Right To Be Forgotten, Expungement Laws Raise New Challenges on the 40th Anniversary of *Cox Broadcasting v. Cohn*

CHARLES D. TOBIN AND CHRISTINE N. WALZ

Forty years ago, in *Cox Broadcasting Corp. v. Cohn*, the U.S. Supreme Court firmly established the First Amendment right to accurately report facts and allegations contained in public court records. With its clear, bright-line rule, the Court extended important protections to journalists and guaranteed to the public greater transparency for the administration of justice.

The Supreme Court, for the very most part, has adhered to the strength of its pronouncement in the *Cox Broadcasting* case. Today, however, developing legal trends in other forums—including the "right to be forgotten" rulings in Europe, California's "online eraser" law for minors, and the growing expungement movement in United States legislatures—pose serious threats to the black-and-white protection that the Justices extended decades ago.

Cox Broadcasting v. Cohn and Its United States Progeny

In *Cox Broadcasting v. Cohn*,[1] the Supreme Court clearly recognized that journalists should not be placed in peril for publishing information given to them by the custodians of government records. The specific issue: whether a reporter could be held liable for invasion of privacy for publishing the name of a rape victim, when it was a matter of public record contained in court files provided to him by a court clerk.

Charles D. Tobin and Christine N. Walz are with the Washington D.C. office of Holland and Knight LLP. Mr. Tobin is a past chair of the ABA Forum on Communications Law.

The journalist involved in the case, Tom Wassell from WSB-TV, was reporting on the rape of a Georgia college student found dead after a party in suburban Atlanta.[2] Initially, before prosecutors began exploring rape charges, the name of the girl—Cynthia Leslie Cohn—was published in at least one newspaper, under the headline: "Tests Seek Death Cause of Girl, 17."[3] Six teens were eventually charged with raping the highly intoxicated young woman and leaving her on the ground near her home. The case received intense media coverage.[4] Five of the defendants pled guilty to rape or attempted rape.

Wassell, in covering the trial of the last defendant, asked the court's clerk and received a copy of the indictment, which included the name of the victim.[5] Upon receipt of this information, Wassell identified the victim in his reporting. The victim's father, Martin Cohn, filed a lawsuit against Cox Broadcasting, claiming money damages for invasion of privacy. The lawsuit was based, in part, on a Georgia statute that flatly prohibited identifying rape victims in broadcast or print reports.[6]

Cox Broadcasting argued that the broadcast was privileged under both state law and the First and Fourteenth Amendments to the U.S. Constitution. The trial court rejected the claims, held that the Georgia statute gave a civil remedy to those injured by its violation, and granted summary judgment to Cohn on the issue of liability.[7] On appeal, the Georgia Supreme Court initially held that Georgia's statute prohibiting publication of rape victims' names did not itself extend to a civil cause of action for invasion of privacy, but nonetheless found a cause of action under the common law privacy tort of public disclosure.[8] The deceased victim's privacy, according to the court, could not be invaded, but her father had stated a valid cause of action for invasion to his own privacy by the publication of his daughter's name.[9]

The Georgia Supreme Court then found that there were issues of fact as to whether WSB-TV and Cox Broadcasting were liable, and it agreed with the trial court that the First Amendment did not bar liability under the circumstances.[10] Relying on a California Supreme Court decision *Briscoe v. Reader's Digest Assn., Inc.* from a few years earlier, the Georgia Supreme Court said: "The rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other."[11]

On rehearing, the Georgia Supreme Court rejected the station's arguments that the publication was a matter of public concern. Instead, it held that the state statute prohibiting publication of rape victim's names was an authoritative declaration of state policy that the name of a rape victim was *not* a matter of public concern.[12] The statute, the court held, was a "legitimate limitation on the right of freedom of expression contained in the First Amendment," and the court said it could discern "no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection."[13]

Cox Broadcasting appealed to the U.S. Supreme Court, challenging the constitutionality of Georgia's statute.

