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# A Scarlet Letter Written in Permanent Digital Ink: How New Jersey's Open Record Act and Protection of the News Media make Reputational Repair Impossible and Expungements Irrelevant in the Digital Age

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## Introduction

A Google search of the term “Keith Karol NJ” will turn up the following as the first result of the inquiry: “NJ.Com: Bridgewater Teen Faces Drug Charges After Rutgers Dorm Room Raid; Keith Karol arrested for alleged possession of marijuana and cocaine.”<sup>1</sup> The article details that in March of 2011, dorm rooms were raided at Rutgers University, and as a result the 19-year-old Rutgers student, “was charged with possession of marijuana and cocaine and possession with intent to distribute the drugs.”<sup>2</sup> There is no further links or updates to the article. Upon investigation into the public record, it appears that the charges against Keith Karol were dismissed in their entirety a few months thereafter.

In New Jersey, it is common practice for police officers when they find drugs in a shared dorm or apartment, to charge everyone that resides therein with possession.<sup>3</sup> Once the true possessor is found or admits to same, charges against the others are dropped. Neither the news article detailing Keith Karol’s arrest, nor the public record search of Keith Karol’s incident provide that this was the situation that occurred in the Rutgers dorm room in March, but it is a possibility which exists. However, what is known is that the charges against Keith Karol were dismissed in a court of law in New Jersey. Yet in the public eye, his guilt is still perceived. There is no update or link to the article correctly spelling out the updated disposition of his record, just a story of his arrest. Currently, in 2015, Keith Karol should have graduated or been on his way

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<sup>1</sup> Google Search Result (December 1, 2015), [https://www.google.com/?gws\\_rd=ssl#q=keith+karol+nj](https://www.google.com/?gws_rd=ssl#q=keith+karol+nj).

<sup>2</sup> Audrey Levine, NJ.Com: Bridgewater Teen Faces Drug Charges After Rutgers Dorm Room Raid Keith Karol arrested for alleged possession of marijuana and cocaine, (November 11, 2015), <http://patch.com/new-jersey/bridgewater/njcom-bridgewater-graduate-arrested-on-drug-charges>.

<sup>3</sup> See 10A N.J. Pl. & Pr. Forms § 93:135 (“The law recognizes that possession may be constructive instead of actual.. A person who, although not in actual possession of a thing, has knowledge of its character, knowingly has both the power and the intention at a given time to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.”)  
Id.

towards graduation, and he can expect that any prospective employer will immediately find and locate that article.<sup>4</sup>

Keith Karol's story is a common one in the age of the Internet, and the avenues of recourse are still largely unknown at this time in light of the emerging technology. This article addresses the way which New Jersey legislation and case law, in its condescending purposes and effects, have created a system with no opportunity for relief for an individual wishing to ameliorate the reputational collateral effects of a prior arrest or criminal record. Specifically, the article addresses how New Jersey open record laws, privileges and protections provided to the newspapers by New Jersey courts, and the ease and accessibility of obtaining information through the internet, have created a circumstance where an arrestee may forever be plagued with an arrest article posted on the internet, detailing the incident involved, as appearing as a first hit Google search of their full name.

In Part I of the article, I discuss the New Jersey laws and regulations that allow the news media to obtain criminal and arrest information about the public.<sup>5</sup>

In Part II, I review a growing and lucrative online market, the online publication of mug shots, and analyze the current standing on New Jersey law as to the phenomenon.<sup>6</sup>

In Part III, I discuss the different avenues available, and unavailable, for relief for one who has suffered from a damaged reputation pursuant to these widely publicized internet publicized arrest stories.<sup>7</sup>

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<sup>4</sup> Richard J. Peltz, *Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm*, 34 Ohio N.U. L. Rev. 717, 718 (2008) ("Today, Google is a commonplace part of employment decisions with regard to hiring and firing.").

<sup>5</sup> See *infra*, Part I.

<sup>6</sup> See *infra*, Part II.

<sup>7</sup> See *infra*, Part III.

In Part IV, I assert that New Jersey does not practice a “Right to be Forgotten,” unlike the European Union (E.U.). I further assert that New Jersey’s only recognized right to reputational remediation pursuant to a criminal past, an expungement, is deficient and obsolete in its purpose with respect to the emerging technology of the internet.<sup>8</sup>

In Part V, I assert that New Jersey’s statutes, legislation, and case law are so contradictory in their practice and function that there exists no avenue for relief for one who wishes to move on from their criminal past.<sup>9</sup>

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<sup>8</sup> See *infra*, Part IV.

<sup>9</sup> See *infra*, Part V.

## I. How an Arrest Story Makes its Way to Computer Screens in New Jersey

The reputational damage begins at the inception of one's arrest. Once an individual is arrested in New Jersey, and thus part of the court system; the allegations, incidents, and subsequent dispositions all become a part of the government record. From the moment a passerby makes a phone call to a police station, until the time when an individual is being hauled to jail, and everything that occurs in between; all contact with the criminal justice becomes a part of that record. What is and what is not subject to disclosure and release to the press turns on an analysis of New Jersey's Open Public Records Act (OPRA) and New Jersey's Common Law Right of Access ("the common law").

Under OPRA, any "citizen of this State" has the right to inspect and copy public records.<sup>10</sup> There is no restriction against the commercial use of government records under OPRA.<sup>11</sup> Therefore, the newspapers can utilize the information for the commercial gain at the cost of the reputational damage and exposure of an arrestee. New Jersey has exempted from disclosure, and thus access by newspapers, criminal investigatory records.<sup>12</sup> Criminal investigatory records are defined as "a record not required by law to be made, maintained or kept on file that is held by a law enforcement agency pertaining to any criminal investigation or related civil enforcement proceeding."<sup>13</sup> Falling under this exception are arrest reports and police reports, in addition to recordings made by mobile video recorders (MVRs), reports and officer work product, UFRs, incident reports, operation reports, investigation reports, offense reports, and supplemental reports.<sup>14</sup> Also, exempted is an individual's criminal history information.<sup>15</sup>

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<sup>10</sup> N.J.S.A. 47:1A-1.

