing that policymakers can limit end-users', such as employers', exposure to expunged records).

335. *See Callanan, supra* note 4, at 1278, 1292–93 (discussing that the presumption of innocence should be permanent for the non-convicted criminal defendant).

336. *See id.* at 1292–93 (“Society views a criminal charge as an indication of . . . guilt regardless of the . . . outcome of the case.”).

337. *Haber, supra* note 8, at 378.

338. *Id.* at 376; *see also* Freedom of Information Act, 5 U.S.C. § 522.

339. *See Haber, supra* note 8, at 378 (explaining that public oversight helps ensure that governmental agencies do not abuse their power).

340. *Id.* at 379.

341. *See id.* at 359 (“[EU] court records must generally be ‘fair and public’ and . . . judgements must be . . . publicly [announced] . . .”); U.S. CONST. amend. VI (explaining that to be in accordance with the Sixth Amendment, trials in the United States must remain public because criminal defendants are guaranteed the right to a public trial).

342. *Haber, supra* note 8, at 359.

343. *Id.*; Calvert & Bruno, *supra* note 115, at 126 (“[T]he freedom of the press provided by the First Amendment to journalists allows the news media to freely and truthfully report on all varieties of criminal matters as watchdogs on government . . .”) (footnote omitted).

defendants in the U.S. can be provided anonymity until the conclusion of their case.<sup>344</sup> Individuals found to be innocent after trial will maintain their anonymity, while individuals convicted after trial will lose their anonymity and will acquire a public criminal conviction record.<sup>345</sup> Public oversight to maintain the integrity of the court system can still be accomplished while affording defendants anonymity because: (1) lawyers are typically involved in the legal process until adjudication, (2) the true names of the lawyers, prosecutors, and judges will still be available in court proceedings, and (3) the defendants have the right to appeal their final decisions for appellate court review.<sup>346</sup> Removing identifying information about a criminal defendant from case records still enables public oversight of the judiciary to ensure proper decisions are being handed down.<sup>347</sup>

Currently, basing the criminal record system on arrests does not necessarily provide the public with any more public oversight or governmental “transparency” than if arrest records were not considered public criminal history information because the underlying events of an arrest are accounted for from the officer’s perspective.<sup>348</sup> Arrest information does not necessarily ensure governmental “transparency” and public oversight of law enforcement because police reports do not necessarily relay the underlying events of an arrest with complete accuracy.<sup>349</sup>

Overall, basing criminal records on convictions will promote the presumption of innocence while still allowing for public oversight of the judiciary to ensure that proper decisions are being handed down.<sup>350</sup>

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344. See Haber, *supra* note 8, at 380 (“There are a few exceptions to the American approach towards the publication of criminal records, as court proceedings are not always open, and the dissemination of personal information is not always permissible.”) (footnote omitted).

345. Callanan, *supra* note 4, at 1305 (discussing that courts could remove identifying information about defendants when courts find defendants not guilty or dismiss the case, which protects privacy rights and maintains public access to courts).

346. Haber, *supra* note 8, at 379.

347. Callanan, *supra* note 4, at 1305.

348. See Haber, *supra* note 8, at 378–79; Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, L. & CONTEMP. PROBS., Autumn 2008, at 93, 95–96 (“In covering crime stories, journalists typically rely on law-enforcement officials’ views, downplaying the defense perspective while minimally acknowledging the innocence presumption. Thus, news of crime generally exhibits a pro-prosecution bias, rooted most importantly in this dependence of reporters on official and, therefore, purportedly credible sources.”) (footnotes omitted).

349. See Haber, *supra* note 8, at 378; *Arrests as Guilt*, *supra* note 7, at 1019 (“If a police account is seen as the truth, and if acts are commonly assumed to equal crimes, then the police account of an alleged act, which can suffice for the purposes of an arrest, may also be taken as sufficient to establish guilt.”) (footnotes omitted).