In an 8-1 decision,[14] the Supreme Court reversed the judgment of the Georgia Supreme Court, specifically addressing the tort of public disclosure where the disclosure was based on public records in a public prosecution that were open to public inspection.[15] In writing for the majority, Justice Byron White noted that liability for invasion of privacy torts, like defamation, was limited by a fair report privilege, but further recognized the constitutional dimension to the common law and statutory fair report privilege. He wrote:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations.[16]

The Court said that public court records are inherently matters of public concern, and "a public benefit is performed by the reporting of the true contents of the records by the media."[17] Accordingly, the Court established the First Amendment right to accurately report facts and allegations in the public record, reasoning:

> We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.[18]

To the extent it is necessary to protect information like the names of victims, the Court said the onus was on public officials to undertake efforts to avoid disclosure of the information. "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it."[19]

Although the *Cox Broadcasting v. Cohn* decision concerned liability for publishing information contained in a public court file, over the last 40 years it has been applied very broadly, shielding journalists from liability for publishing truthful facts obtained through a variety of means inside and outside of the court setting.[20]

Other Courts Catch Up to the *Cox Broadcasting* Decision

Despite *Cox Broadcasting v. Cohn*'s clear constitutional holding, some courts initially were reluctant to accept a bright-line approach protecting accurately reporting facts and allegations in the public record. For example, California courts continued to rely on *Briscoe v. Reader's Digest Assn., Inc.*, which allowed for a balancing test that took into account whether the public interest in the publication of certain accurate facts fades over time.

Courts struggled to apply this balancing test, leading to very mixed results and uncertainty for journalists. For example, in *Wasser v. San Diego Union*, [21] the California Court of Appeal held that a teacher who had been acquitted of a murder charge could not maintain an invasion of privacy suit against a newspaper for publishing information about that charge, even though it had occurred more than 10 years earlier. The court reasoned that the plaintiff had remained in or near the public eye, and therefore, information about his murder charge remained newsworthy as a matter of law. In contrast, in *Conklin v. Sloss*,[22] the court found that the plaintiff, a rehabilitated felon, could state a cause of action for invasion of privacy for publishing information about his criminal conviction 20 years later. The *Conklin* court was persuaded that plaintiff's actions since then, which included remarrying, fathering two children, and generally rehabilitating himself, raised issues of fact as to whether his conviction remained newsworthy, such that the newspaper would or would not be protected for publishing the information anew.

It was not until 2004 that the California Supreme Court finally caught up to *Cox Broadcasting*'s bright line by overruling its earlier decision in *Briscoe*.[23] In *Gates v. Discovery Communications, Inc.*, the California Supreme Court clearly stated that *Cox Broadcasting v. Cohn*'s holding was unqualified: "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it."[24] Accordingly, "the fact the public record of a criminal proceeding may have come into existence years previously" did not "affect[] the absolute right of the press to report its contents."[25] Based on this reasoning, the California Supreme Court held that a television company that aired a show about a 13-year-old murder case in which the plaintiff was implicated was not liable for invasion of privacy, where the broadcast was based on facts obtained from public official court records.[26]

Today, regardless of how remote in time, the legal protections for accurate reporting on court records is well established under United States law. Elsewhere, a number of legal trends pose new challenges for the right to accurately report the contents of public records. And even here, the long-protected right established by *Cox Broadcasting v. Cohn* and its progeny comes under periodic attack.

The European Union's "Right to Be Forgotten"

The first disturbing trend arises from a European Court of Justice decision announced in May 2014, which concerns the scope of protections under the EU-recognized "right to be forgotten."[27] The case, *Google Spain SL v. Agencia Española de Protección de*

Data, involved a government debt-collection notice about the plaintiff, Mario Costeja Gonzales, published in 1998, which remained on the Internet in 2010. The debt collection issue had been long resolved, and the plaintiff sought, through the Spanish data protection agency, to have the notice removed from Google search results as outdated.[28] The agency ruled against Google Spain, and Google appealed to Spain's National High Court.[29] The court certified questions to the European Court of Justice, which is tasked with issuing preliminary rulings on points of EU law arising in domestic proceedings to ensure uniform application throughout the EU.