<sup>11</sup> See *Spaulding v. County of Passaic*, GRC Complaint No. 2004-199 (September 2006). See also *Burnett v. County of Bergen*, 198 N.J. 408 (2009).

<sup>12</sup> N.J.S.A. 47:1A-1.1.

<sup>13</sup> *Id.*

<sup>14</sup> See *River Edge Savings & Loan Association v. Hyland*, 165 N.J. Super. 540, 545 (App. Div.), certif. denied, 81 N.J. 58 (1979), ("no law required that results of law-enforcement official's investigation into alleged criminal

<sup>15</sup> *Id.*

So how then does one's arrest in New Jersey become publicized on the Internet? If an arrest has been made, OPRA allows, upon immediate request, the release of *information* (not the actual records) of the arrestee's name, age, residence, occupation, marital status, time and place of arrest, text of the charges, accusation, indictment, arresting personnel and agency, amount of bail and whether it was posted, information of the circumstances immediately surrounding the arrest, details regarding any pursuits, and the use of any weapons.<sup>16</sup> This information can be released in the form of a redacted police report<sup>17</sup>, which only displays those specific details, or it will come in the form of a press release by the police agency, summarizing the contents to address those pertinent details.<sup>18</sup> Thus, the events likely to take place are that a newspaper will contact a police station and make a request under OPRA for information regarding arrests on a routine basis. Newspapers will generally contact police stations and request arrest information in a bundle to be displayed and published on their websites. These requests may come in the form of a written request or electronically, allowing streamlined access to arrest information.<sup>19</sup> Thereafter, the police station will provide the aforementioned pertinent details surrounding the incident and the subject arrestee, including the personal information outlined above, which will

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offense be maintained or kept, and thus such results were not subject to Right-to-Know Law"). See also *Asbury Park Press, Inc. v. Borough of Seaside Heights*, 246 N.J. Super. 62, 67 (Law Div. 1990) ("no law required that police reports be maintained or kept and thus reports were not subject to [the] Right-to-Know Law").

<sup>15</sup> *N.J.A.C. 13:59-1.1*. (Access to the State Criminal History Record Information File is limited to specifically authorized agencies.)

<sup>16</sup> *N.J.S.A. 47:1A-3(b)*.

<sup>17</sup> See *Morgano v. Essex County Prosecutor's Office*, GRC Complaint No. 2007-156 (February 2009) (Counsel held that the most comprehensive government record that contains the information in *N.J.S.A. 47:1A-3.b* is an arrest report.)

<sup>18</sup> See *N. Jersey Media Grp., Inc. v. Twp. of Lyndhurst*, 441 N.J. Super. 70, 81, 116 A.3d 570, 576 (App. Div. 2015) (Issuing a press release with some information related to the OPRA request fulfills a requirement that certain information concerning a criminal investigation must be made available to the public within 24 hours or as soon as practicable of a request for such information.)

<sup>19</sup> *Russo v. City of East Orange (Essex)*, GRC Complaint No. 2014-430 (the City's policy of banning submission of OPRA requests electronically represents an unreasonable obstacle on access, "Allowing for at least one form of electronic transmission method is reasonable in a time when citizens and public agencies are increasingly relying on technology to perform their daily duties. Additionally, allowing for at least one electronic method will provide an efficient and expedient method for requestors to obtain records.")

<sup>40</sup> *Id.*

subsequently be published to a newspaper on either to a print newspaper, to an article posted on the Internet on the news media's website, or both.

The press will not be able to obtain much more than this general information until the closure of an investigation. Once a case is closed from investigation, while the records are not statutory public records and thus still not accessible under OPRA, police reports and records are considered common law public records which may be subject to disclosure, albeit with restriction set by the court<sup>20</sup>, following an in camera review and balancing of interests, whereby the interest in access by the press is weighed against the interest in confidentiality.<sup>21</sup> Because the investigation is closed, the confidentiality interest diminishes, thus increasing the chances that the court will find in favor of access of criminal investigation records.<sup>22</sup>

Common Law requests by the press differ in that access to closed investigation criminal records require standing, where comparatively, OPRA does not require any reason to justify disclosure. Because the press has been determined by the New Jersey courts to be “the eyes and ears of the public,” being part of a reporting agency alone is generally sufficient to confer standing for access to public documents.<sup>23</sup> Even though the press is gathering the information largely under a motive for profit, the New Jersey courts have determined a private profit motive to be sufficient for standing.<sup>24</sup> Newspapers, as commercial entities, will regularly pursue and print stories based on their potential popularity and public interest, and even though the story

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<sup>20</sup> *McClain v. College Hospital*, 99 N.J. 346, 429 A.2d 991 (1985).

<sup>21</sup> See *Shuttleworth v. City of Camden*, 258 N.J. Super. 573, 610 A.2d 985 (App. Div. 1992). See also *Asbury Park Press Inc. v. Borough of Seaside Heights*, 246 N.J. Super. 62, 586 A.2d 870 (Law Div. 1990).

<sup>22</sup> *Id.*

<sup>23</sup> See *South Jersey Publishing Co. v. New Jersey Expressway Auth.*, 124 N.J. 478, 496–97, 591 A.2d 921 (1991). See also *S. New Jersey Newspapers, Inc. v. Twp. of Mt. Laurel*, 141 N.J. 56, 660 A.2d 1173 (1995).

<sup>24</sup> *Higg-A-Rella, Inc. v. Cty. of Essex*, 141 N.J. 35, 47, 660 A.2d 1163, 1166 (1995).

<sup>40</sup> *Id.*

may not inherently serve the public interest, standing under common law right of access is still conferred by the New Jersey courts.<sup>25</sup>

Collectively, under both OPRA and the common law, New Jersey is extremely protective over police reports and other government records upon the initiation of an arrest. However, one should not confuse this protective nature in light of the reputational damage and privacy interest of a defendant, as may easily be initially gathered upon the plain reading of the first section of OPRA which states that “a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy.”<sup>26</sup> This clause, however, has been deemed not to reflect a legislative intent to create private causes of action for those who believe their privacy rights have been violated.<sup>27</sup> Rather, New Jersey finds a strong public interest in the success of criminal prosecutions and the protection of potential witnesses and informants to be “vital.”<sup>28</sup> In fact, because the information regarding an individual’s arrest is statutorily required to be available, there is no implication to a right to privacy for the alleged criminal defendant.<sup>29</sup>

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<sup>25</sup> *Home News v. State, Dep't of Health*, 144 N.J. 446, 454, 677 A.2d 195, 198 (1996).