350. See Callanan, *supra* note 4, at 1305.

## V. CONCLUSION

In conclusion, criminal records that consist of mere arrests without a conviction still erect barriers that may last a lifetime for legally innocent individuals.<sup>351</sup> In a system that values the presumption of innocence, records of arrests should not be as damaging as records of convictions.<sup>352</sup> Yet, arrests can be just as consequential as convictions in a system that bases its criminal records on arrests rather than convictions.<sup>353</sup> Expungement used to be able to restore arrestees' innocent status by effectively making criminal history records invisible to the public.<sup>354</sup> The digital age, however, has gutted the effectiveness of expungement.<sup>355</sup> There are solutions proposed to make expungement more effective and thus, limit the collateral consequences faced by innocent individuals with an arrest record.<sup>356</sup> Most proposed solutions, however, have focused on retracting public exposure to arrest information after that information was already disseminated to CRAs or was already made public by news reports, social media posts, or mugshot websites.<sup>357</sup> Once information is legally disseminated and published on the internet, later requiring its removal conflicts with constitutional guarantees like the freedom of the press and the freedom of speech.<sup>358</sup> Thus, proposed solutions like recognizing a right to be forgotten or implementing laws that make criminal history information private only after expungement are bound to conflict with constitutional rights, since these solutions require the erasure of information that was already lawfully published.<sup>359</sup> Ultimately, expungement in the digital age is merely a symbolic gesture from the government because any attempt to extend expungement requirements to nongovernmental sources—to make expungement more effective in the digital age—will likely be deemed a form of censorship.<sup>360</sup>

Consequently, the original goal behind expungement statutes—to make innocent arrestees' criminal history invisible to the public—must be satisfied by other means.<sup>361</sup> The United States should follow the EU by basing its criminal record system on convictions rather than arrests to make an

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351. *See Arrests as Guilt, supra* note 7, at 997–98.

352. *See Callanan, supra* note 45, at 1308.

353. Lantz & Minutola, *supra* note 4, at 12.

354. Haber, *supra* note 8, at 348.

355. *Id.* at 338.

356. *Id.* at 368, 370.

357. *Id.* at 370–71.

358. Westrope, *supra* note 216, at 375; Calvert & Bruno, *supra* note 115, at 138.

359. Haber, *supra* note 8, at 371.

360. Corda, *supra* note 183, at 25.

361. *See* Haber, *supra* note 8, at 347.

innocent arrestee's arrest information invisible to the public and to preserve the presumption of innocence.<sup>362</sup> Basing the criminal record system on arrests has led to a common belief that when an individual is arrested or charged with a crime, that individual must be guilty of something.<sup>363</sup> In reality, arrests are carried out for many reasons other than as a response to criminal conduct.<sup>364</sup> Basing the United States' criminal record system on convictions rather than arrests will limit public exposure to innocent individuals' interactions with the criminal justice system, which will help preserve their innocence without compromising public safety or governmental transparency.<sup>365</sup>

The answer to the age-old question, "if they [were] innocent, why did they run from the police?", is quite clear in a country where mere arrests paint innocent individuals as criminals.<sup>366</sup> There are many reasons why innocent individuals may attempt to evade arrest, including the fact that innocent individuals want to retain their innocence in a society where arrests can be just as socially and professionally stigmatizing as convictions.<sup>367</sup> In the *Land of the Free*, criminal records should be based on guilt rather than accusation.<sup>368</sup>

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362. Jacobs & Blitsa, *supra* note 3, at 136–37.

363. Callanan, *supra* note 4, at 1278.

364. Natapoff, *supra* note 306, at 1331–32.

365. *See* Reza, *supra* note 317, at 803 (footnote omitted); Callanan, *supra* note 4, at 1305.

366. *See Why Innocent People Fear and Run from the Police*, LEARNABOUTGUNS.COM (Sept. 2, 2020), <http://www.learnaboutguns.com/2020/09/02/why-innocent-people-run-from-the-police/>.

367. *See id.* (explaining reasons why innocent individuals may run from the police).

368. Callanan, *supra* note 4, at 1278 (discussing that the non-convicted should not suffer consequences outside of court due to society's skepticism in the legal outcome).