Ruling en banc, the European Court of Justice found that Google, as a data processor and controller,[30] was subject to the European Union's 1995 Data Protection Directive, a regulation that provides individuals a right to seek erasure of incomplete or inaccurate data.[31] The European Court of Justice took the statutory interpretation even further, holding that the directive applied not just to incomplete or inaccurate data, but also to data that was outdated or no longer needed for its original purpose.[32]

In its decision, the European Court of Justice balanced Mr. Gonzalez's right to privacy and right to be forgotten against Google's arguments that it had a right to include the information in its search results.[33] Although the underlying publication was protected under the law because it had been made upon an order from a Spanish government agency,[34] the court rejected Google's argument that it should not be required to remove search results because the underlying publication was both legally published and still publicly available.[35]

Instead, the court said that:

> [I]f it is found, following a request by the data subject [under the Directive], that the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally at this point in time, is incompatible with [the Directive] because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased.[36]

In the European court's view, easily accessible private information on the Internet seriously interfered with individuals' privacy interests and focused on the negative impact of retrieval of outdated information.

> It must be pointed out at the outset that… processing of personal data, such as that at issue in the main proceedings, carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet - information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty - and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous.[37]

In sum, the European Court of Justice concluded that the right to be forgotten outweighs both the economic interest of the search engine operator and the interest of the general public in searching for and locating the information. The court also noted, without much discussion or guidance, that its balancing test might produce different outcomes if the subject of the data had a role in public life.

The court's decision establishes a precedent that will require search engines, Internet publishers, and website operators to engage in a complicated analysis to assess whether information complained about is "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue" and "whether the data subject has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name."[38] Remarkably, the Court specifically noted that the required analysis should not take into account whether the publication or retrieval of the information at issue would cause prejudice to the individual.[39]

Indeed, the United Kingdom's Information Commissioner recently issued an order that demonstrates the troubling reach of the *Google Spain* decision. After Google responded to an individual's request and removed links pertaining to a 10-year-old criminal offense, news organizations, as part of their coverage of the *Google Spain* decision, wrote stories detailing some of Google's actions in response to removal requests. Those articles, which were indexedby Google and searchable, contained details of the individual's original crime. Google refused to remove these later posts, finding that they were part of a recent news story and in the public interest.[40]

The U.K. Information Commission ordered Google to remove these new posts from their search results, even though they are current journalistic content which may both newsworthy and in the public interest. It reasoned, "that interest can be adequately and properly met without a search made on the basis of the complainant's name providing links to articles which reveal information about the complainant's spent conviction."[41]

There is no question that the lawsuit is having a significant impact on Google and other search engines. Since the decision, Google has received more than 324,094 takedown demands (concerning more than one million URLs)[42] and faces a number of lawsuits from requesters who are unhappy with their digital profile.[43] It was required to create a technical infrastructure and administrative process to handle takedown demands in the EU. More specifically, it created a form for accepting takedown demands, which is available through the Google search pages for the countries covered by the European Court of Justice's decision.[44] To submit a takedown demand, petitioners are required to provide their names, links to the offending material, and an explanation of why the inclusion of a search result is irrelevant, outdated, or otherwise objectionable.[45] If a request is granted, the underlying website publishing the content is sent a notice so that it may argue for keeping the link active as a search result.[46] A team at Google then makes case by case determinations as to what material should be removed. Google's removal request form describes the analysis its team engages in:

> When you make such a request, we will balance the privacy rights of the individual with the public's interest to know and the right to distribute information. When evaluating your request, we will look at whether the results include outdated information about you, as well as whether there's a public interest in the information—for example, we may decline to remove certain information about financial scams, professional malpractice, criminal convictions, or public conduct of government officials.[47]

This analysis—now required, at the very least, for search engines operating in EU countries—represents a significant departure from the bright-line protections for accurate reporting based on public records established in the United States by *Cox Broadcasting v. Cohn* and its progeny.

RTBF and Renewed Tension with Domestic Law

The "right to be forgotten" may be, for the moment, a creature of European law only. But one troubling decision a few decades ago in U.S. access law—recently mirrored in a European case—demonstrate that virtual privacy arguments risk erosion of the clear protections of *Cox Broadcasting v. Cohn* may also be at risk here. Further risk to established protections may also be approaching from new sets of statutory laws.