<sup>26</sup> *N.J.S.A.* 47:1A-1.

<sup>27</sup> *Ferraro v. City of Long Branch*, 314 N.J.Super. 268, 714 A.2d 945 (A.D.1998), certification denied 157 N.J. 541, 724 A.2d 801.

<sup>28</sup> *Loigman v. Kimmelman*, 102 N.J. 98, 101, 107-108 (1986).

<sup>29</sup> *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367, 36 A.L.R.5th 711 (1995).

<sup>40</sup> *Id.*

## II. Mug Shot Disclosure under New Jersey State Law and the Freedom of Information Act

Website and news organizations publish mug shots of individuals only if they are released by law enforcement agencies. On the state level, whether and how news media and websites obtain mug shots from state law enforcement agencies depends on the individual state's open record laws.

Mug shots in New Jersey are exempt from disclosure during criminal investigations, thus denying the press routine access as they may have in other states.<sup>30</sup> However, certain police agencies will routinely publish mug shots to their website. Current New Jersey law does not address the availability of mug shots to the public; rather, such is left to the discretion of individual police agencies.<sup>31</sup> In 2013, two bills were proposed regarding publication of mug shots in New Jersey. Bill No. 3906 proposed amending OPRA to make mug shots of anyone arrested but not yet convicted confidential. Bill No. 4083 proposed requiring mug shots, along with names and addresses of arrestees, to be released to the public in a routine manner. However, neither bill gained enough support to move forward and be passed. Thus, in New Jersey, depending on the municipality of one's arrest and the policies set forth therein, an alleged criminal defendant may be subject to publication of their mug shot, even if found not guilty and their reputation subsequently damaged. With the advent of the Internet, mug shots have become the subject of exploitative websites, who indiscriminately post the photographs and charge enormous fees for removal.<sup>32</sup>

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<sup>30</sup> Executive Order 69 (Whitman 1997) provides that fingerprint cards, plates and photographs and similar criminal investigation records that are required to be made, maintained or kept by any State or local government agency are exempt from disclosure under OPRA.

<sup>31</sup> Statement. 2012 New Jersey Assembly Bill No. 4083, New Jersey Two Hundred Fifteen Legislature – Second Annual Session.

<sup>32</sup> See Mugshots.com “UNPUBLISH MUGSHOT” function (“Which service would you like to purchase? 1 arrest including mugshot(s) - \$399.00; 2 arrests including mugshots - \$798.00; 3 arrests including mugshots - \$1197.00; 4

Those individuals charged with federal crimes will typically have their mug shots taken and archived by the United States Marshals Service (USMS).<sup>33</sup> Because the USMS is a federal law enforcement agency, their disclosure of mug shots is governed by the federal law, namely, the Freedom of Information Act (FOIA).<sup>34</sup> Under the FOIA, there exists an exception that allows for the government to withhold “records or information compiled for law enforcement purposes” when the disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”<sup>35</sup> This exemption is unlike the privacy exemption under OPRA, which only prohibits disclosure when it violates a persons reasonable expectation of privacy, which as previously discussed, the courts have determined the criminal arrestee does not have a right to such an expectation.<sup>36</sup>

The exception has been the subject of three Circuit Court decisions. The Sixth Circuit found is favor of disclosure as it found no privacy interest in the arrestee whose mug shot was released.<sup>37</sup> The Tenth and Eleventh Circuits, however, found in favor of nondisclosure, and found that under the FOIA, the mug shots of arrestees were to be exempted.<sup>38</sup> However, because the FOIA privacy exception applies to the location of the requestor, in practice, all mug shots were able to be obtained from the USMS by having all requests “come from” a location within the Sixth Circuit, as under the FOIA, the location of the actual arrest being irrelevant.<sup>39</sup>

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arrests including mugshots - \$1479.00; 5 arrests including mugshots - \$1799.00”) (November 5, 2015), <http://mugshots.com/>.

<sup>33</sup> Kathryn Shephard, *Mug Shot Disclosure Under FOIA: Does Privacy or Public Interest Prevail*, 108 Northwestern U. L. Rev. 343, 345 (2014).

<sup>34</sup> *Id.*

<sup>35</sup> 5 U.S.C. 552(b)(7)(C).

<sup>36</sup> See *supra*, Part I at 7.

<sup>37</sup> *Detroit Free Press Inc. v. Dep’t of Justice*, 73 F.3d 93, 96-97 (6<sup>th</sup> Cir. 1996).

<sup>38</sup> See *World Publishing Co. v. U.S. Dep’t of Justice*, 672 F.3d 825 at 826 (10<sup>th</sup> Cir. 2012). See also *Karantsalis v. U.S. Dep’t of Justice*, 635 F.3d 497, 504 (11<sup>th</sup> Cir. 2011).

<sup>39</sup> See *supra*, Kathryn Shephard at 346.

<sup>40</sup> *Id.*

In light of the confusion caused by the Circuit Court decision, in December of 2012, the USMS implemented a blanket policy that mug shots would not be disclosed unless it would serve a legitimate law enforcement purpose.<sup>40</sup> Thus, looking at the federal FOIA privacy exemption and New Jersey privacy exemption comparatively, even though the Tenth and Eleventh Circuit opened the door to give arrestees a privacy right, the Sixth Circuit's opinion in finding that no privacy right exists, made the Sixth Circuit opinion mute for practical purposes and all mug shots were able to be obtained by simply making a request from within the Sixth Circuit jurisdiction. Therefore, whether or not a mug shot will be disclosed to the public, whether on the New Jersey state level or on the federal level, will be entirely dependent on the individual policies of the agencies holding the records. Both OPRA and the FOIA have failed to clearly set forth a bright line universal rule with regard to withholding or disseminating this type of information. An arrestee's reputational injury thus largely depends on where they were arrested and the individual policies of the law enforcement agency housing the records therein.