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Reporters Committee v. DOJ *and New ECHR Aggregation Ruling*

Although the case predates the Internet, the Supreme Court's 1989 decision in the Freedom of Information Act (FOIA) case *U.S. Department of Justice v. Reporters Committee for Freedom of the Press* presaged much of the current virtual privacy debate.[48] In this case, the Reporters Committee challenged the Federal Bureau of Investigation's denial of a FOIA request for the "rap-sheet"—the criminal history aggregated from various law enforcement agencies—of a mob figure who had been involved in dealings with a corrupt Congressman. The FBI had denied the request under FOIA Exemption 7(c), which exempts from disclosure information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

The Supreme Court unanimously ruled for the FBI. In the controlling decision by Justice John Paul Stevens, the Court noted that most of the information in rap sheets is freely available to the public. "Arrests, indictments, convictions, and sentences are public events that are usually documented in court records. In addition, if a person's entire criminal history transpired in a single jurisdiction, all of the contents of his or her rap-sheet may be available upon request in that jurisdiction."[49]

The *Reporters Committee* Court, however, rejected the argument that the public nature of these records meant the subject had no privacy interest at all, saying that it reflected a "cramped notion of personal privacy."[50] Further, the Court in a footnote waived away its holding in *Cox Broadcasting*, regarding privacy and public records, by noting the different legal contexts of the two cases: "The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution."[51] The core issue in any FOIA case, the Court noted, is the statute's purpose in providing citizens information about "what their government is up to."[52] The *Reporters Committee* Court concluded that the aggregated criminal records compiled by the FBI tell citizens little about what their government is up to, and that the subject's "privacy" interests in the aggregation therefore outweighs the public interest.

> Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that, when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted."[53]

The American ruling in *Reporters Committee*, that an aggregation of information from what is otherwise public may not serve the public interest, remarkably parallels the very recent decision of the European Court of Human Rights in *Satakunnan Markkinapörssi Oy and Stamedia Oy v. Finland*, decided July 21, 2015.[54] The case arose out of the courts of

Finland, where the government, by law, makes public the taxable income and assets of its citizens. The two defendants, a newspaper and a magazine, published the lists of the data and offered SMS text delivery service of individualized data for a fee.

Finland's data protection agency brought an action challenging the publications. Initially, the publications won a ruling that their work constituted journalism, which is permitted under data privacy laws, rather than the activity of personal data processing that is controlled under EU law.[55] On appeal, Finland's highest court disagreed, holding that the publication of the tax database was excessive and unnecessary to the public interest because it did not contribute to public debate.[56]

When the case reached the European Court of Human Rights (ECHR), that tribunal upheld the Finnish court. The ECHR, while acknowledging that "the general subject-matter" of tax data is a matter of Finnish public record and public interest,[57] the extent of the data published was not protected journalistic activity.[58] The decision contains virtually no discussion of the specific basis or weight given for the purported privacy interest or the degree of publication that the court would not consider excessive.

Both the *Reporters Committee* case here and the *Satakunnan Markkinapörssi Oy* ruling abroad reflect judicial skepticism about the publication of aggregated data, even where the original records are public information. More troubling still, the latest wave of legislation in the United States seeks to prevent once-public information from even remaining available to journalists and others.

"Online Erasers" and Expungement Laws

In trying to address what may be legitimate policy concerns, some state legislatures have adopted laws with the potential to compromise the clear rule established by *Cox Broadcasting* and its progeny.

For example, in 2013, attempting to address the long-term reputational implications of social media behavior and postings of minors, the California Legislature enacted a law to allow minors to use an "online eraser" to delete their online posts.[59] More specifically, the law provides that websites and mobile applications directed to minors, or that have actual knowledge that a user is a minor, must allow registered users under 18 to remove (or ask the provider to remove or anonymize) publicly posted content.

The law did not become effective until January 1, 2015, and therefore, its practical application remains unclear. However, the statute could be used to impose liability or otherwise challenge accurate reporting. For example, under a broad reading, it is possible that the statute could applied to journalists whose reporting relied, in part, on social media content posted by minors, which the minors later sought to have "erased."[60]

Similarly, there is also a growing trend to allow for the expungement of criminal records, under certain circumstances. Expungement laws may restrict public access to criminal records in cases where the individual was acquitted or the charges were dismissed,[61] where the charge or conviction was against a minor,[62] or where the underlying charge was not serious.[63]

These laws allow individuals to omit references to their criminal records on job and housing applications, and require that criminal background checks do not show expunged charges or convictions. The laws are designed provide relief from the collateral consequences of a criminal charge or conviction—such as an inability after parole or acquittal to find employment or housing because of the results of a criminal background check. Supporters believe that these laws may help reduce recidivism by giving people who have served their punishment opportunities that would be shut off to them if their criminal records remained available.[64]

Conclusion

Cox Broadcasting v. Cohn was a crucial decision that established important protections for accurate journalism based on public documents. As a doctrine that precludes liability for accurately publishing public information, it remains bedrock, essential law, even if the face of growing efforts to close off once-public sources of information.[65]

Unfortunately, however, legal trends here and abroad threaten to pose new barriers to accessing and publishing accurate information through public records. This developing patchwork of rulings and statutes could one day make reporting on newsworthy people less reliably complete. And ultimately, the rising wave of privacy hysteria could erode the foundation to First Amendment protections that *Cox Broadcasting* has provided for decades.

Endnotes

1. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975)
2. *Id.* at 472.
3. "Tests Seek Death Cause of Girl, 17," *Atlanta Constitution* (August 17, 1971) (courtesy of the library archives of Dalton State College).
4. *Id.*
5. *Id.*
6. *Id.* The statute, Ga. Code Ann. s 26—9901 (1972) made publishing or broadcasting the name of the victim a misdemeanor.
7. *Id.* at 473-74.
8. *Id.*at 474-75.
9. *Id.*
10. *Id.* at 475.
11. *Id*. (citing *Briscoe v. Reader's Digest Assn., Inc.*, 4 Cal.3d 529, 541, 93 Cal. Rptr. 866, 874, 483 P.2d 34, 42 (1971)). In *Briscoe*, the California Supreme Court permitted a claim to advance on behalf of a man who had been convicted of hijacking a truck and served his punishment. *Readers Digest* magazine, 11 years later, mentioned him and the crime in an article about hijacking. The California court held that a jury could find the publication offensive and non-newsworthy: "He committed a crime. He was punished. He was rehabilitated. And he became, for 11 years, an obscure and law-abiding citizen. His every effort was to forget and have others forget that he had once hijacked a truck." As noted *infra*, the California Supreme Court expressly overruled *Briscoe* years later in *Gates v. Discovery Commc'ns, Inc.*, 34 Cal. 4th 679, 101 P.3d 552 (2004).
12. Id.
13. *Id.*
14. Chief Justice Warren Burger concurred in judgment only, while Justices Lewis Powell and William Douglas each wrote a concurring opinion. Justice William Rehnquist wrote the sole dissenting

opinion.

15. *Id.* at 476. The Court noted that its decision was not addressing "an action for the invasion of privacy involving the appropriation of one's name or photograph, a physical or other tangible intrusion into a private area, or a publication of otherwise private information that is also false although perhaps not defamatory." *Id.* at 488.

16. *Id.* at 491-92.

17. *Id.* at 495.

18. *Id.* at 496.

19. *Id.*

20. *See The Florida Star v. B.J.F.,* 491 U.S. 524 (1989) (newspaper could not be held civilly liable for publishing the name of a rape victim); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979) (statute violated the First and Fourteenth Amendments in prohibiting truthful publication of alleged juvenile delinquent's name, lawfully obtained by newspapers by monitoring police band radio frequency and interviewing eyewitnesses); *Bartnicki v. Vopper*, 542 U.S. 514 (2001) (no civil damages against a broadcaster who lawfully obtained another's illicit recording of a cell phone conversation and broadcast the contents in violation of federal wiretapping statute); *McNally v. Pulitzer Pub. Co.*, 532 F.2d 69 (8th Cir. 1976) (no liability for publishing newspaper article quoting psychiatric report used at court hearing to determine plaintiff's competency to stand trial, even portions not read in open court); *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202 (3d Cir. 1991) (no Section 1983 claim for disclosure of information contained in police report concerning wife's allegations of spousal abuse); *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 223 Cal. Rptr. 58 (Ct. App. 1986) (no liability where newspapers published unfavorable evaluation of individual who was investigated by state bar as a prospective judicial appointee, even though the evaluation was confidential under state law).

21. 191 Cal. App. 3d 1455, 1463, 236 Cal. Rptr. 772, 777 (Ct. App. 1987)

22. 86 Cal.App.3d 241, 150 Cal.Rptr. 121(Ct. App. 1978)

23. *See Gates v. Discovery Commc'ns, Inc.*, 34 Cal. 4th 679, 101 P.3d 552 (2004).