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<sup>40</sup> Id.

### III. Finding a Cause of Action for a Damaged Reputation

One of the greatest frustrations that may come about for an individual whose arrest has been made public knowledge on internet news media sources is that very little can be done to remove the information or receive any type of compensation for the reputational damage that ensues, based on the way the police blotters and arrest articles are written by news media and the protections thereby provided by the New Jersey courts. For the most part, the articles published to the media and posted on the internet are true, Keith Karol *did* get arrested for possession of marijuana.<sup>41</sup> The fact that the charges against Keith Karol were subsequently dropped in their entirety a few months later and no mention is made of that in the news article, does not change the fact that the substance of the article is true.<sup>42</sup>

For a damaged reputation Plaintiff in New Jersey, the two most appropriate and common causes of action for relief against a news media agency would be the tort of Defamation and the tort of False Light. When an individual brings an action for defamation against a news media defendant, the plaintiff must prove the following three elements: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the statement was communicated to another person (and was not privileged); and (3) that the defendant published the defamatory statement with actual malice.<sup>43</sup> Generally, a defamatory statement is one that “subjects an individual to contempt or ridicule, one that harms a person's reputation by lowering the community's estimation of him or by deterring others from wanting to associate or deal with him.”<sup>44</sup>

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<sup>41</sup> See *supra*, Introduction at 1.

<sup>42</sup> *Id.* at 1-2.

<sup>43</sup> *Durando v. Nutley Sun*, 209 N.J. 235, 248-49, 37 A.3d 449, 457 (2012).

<sup>44</sup> *Id.*

The elements of a false light claim are: (1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.<sup>45</sup> Further, the publicized material in a false light claim must constitute a "major misrepresentation" of the plaintiff's "character, history, activities, or beliefs."<sup>46</sup> The tort of false light is "analogous to defamation, in that the statement which gives rise to the cause of action must be untrue."<sup>47</sup>

Thus, both tort claims protect against offensive false statements made about an individual. The main difference between the two claims is that defamation protects the public reputation of an individual, whereas false light focuses on the potential disruption of the harmed plaintiff's internal mental tranquility.<sup>48</sup> The similar key to both claims, and the similar factors that make the arrestee's claim quite difficult, is that in order to succeed in either the arrestee plaintiff must show (1) that the information/statement was *false*; and (2) that the news media defendant acted with "actual malice."<sup>49</sup>

Because the arrest articles posted in today's news are generally true at the time they were written, in light of the facts given to the news media by the police agency at the time of an individual's arrest, the statements made therein are likely true and thus not actionable. If a news media defendant is able to show a court that the information reported was truthful at the time that

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<sup>45</sup> *Leang v. Jersey City Bd. of Educ.*, 198 N.J. 557, 588-89, 969 A.2d 1097, 1115-16, 29 I.E.R. Cas. (BNA) 72 (2009) (citing Restatement (Second) of Torts § 652E). See also *Ingris v. Drexler*, 2015 WL 1472657, 4 (D.N.J. 2015).

<sup>46</sup> See *Id.* See also 18 N.J. Prac., Employment Law § 13.2 (2d ed.).

<sup>47</sup> *Bisbee v. John C. Conover Agency, Inc.*, 186 N.J. Super. 335, 341-42, 452 A.2d 689, 692 (App. Div. 1982).

<sup>48</sup> *Romaine v. Kallinger*, 537 A.2d 284, 290 (N.J. 1988).

<sup>49</sup> See *Miele v. Rosenblum*, 603 A.2d 43, 48 (N.J. Super. Ct. App. Div. 1991).

it was reported, such would be a valid common law defense in a defamation action.<sup>50</sup> Under the First Amendment, true statements by the news media are absolutely protected.<sup>51</sup>

Thus, the only way a claim of defamation or false light for the arrestee with a damaged reputation pursuant to the local police blotter's website has any chance of success is if criminality is falsely attributed.<sup>52</sup> Where a false criminal accusation may fall into this category, a true and accurate report about an arrest where updates as to the final disposition of the case are omitted will not.<sup>53</sup>

The additional obstacle that one may face in pursuing a defamation and/or false light claim against the news media regarding an arrest article is the "actual-malice" standard afforded to issues relating to public concern and news media defendants. In New Jersey, free speech protections are expanded beyond that of their federal counterpart in cases involving media and media-related defendants.<sup>54</sup> Further, the enhanced protection of an actual-malice standard in New Jersey are given to any type of defamation/false light defendant, whether media or non-media, when the statements and/or information relate to matters of public concern.<sup>55</sup> Even the question as to whether the plaintiffs bringing forth the action are a private person or public figure is irrelevant when the issue relates to that of public concern; the actual-malice standard will apply.<sup>56</sup> Unfortunately for the plaintiff and former arrestee, criminal allegations will always involve a matter of public interest or concern, and thus will be subject to the higher "actual- malice" standard of review in New Jersey courts.<sup>57</sup>

<sup>50</sup> *G.D. v. Kenny*, 205 N.J. 275, 293, 15 A.3d 300, 310 (2011).

<sup>51</sup> *Ward v. Zelikovsky*, 136 N.J. 516, 530, 643 A.2d 972, 979 (1994).

<sup>52</sup> *G.D.*, supra, 205 N.J. at 293.

<sup>53</sup> See *Hoagburg v. Harrah's Marina Hotel Casino*, 585 F.Supp. 1167 (D.N.J.1984). See also *Dijkstra v. Westerink*, 168 N.J.Super. 128, 401 A.2d 1118 (App.Div.1979), certif. den. 81 N.J. 329, 407 A.2d 1203 (1979).

<sup>54</sup> *Durando*, supra, 209 N.J. at 250.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Senna v. Florimont*, 196 N.J. 469, 496-97, 958 A.2d 427, 443-44 (2008).