24. *Id.* at 693.

25. *Id.*

26. *Id.*

27. *Google Spain SL v. Agencia Española de Protección de Data*, 612CJ0131 (European Court of Justice May 13, 2014).

28. *Id.* at ¶ 15.

29. *Id*. at ¶ 17.

30. In order to find that Google was subject to the Directive, the European Court of Justice first found that Google was a "data processor" and a "data controller." The determination that Google was a data processor was expected but the determination that it was a "data controller" was seen as more controversial. The court's decision turned on Google's control over its algorithm and search functions, which the court said determined the "purpose and means" of its web searches. *See id*. at ¶¶ 21-41.

31. *Id.*

32. *See id.* at ¶ 93 ("[E]ven initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.")

33. *Id.*

34. *See id.* at ¶ 16. (noting that the Spanish data protection agency took the view that the publication by *La Vanguardia* was legally justified" as it took place upon order of the Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible.")

35. *Id.* at ¶¶ 84-87. Because the original publication on *La Vanguardia*'s website was deemed legally justified, the ECJ did not require the newspaper to remove the information from its web archives.

36. Id. at ¶ 94.

37. *Id.* at ¶ 80.

38. *Id.* at ¶¶94-96.

39. *Id.* at ¶ 96.

40. *See* Samuel Gibbs, "Google ordered to remove links to 'right to be forgotten' removal stories," *The Guardian* (Aug. 20, 2015), available at http://www.theguardian.com/technology/2015/aug/20/google-ordered-to-remove-links-to-stories-about-right-to-be-forgotten-removals.

41. *See id*. *See also* Data Protection Act 1998, Supervisory Powers of the Information Commissioner Enforcement Notice (August 18, 2015), available at https://ico.org.uk/media/action-weve-taken/enforcement-notices/1432380/google-inc-enforcement-notice-18082015.pdf.

42. *See* Google Transparency Report, available at http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en. (last visited October 7, 2015)

43. *See* Kennedy Van der Laan, Media Report, *Dutch Google Spain ruling: More Freedom of Speech, Less Right to Be Forgotten for Criminals* (Sept. 26, 2014), available at http://www.mediareport.nl/persrecht/26092014/google-spain-judgment-in-the-netherlands-more-freedom-of-speech-less-right-to-be-forgotten-for-criminals/ (discussing Court of Amsterdam decision involving claims by owner of escort agency who was convicted to six years' imprisonment in 2012 for "attempted incitement of contract killing" that he had a right to have links to online publications connecting him to the crime removed from Google search results).

44. *See, e.g.* Search removal request under data protection law in Europe, available at https://support.google.com/legal/contact/lr_eudpa?product=websearch&hl=en. *See also* Jill Lepore, Jeffrey Toobin, Jonathan Blitzer, "Google and the Right to Be Forgotten," *The New Yorker* (September 29, 2014). The search removal request form cannot be accessed from the main "Google.com" search page primarily used in the United States. Recently, the French data regulator ordered Google to apply delistings to its google.com domain, not just its European sites like google.fr. Under French law, this decision is not appealable at this time. *See* Samuel Gibbs, "French data regulator rejects Google's right-to-be-forgotten appeal," *The Guardian* (September 21, 2015), available at http://www.theguardian.com/technology/2015/sep/21/french-google-right-to-be-forgotten-appeal.

45. *Id.*

46. *Id.*

47. *Id. See also* Jill Lepore, Jeffrey Toobin, Jonathan Blitzer, "Google and the Right to Be Forgotten," *The New Yorker* (September 29, 2014).

48. 489 U.S. 749, 109 S.Ct. 1468 (1989).

49. 109 S.Ct. at 1471.

50. *Id.* at 1476.

51. *Id.* at 1475 note 13.

52. *Id.* at 1481 (citation and italics omitted).

53. *Id.* at 1485.

54. Application No. 931/13, available at: http://www.ulapland.fi/loader.aspx?id=c7cd26b8-658f-4541-ba91-ac95234f1efc

55. *Id.* at ¶11.