In order for a fact finder to determine that an editor or news media publisher acted with actual-malice, the news media defendant must have either (1) in fact entertained serious doubts about the truth of the arrest article or the contents therein; or (2) had a subjective awareness of the story's probable falsity.<sup>58</sup> Thus, in order for a plaintiff to produce clear and convincing evidence of actual malice on behalf of the news media defendant, the news media must have “published the article with knowledge of the article's falsity or with reckless disregard for whether the article was true or false.”<sup>59</sup> As previously discussed, at the time of publication of an arrest article, editors will largely report the direct summaries of the facts provided by the police agencies, therefore, knowledge of falsity is likely not to be relevant.<sup>60</sup>

Alternatively, it would seem reasonable to evidence reckless disregard of the truth by way of the editors or publishers failure to update the arrest articles and police blotter websites according to the disposition of the criminal cases initially reported on. However, the state of mind standard applies only at the time of publication, as there exists no common law or statutory duty for the news media to update their articles.<sup>61</sup> The news media website, NorthJersey.com, provides that practical meaning of this standard within their police blotter policy, therein stating: “Any posted content will NOT be removed from northjersey.com or otherwise edited unless it was inaccurate at the time of publication. This means that if we have posted information about a charge or arrest that is ultimately dismissed, dropped or expunged, or if you are ultimately found not guilty of the charge, the information will remain posted because it was accurate at the time of

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<sup>58</sup> *Costello v. Ocean Cty. Observer*, 136 N.J. 594, 615, 643 A.2d 1012, 1022 (1994)

<sup>59</sup> *Id.* at 1025.

<sup>60</sup> See *supra*, Part III at 12-13.

<sup>61</sup> See *Costello*, *supra*, 136 N.J. 594 at 616.

publication.”<sup>62</sup> Thus, the NorthJersey.com police blotter policy is consistent with a successful defense of a defamation and/or libel action pursuant to the heightened actual-malice standard.

Even in the circumstance that the contents of an arrest article were not entirely true and/or inaccurate, such as minor details regarding biographical information or minor factual inaccuracies, a news media defendant will not only escape liability pursuant to the actual-malice standard, but will also prevail pursuant to the fair report privilege given exclusively to news media defendants as well. Careless acts of publication, usually considered irresponsible by journalistic standards, are shielded.<sup>63</sup> Clumsy editing and mistakes due to a news media defendant's haste to edit will not meet the actual-malice threshold.<sup>64</sup>

Regardless of the news media defendant's mindset, the fair-report privilege provided to news media defendants will likely allow the liability-exonerating defense of truth to be asserted.<sup>65</sup> Protected by a fair-report privilege in New Jersey, an article published by the news media “need not be a verbatim report; it is enough that the report be a rough-and-ready summary that is substantially correct” in order to abstain from liability.<sup>66</sup> The entire news article will be looked at on a whole to determine the impression on the reader, and “minor inaccuracies [will] not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge be justified.’”<sup>67</sup> The leniency is provided, in part, because the focus of defamation law is on the “substantial truth,” thus minor inaccuracies may be overlooked.<sup>68</sup> Thus, sloppy journalism and careless acts of an editor, which may ultimately lead to the damaged reputation of an individual,

<sup>62</sup> NorthJersey.com police blotter policy, (February 18, 2014), <http://www.northjersey.com/about-us/northjersey-com-police-blotter-policy-1.177155>.

<sup>63</sup> *Lawrence v. Bauer Publ'g & Printing Ltd.*, 89 N.J. 451, 468 (1982).

<sup>64</sup> *Schwartz v. Worrall Publ'ns, Inc.*, 258 N.J. Super. 493, 497, 502, 610 A.2d 425 (App.Div.1992).

<sup>65</sup> *G.D.*, supra, 205 N.J. at 293.

<sup>66</sup> *Salzano v. N. Jersey Media Group Inc.*, 201 N.J. 500, 523, 993 A.2d 778 (2010).

<sup>67</sup> See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S. Ct. 2419, 2433, 115 L. Ed. 2d 447 (1991).

See also *G.D. v. Kenny*, 205 N.J. 275, 294, 15 A.3d 300, 310-311 (2011).

<sup>68</sup> *Masson*, supra, 501 U.S. at 516.

will likely result in no liability on behalf of the news media in large part due to their protected privilege.

It is clear that the generous protections and privileges afforded to the New Jersey news media defendant in a defamation and/or false light action are unlikely to provide any satisfactory outcomes to the damaged reputation plaintiff. Notably, however, the New Jersey Supreme Court has stated that with the great protections afforded to a free press, “a great responsibility [is placed] on the media to police itself.”<sup>69</sup> The court has explained that because “the primary objective of a free press is to promote the truth so that citizens will have a better understanding of current events and of the workings of their government” when an article contains false statements “that needlessly do harm to a person's reputation” that primary objective is not advanced which afforded the news media those protections in the first place.<sup>70</sup> An editor or publisher’s “shoddy and careless reporting that leads to the dissemination of false or misleading information is detrimental to the enlightenment of a free society. A newspaper's greatest reward is the public's trust” and thus they should act accordingly in order to retain it.<sup>71</sup>

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<sup>69</sup> *Durando*, supra, 209 N.J. at 257.

<sup>70</sup> *Id.*

<sup>71</sup> *Costello*, supra, 136 N.J. at 620.

#### IV. Does a Right to be Forgotten Exist in New Jersey?

For the individual with a publicized arrest, a likely result that may occur is that upon searching their name into a search engine website, one of the first results that will pop up will be the news article detailing their arrest, even if the article was from years past. The article may not be updated to reflected changes in the disposition of the arrestees' record, such as a dismissal of all charges that were brought forth<sup>72</sup>, as the news media is under no obligation to update same. Unfortunately, in the United States, very little can be done to change the algorithm of the search engine websites that display such incriminating website results first.

The United States Supreme Court has rejected liability on behalf of the media defendant in tort for published articles detailing true facts concerning a rehabilitated former criminal's past, so long as those facts are obtained within the public record.<sup>73</sup> Thus, the fact that an individual may be forever plagued by a single criminal incident in the past is of no issue to a news media defendant, so long as that information was made available through state open record laws, like OPRA. As unequivocally stated by the United States Supreme Court "the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection"<sup>74</sup> and "the press may not be prohibited" from truthfully publishing information released to the public in official court records."<sup>75</sup> Because New Jersey is bound by the decisions of the United States Supreme Court on matters of federal constitutional law, there currently exists no possibility for the state to help remedy the reputational damage caused by the publication of an individual's arrest.<sup>76</sup>

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<sup>72</sup> See, supra, Introduction at 1-2

<sup>73</sup> See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975). See also *Gates v. Discovery Commc'ns, Inc.*, 34 Cal. 4th 679, 692, 101 P.3d 552, 559-60 (2004).

<sup>74</sup> *Id.* at 495.

<sup>75</sup> *Oklahoma Pub. Co. v. Dist. Court In & For Oklahoma Cty.*, 430 U.S. 308, 311 (1977).

<sup>76</sup> See *Gates v. Discovery Commc'ns, Inc.*, 34 Cal. 4th 679, 692, 101 P.3d 552, 560 (2004).

Comparatively, the European Union utilizes a different approach with regard to a “right to be forgotten.”<sup>77</sup> The right to be forgotten in the European Union allows a person to demand for the deletion or erasure of information published on the Internet to which the person objects.<sup>78</sup> Courts have enforced this right, as evidenced by the German courts who ordered certain publishers to remove references to a since rehabilitated convicted murderer's past following his prison release.<sup>79</sup>

Much like the news media original article publications themselves, search results from websites such as Google constitute speech under the United States Supreme Court, and thus, all the great protections and privileges afforded to the news media accordingly follow suit to search engines.<sup>80</sup> In addition, under Section 230 of the Communications Decency Act, search engine websites such as Google, Yahoo, etc. are immunized from liability “for their editorial decisions regarding screening and deletion from their network.”<sup>81</sup> Because Section 230 provides that (1) “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” and (2) “no cause of action may be brought and no liability may be imposed under any State or local rule that is inconsistent with this section”<sup>82</sup> search engine websites such as Google “cannot be held liable for state law defamation based on the fact that it ‘decided’ to publish a third party's statements, which has been identified by the Third Circuit as a traditional editorial function. In the same

<sup>77</sup> See Allyson Haynes Stuart, *Google Search Results: Buried If Not Forgotten*, 15 N.C. J. L. & Tech. 463 (2014)

<sup>78</sup> See Allyson Haynes Stuart, *Google Search Results: Buried If Not Forgotten*, 15 N.C. J. L. & Tech. 463 (2014)

<sup>79</sup> See Jasmine E. McNealy, *The Emerging Conflict Between Newsworthiness and the Right to be Forgotten*, 39 N. Ky. L. Rev. 119, 120 (2012).

<sup>80</sup> Allyson Haynes Stuart, *Google Search Results: Buried If Not Forgotten*, 15 N.C. J. L. & Tech. 463, 485 (2014)

<sup>81</sup> *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007).

<sup>82</sup> 47 U.S.C.A. § 230 (West)

vein, Google cannot be held liable for failing to withdraw this statement once it has been published.”<sup>83</sup>

Traditionally, an individual who wanted to be “forgotten” from their criminal past and have their record cleared for integrity of their public image or when seeking employment, would obtain an expungement order from the New Jersey courts. However, in today’s Internet age, the practical effects of an expungement will likely not be satisfying to the individual with a publicized news article about their arrest. In New Jersey, the expungement-of-records statute<sup>84</sup> is intended to provide “relief to the one-time offender who has led a life of rectitude and disassociated himself with unlawful activity.”<sup>85</sup> However, the relief provided by an expungement, according to the New Jersey Supreme Court, “does not include the wholesale rewriting of history.”<sup>86</sup>

An individual with a criminal background may petition for the expungement “all records and information”, including an arrest, after the dismissal of their case, or even after a conviction with the passage of ten years of time, “from the date of [the] conviction, payment of fine, satisfactory completion of probation or parole, or release from incarceration, whichever is later.”<sup>87</sup> When an expungement petition is granted by court order, the result is not the destruction of records, but rather, the records are removed from government agency files.<sup>88</sup> They are then isolated and contained within an expungement unit, and when a request is made with regard to the conviction the government agency is required to provide the following response to the inquirer; “there is no record information.”<sup>89</sup> Thus, New Jersey’s expungement statute does not

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<sup>83</sup> *Mmubango v. Google, Inc.*, No. CIV.A. 12-1300, 2013 WL 664231, at \*3 (E.D. Pa. Feb. 22, 2013).

<sup>84</sup> *N.J.S.A. 2C:52-1 to -32.*

<sup>85</sup> *N.J.S.A. 2C:52-32.*

<sup>86</sup> *G.D.*, supra, 205 N.J. at 294-95.

<sup>87</sup> *N.J.S.A. 2C:52-2(a)*

<sup>88</sup> *N.J.S.A. 2C:52-15*

<sup>89</sup> *Id.* See *G.D.*, supra, 205 N.J. at 295.

permanently erase or obliterate an individual’s criminal background.<sup>90</sup> Because an individual’s arrest has historically, factually speaking, occurred, a statute is unable to rewrite history, and thus the First Amendment continues to protect the news media’s right to have a published article regarding an arrest online.

Thus, the subsequent expungement of an individual’s criminal record does not require a news agency to “excise from its archives a past story,” because, according to the New Jersey Supreme Court, “common sense tells us that an arrest or conviction may become general knowledge within a community and that people will not banish from their memories stored knowledge even if they become aware of an expungement order. And long before the entry of an expungement order, information about an arrest and conviction may be compiled by data aggregators and disseminated to companies interested in conducting background checks.”<sup>91</sup> The Supreme Court of New Jersey acknowledges that the Internet dramatically changes the effect of expungements, as information is now instantaneously transmitted, “All of the beneficial purposes of the expungement statute, and the protections it provides, will not allow a person to fully escape from his past. The expungement statute—enacted at a time when law enforcement and court documents may have been stored in the practical obscurity of a file room—now must coexist in a world where information is subject to rapid and mass dissemination.”<sup>92</sup> Even if a newspaper knows an expungement order exists at the time of publication, such would not qualify to vault the actual-malice threshold subjecting them to liability in New Jersey.<sup>93</sup>

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<sup>90</sup> *G.D.*, supra, 205 N.J. 275, 297, 15 A.3d 300, 313 (2011).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 314 (2011) (“We cannot conceive that the Legislature intended to punish, under our Criminal Code, persons who have spoken truthfully about lawfully acquired information long contained in public records, even if they know of the existence of an expungement order.”)