56. *Id.* at ¶17.
57. *Id.* at ¶65.
58. *Id.* at ¶72.
59. *See* SB 568 (California Business & Professions Code Sec. 22581).
60. Because the statute itself does not include a private cause of action or other enforcement mechanism, it is unclear how violations of the statute will be enforcement. *See* SB 568 (California Business & Professions Code Sec. 22581).
61. *See, e.g.* Alaska Stat. § 12.62.180(b) (records of criminal cases in which a person was acquitted or had charges dismissed are confidential); Cal. Penal § 851.8(d) (In a case where a person has been arrested and charged, but no conviction has occurred, the court may, with the concurrence of the prosecuting attorney, order that the records may be sealed and destroyed); Col. Rev. Stat. § 24-72-308 (criminal record sealed where the charges are completely dismissed or the person is acquitted). For further examples, *see* Margaret Colgate Love, NACDL Restoration of Rights Resource Project, Judicial Expungement, Sealing, and Set-aside (October 2014), available at http://files.equaljusticeworks.org/Session%20%231%20EOLC%20Handouts%20Combined.pdf.
62. *See, e.g.* Ala. Code §§12-15-136-12-15-137 (delinquency adjudications (with exceptions)sealed after final discharge or court order if no pending criminal proceedings); D.C. Code § 16-2335(a)(records are sealed when individual reaches age of majority and after two-year waiting period with no subsequent convictions). For further examples, *see* Margaret Colgate Love, Judicial Expungement, Sealing, and Set-aside (October 2014).
63. *See, e.g.* S.D. Codified Laws § 23-6-8.1 (records of misdemeanor offenses may be destroyed after ten years); Wyo. Stat. Ann. § 7-13-1501 (certain misdemeanors may be expunged five years after completion of sentence where offense did not involve use of firearm). For further examples, *see* Margaret Colgate Love, Judicial Expungement, Sealing, and Set-aside (October 2014), *supra* FN 56.
64. Indeed, advocates argue that expungement law should go even further than most do. *See*, *e.g.* Margaret Colgate Love, "The Debt That Can Never Be Paid: A Report Card on the Collateral Consequences of Conviction," *Crim. Just.*, Fall 2006, at 16, 24 ("If reintegration of criminal offenders is a desirable social goal, as well as an important means of ensuring public safety, it is critical to begin serious discussion of the growing contrary pressures that seem to consign all persons with a criminal record to the margins of society, and to a permanent outcast status in the eyes of the law. In particular, we must find a way to persuade employers and others in a position to control access to benefits and opportunities that it is safe to go behind the fact of a criminal record, to deal with individuals rather than stereotypes and generalities. The most effective way to accomplish this is to find a way to recognize when individuals have completed their journey through the criminal process, and to make the record itself reflect their graduation.")
65. *See, e.g. Martin v. Hearst Corporation*, 777 F.3d 546 (2d. Cir. 2015) *cert. denied*, (U.S. Oct. 5, 2015) (holding that statute requiring the state to erase official records of an arrest under certain circumstances does not make historically accurate news account of arrest tortious, and affirming summary judgment for defendants); *G.D. v. Kenny*, 15 A.3d 300, 315–16 (N.J. 2011) ("[T]he expungement statute does not transmute a once-true fact into a falsehood. It does not require the excision of records from the historical archives of newspapers or bound volumes of reported decisions or a personal diary. . . . It is not intended to create an Orwellian scheme whereby previously public information—long maintained in official records—now becomes beyond the reach of public discourse on penalty of a defamation action. Although our expungement statute generally permits a person whose record has been expunged to misrepresent his past, it does not alter the metaphysical truth of his past, nor does it impose a regime of silence on those who know the truth."); *Bahr v. Statesman Journal Co.*, 624 P.2d 664, 666 (Or. Ct. App. 1981) ("The [expungement] statute does not, however, impose any duty on members of the public who are aware of the conviction to pretend that it does not exist. In other words, the statute authorizes certain persons to misrepresent their own past. It does not make that representation true."); *Rzeznik v. Chief of Police of Southhampton*, 373 N.E.2d 1128, 1133 (Mass. 1978) ("There is nothing in the statute or the legislative history to suggest that, once the fact of a conviction is sealed, it becomes nonexistent, and hence untrue for the purposes of the common law of defamation.")