Obtaining employment with a criminal background can be an obstacle for many applicants, depending on the field and nature of the position involved. Effective March 1, 2015, under the Opportunity to Complete Act, an employer cannot require an applicant for employment to complete any employment application that makes inquiries regarding an applicant's criminal records during the initial employment application process, unless such is voluntarily initially disclosed by the applicant.<sup>94</sup> However, once the initial employment application process is complete, an employer is not prohibited from inquiring into an applicant's criminal record.<sup>95</sup> The employer may refuse to hire the applicant based on their criminal record without being subject to any discriminatory penalties, unless that record is subject to expungement. Furthermore, New Jersey takes an additional step to protect the individual arrested without a conviction, in order to receive an individual's criminal background history, the inquirer must certify not to presume guilt for any arrests pending court action or charges indicated on records received.<sup>96</sup> Thus, a person must be presumed innocent by an employer if a pending charge has no final disposition on the record indicating guilt.<sup>97</sup> In addition, applicants must be furnished with notice that will allow the individual time to rebut and correct the information on a criminal background report.<sup>98</sup>

It is clear from the legislation that New Jersey has taken significant steps in order to prevent discrimination against the individual with a criminal past. However, these procedures and certifications an employer must abide by, most importantly the presumption of innocence, only takes effect when the employer is making an official request for documentation and records from the New Jersey Criminal Justice Information System or State Bureau of Identification.<sup>99</sup>

<sup>94</sup> N.J. Stat. Ann. § 34:6B-14 (West).

<sup>95</sup> Id.

<sup>96</sup> Guide to Employee Handbooks Appendix H § H:32 (West).

<sup>97</sup> N.J. Admin. Code § 13:59-1.6.

<sup>98</sup> Id.

<sup>99</sup> N.J. Admin. Code § 13:59-1.1.

Nothing in the legislation requires an employer to certify a presumption of innocence based on a published news article of one's arrest. Thus, there exists a hole in the purpose and intent of the current legislation and the reality of modern technology of today. Realistically, and regardless of the stage of the employment process or the existence of voluntary consent by the applicant, an employer needs to only type the applicant's name into an internet search engine in order to obtain criminal history information. As previously discussed, under New Jersey open record laws, the general public has a right to that information and the news media a right to its mass publication.<sup>100</sup> Thereafter, if any public criminal background information is found, the employer may make their own determination of innocence or guilt without the need to sign a certification agreeing to presume the applicant innocent. Not only are the goals of the discrimination legislation frustrated by open record laws and unyielding free speech power to the press, but the new regulations set forth are almost entirely irrelevant and unnecessary in the digital age when public records are widely available on the Internet.

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<sup>100</sup> See supra, Part I.

## V. Analysis - The Issues and Frustrations That Come with the Internet

The common adage, “time heals all wounds,” is no longer relevant to those suffering from reputational damage of a past criminal incident. New Jersey’s open record laws, coupled with its great protection and freedom granted to the press, provides little opportunity for one to forget and move on from a past single incident that may be a poor reflection of their character.

New Jersey Courts initially provided extensive protections and freedoms to the press during a time when society did not have the technology that exists today to widely disseminate information to the public, thus the press required broad latitude in order to fulfill a societal demand. But now that technology has modernized, not only is society able to obtain news quicker on the Internet and search past stories, but the arrest stories of individuals are instantaneously accessible and remain on the Internet in perpetuity. The reputational injuries of individuals with a criminal past are compounded and perpetuated by the current technology, in that the information is readily accessible to all members of the public through a simple Internet search and the longevity of the seemingly permanent publication.<sup>101</sup> News media agencies are not obligated to update stories or remove information, whereas comparatively, the information revealed from a New Jersey record keeping agent would be appropriately updated and tailored to protect confidences in light of an expungement, and provide a rebuttable for correction. At one time, prior to the emergence of the internet news media, the only way one would be able to obtain information related to another’s background was through an official request of an agency, and thus the disclosure was limited. This is no longer the case. The press determines the amount of disclosure, the permanency of one’s past, and ultimately, how an individual will be perceived in the public eye.

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<sup>101</sup> Richard J. Peltz, *Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm*, 34 Ohio N.U. L. Rev. 717, 718 (2008).

Following the publication of an arrest article, the news media has no burden to update or time-stamp the material posted. Because the facts set forth therein are “true,” and simply restate the information provided to the press pursuant to the provisions of OPRA, the news media is relieved from any liability from a defamation claim in a New Jersey court.<sup>102</sup> These protections afforded to the press fail to take into account the defamatory nature of the public’s ready accessibility to an individual’s arrest article when taken out of the context of time, and the potential injuries that arise. A vast amount of law has been updated and changed in order to reflect the new way in which emerging technology, particularly the Internet, transforms traditional legal definitions and notions. What once worked in the past is no longer relevant.

Expungement provisions in New Jersey not only have a defined purpose to relieve one of the reputational plague that comes with a criminal past, but in addition, contains provisions therein to protect the confidences of an individuals who obtained an expungement. Further, New Jersey legislation sets forth employment discrimination law that does not allow one to inquire in the initial application phase about one’s criminal past, yet, nothing is in place to stop the employer from typing the applicant’s name in a Google search bar, under his right to have access to public information; to be viewed in an easily accessible format and permanent publication, pursuant to the press’ freedom unyielding of speech.

The protections afforded to the press by the New Jersey courts are provided largely in part pursuant to the press’ “duty to keep the public informed,” but this notion is largely outdated. The public no longer needs to rely on solely the press for the dissemination of information. Records can be obtained through a number of New Jersey government websites that operate to

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<sup>102</sup> See *supra*, Part III.

serve the very function to provide information to the public.<sup>103</sup> The press just obtains that same information, publishes it for profit, but unlike government entities, fails to update the information according to the disposition of a case, provide an opportunity by the subject of the article's contents to rebut and/or correct the information, and take into account the issuance of an expungement order which would redact the information of an arrest altogether.

Between OPRA, free speech and other legal protections afforded to the press, discrimination legislation, and expungement statutes, each contradicts the others goals. OPRA's purpose is to provide access to the public with government information, not to provide opportunity for the press for commercial profit. The purpose of an expungement is to relieve one of the reputational damage caused in part by their criminal past, yet, the great liberty afforded to the press in New Jersey's court precedent overlooks and steps past that purpose entirely. There is a clear contradiction in New Jersey between the goals of the legislature, and the continuing rulings by the court. So long as speech by the press is strongly protected, the legislature's goals are obliterated.

At this current time, no opportunity for relief exists for the individual whose past arrest has been publicized on the Internet. Their only hope falls within the scope that their arrest took place during a time before the news media made common practice to publicize arrests, that their arrest was not newsworthy or projected enough commercial profit to warrant publication, or that the police agency which took their mug shot has a policy in place not to disclose it. The press has no obligation to remove the article or update the article, and search engines have no obligation to remove the links to the articles on their search result pages.

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<sup>103</sup> See NJ Courts Public Access, <http://njcourts.judiciary.state.nj.us/web15z/ACMSPA/> and <https://njcourts.judiciary.state.nj.us/web15z/ExternalPGPA/>. See also New Jersey State Police: NJ Criminal History Records Information, <http://www.njsp.org/criminal-history-records/>.

Up to the present time, court orders for news media websites to remove and delete arrest articles, even in light of an expungement, have been overturned and thus failed.<sup>104</sup> Logically, this makes sense; a court cannot take action that is contradictory to the very protection it afforded—unlimited and unyielding free speech to the press. Once published, the only avenue for relief rests within the policies of the news media agencies themselves. Although many news media websites enforce a “no update/no removal” policy when it pertains to arrest reports,<sup>105</sup> other news agencies take the position to be more lenient of their first amendment privileges and respectful to the privacy and dignity of the public. If leniency is afforded at all in an online newspaper’s policy, it is likely to take the form of a “no-index” or “un-archiving” of the arrest article upon showing proof of a dismissal of the criminal action or an expungement. Utilizing a Robots Exclusion Protocol (REP)<sup>106</sup>, the article URL is tagged in such a way as to prevent search engine websites from crawling and indexing the site in search results. The article remains on the Internet on the newspaper website, however, in order for one to access the article they would have to first access the newspaper website and then search through the archives, usually by date.<sup>107</sup> This will generally lead to a satisfaction on behalf of the former arrestee, as the negative article will no longer appear on a Google search of his or her name, and locating the article about the arrest will prove to be quite difficult unless one already knew of the arrest and that it was

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<sup>104</sup> Clay Calvert & Jerry Bruno, When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?, 19 CommLaw Conspectus 123, 139 (2010). (“A judge said two local newspapers were no longer under court order to delete archived news articles about clients of a State College lawyer seeking to have their records expunged. The expungement orders will be revised to remove any reference to the *Centre Daily Times* and the *Daily Collegian*, the student paper at Pennsylvania State University, Centre County Judge Thomas Kistler said.”)

<sup>105</sup> See *infra* note 48 and accompanying text; See also [http://www.thesunnews.net/editorial/864-The\\_Sun\\_editorial\\_Bad\\_boys,\\_bad\\_boys\\_-\\_Our\\_police\\_blotter\\_policies\\_and\\_the\\_law.html](http://www.thesunnews.net/editorial/864-The_Sun_editorial_Bad_boys,_bad_boys_-_Our_police_blotter_policies_and_the_law.html) (The policy of The Sun online newspaper, which refuses to update or remove any information regarding arrests.)

<sup>106</sup> See <http://googlepublicpolicy.blogspot.com/2009/07/working-with-news-publishers.html> (instructions from Google to webmasters on how to remove a page from search results)(“If a webmaster wants to stop us from indexing a specific page, he or she can do so by adding '<meta name="googlebot" content="noindex">' to the page. In short, if you don't want to show up in Google search results, it doesn't require more than one or two lines of code.”)

<sup>107</sup> <https://www.abine.com/blog/2011/online-guilty-before-proven-innocent/>

published to that specific news agency website. Thus, if one has no idea about another being arrested in the past, a Google search will not immediately reveal same. For the majority of people, the at-home background search of another ends there- no further investigation is performed. On the other side of the table, the news group is happy because technically the article has not been removed, thus they are not forced to entirely compromise their first amendment rights with regard to publication. Another common, yet less effective remedy offered by news agencies is providing for an update or editorial note upon proof of a dismissal or expungement. Unless used together with the aforementioned no-indexing policy, this has little effect on improving the social stigma associated with an arrest article. Rarely, some news websites will remove an arrest article completely from a website upon proof of a dismissal.<sup>108</sup>

In light of New Jersey Courts clear stance not to budge on infringement on the press' rights to post arrest articles, the best place for the former arrestee to start remedying their online reputation is by asking, or pleading, the newspaper websites to compromise themselves- even with the knowledge that they are under no obligation to. Beyond the ethical implications of journalists, which serve as nothing more than general guideposts and not definitive rules to abide by, as evidenced by the majority of practice,<sup>109</sup> there exists no opportunity for relief for the New Jersey individual with a criminal past. Unless the law aligns itself with the modernization of technology, former arrestees are helpless to the unyielding power of the online newspaper.

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<sup>108</sup> See <http://oswegocountytoday.com/contact-us/our-police-blotter-policy/> (Policy Blotter Policy of Oswego County Today) (“We will remove a police blotter item from our system only if the person involved has had all charges related to the incident in question dropped, or if the person is found not guilty after a trial.”)

<sup>109</sup> See <http://www.spj.org/ethicscode.asp> (Ethic Codes of Journalists) (“Gather, update and correct information throughout the life of a news story.; Balance the public’s need for information against potential harm or discomfort. Pursuit of the news is not a license for arrogance or undue intrusiveness.; Balance a suspect’s right to a fair trial with the public’s right to know. Consider the implications of identifying criminal suspects before they face legal charges;/ Consider the long-term implications of the extended reach and permanence of publication. Provide updated and more complete information as appropriate.”)