

---

## Crime Data, the Internet, and Free Speech: An Evolving Legal Consciousness

---

Sarah Esther Lageson

Digitization and open access to governmental data have made criminal justice information incredibly easy to access and disseminate. This study asks how law should govern access to criminal histories on the Internet. Drawing upon interviews with crime website publishers and subjects who have appeared on websites, I use legal consciousness theory to show how social actors interpret, construct, and invoke law in a nascent and unregulated area. The analysis reveals how both parties construct legality in the absence of positive legal restrictions: Website publishers use legal justifications, while those appealing to have their online record cleared resort to personal pleas, as opposed to legal remedy. Ultimately, I show how current data practices reinforce structural inequalities already present in criminal justice institutions in a profoundly public manner, leaving website subjects with little recourse and an inescapable digital trail.

The digitization of governmental data and the dissemination of these data online have made criminal justice information easier to access than ever before. What used to require an in-person request at an administrative arm of a local criminal justice agency is now immediately available online. Once a person is arrested or charged with a crime, a digital trail begins as various agencies document each interaction an individual has with the criminal justice system. These data are publicly available, and are increasingly reposted on various venues, such as on websites, crime watch blogs, Facebook pages, mug shot databases, and the like. Criminal complaints, booking photos, and jailhouse rosters are simply a mouse-click away. For the website “subject,” a simple Google search for their name yields a digital trail that might reveal low-level convictions from long ago, arrests that never led to charges, or offenses that were legally sealed or expunged.

The emergence of these websites introduces a host of previously unanswered questions. Are these websites legal? Do we have a right to publicly post any and all criminal justice data?

---

Please direct all correspondence to Sarah E. Lageson, Rutgers University-Newark School of Criminal Justice, Center for Law and Justice #547, 123 Washington Street, Newark NJ 07102; e-mail: sarah.lageson@rutgers.edu.

What recourse exists for those who appear on these websites? This study uses the lens of legal consciousness theory to examine these questions by asking how social actors interpret, construct, and invoke ambiguous law in a nascent and unregulated area. To understand divergent views on these questions, this study draws upon two unique sets of qualitative data to ask: how should the law govern access to criminal histories on the Internet? For the first set of data, I analyze in-depth interviews with crime website publishers and content analyses of 100 crime reporting websites; and for the second, I use interview data with those whose records have appeared on crime websites. The analysis follows in three parts: I first show how distinct *views of the criminal justice system* shape respondent's views on access to records; second I analyze recommendations for what *law should do* from each group; and third, I ask each group *if and how they invoke law*.

These two groups hold distinct views. The first set of interviewees, the “publishers” (composed of those who produce crime reporting websites) believe in the social good of producing this information for public consumption. Conversely, the “subjects” (those who have appeared on websites) are wary of their digital criminal record, describing the deleterious effects of this extralegal sanction that is widely available to anyone with access to the Internet. The analysis reveals how both parties construct legality in the absence of positive legal restrictions. In these divergent constructions of law, website publishers use legal justifications, while those appealing to have their online record cleared resort to personal pleas, as opposed to legal remedy. In recognizing the development of legal consciousness around privacy and emerging technologies, this study begins an important discussion on access to criminal histories by highlighting the experiences of those who will be impacted on both sides of the debate. I conclude by arguing that the unfettered public distribution of criminal justice data reinforces structural inequalities already present in criminal justice institutions, reifying relationships of power and patterns of punishment – of which understanding of law plays a key role.

## **Background**

### **Public Access to Criminal Justice Data**

Individual-level crime data falls under the umbrella of public government data, though these data are managed under local jurisdictions to varying degrees of accuracy and completeness (Jacobs 2015). As the online marketplace for these data has increased, many public agencies contract with private vendors to outsource their recordkeeping (Hochberg 2014). Once made

public, these data are scraped and reposted to innumerable other sites, including those run by independent website publishers, like those examined in this study. In other words, digitization has made accessing criminal justice data easier than ever (Jacobs 2015). Legal guidance, thus far has focused mostly on paper records and on the process of first obtaining governmental data, and then reporting and publishing those data.

### *Obtaining and Publishing Crime Data*

There are two primary modes to legally publish individual-level crime data on websites. First, one can obtain crime information through a Freedom of Information Act Request. Second, one can republish records already made public. Digitization has radically changed both of these practices. A “criminal record revolution” (Watstein 2009) has occurred in recent years, due largely in part to the adoption of new technologies by criminal justice administrators. This allows regular citizens easy, online access to criminal histories that previously required visiting a courthouse or filing extensive paperwork. As a result, proliferations of online mediums have emerged, instantly disseminating mug shots, jailhouse rosters, and court documents. This widespread release of individual-level criminal histories has proceeded unchecked by federal or state governments, even amidst growing evidence of the dissemination of erroneous records or dismissed charges (Logan and Ferguson 2016; National Consumer Law Center 2012; Conley et al 2012; U.S. Bureau of Justice Statistics 2005),

Laws governing data were originally created to ensure the public’s right to know if institutions are doing their job well. State-level open access laws govern local control of criminal justice data (such as mug shots), and are often developed under the framework of the Freedom of Information Act, or FOIA (Reporters Committee 2008). FOIA was enacted in 1966 as the first American law to guarantee all citizens the right to access information from their government. Embedded in the legislation is a tension between competing interests to increase government transparency while maintaining an individual’s privacy (Shephard 2014). There are two exceptions to this general rule of disclosure: Exceptions 6 and 7(C), which relate to individuals’ right to privacy. These exceptions establish that if disclosure of information by a government agency would cause an unwarranted invasion of personal privacy, the agency need not release that information (see, for instance, Bobet 2014: 640; Shephard 2014). Exemption 6 applies to personnel and medical files, and 7(C) refers to information compiled for law enforcement agencies. When challenged, courts use a balancing test to determine if the

public's interest in obtaining data will shed light on an agency's performance of its statutory duties. This test was developed in *Department of Air Force v. Rose* (425 U.S. 352 [1976]), when the Air Force claimed a FOIA exemption and refused to release information about disciplinary actions against individual cadets. In this case, the US Supreme Court ordered the documents released since public tax dollars funded the school. Thus, the privacy exemptions to FOIA are designed to protect information about a private individual that does not relate to the agency's conduct and therefore does not serve the public interest.

The protective reach of Exemption 7(C) was significantly expanded in *U.S. Department of Justice v. Reporter's Committee for Freedom of the Press* (1989) when the FBI refused to release rap sheets to reporters. The reporters argued rap sheets should be made available, as they are simply a compilation of public data from different institutional sources. Their argument rested on the logic of public access: because these data are already available at, say, various county sheriffs offices and local jails, the reporters argued that arrestees do not have a privacy interest in a rap sheet that compiles this information in a single document. Drawing upon the balancing test developed in *Rose*, the Court rejected the reporters' argument and ruled:

There is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information...while a rap sheet might be of some public interest in that it is relevant for 'writing a news story,' that 'is not the kind of public interest for which Congress enacted the FOIA' (*Reporters Comm.*, 489 U.S. 1989: 762).

The Court also considered how disclosure might complicate a persons' ability to move on from long-ago mistakes, particularly when new technologies allow users to archive these activities online. The Court noted that individuals would likely be "affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten" (*Reporters Comm.*, 489 U.S. 1989: 769, quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 381 [1976]). Rapid technological change has made this ruling especially pertinent—and pushed into uncomfortable new light—in a world of digital and online records. Multitudes of websites and companies do precisely the activity Justice Stevens warned against: provide an easily accessed, organized repository of individual-level criminal justice data.

There is also a contemporary historical arc to making governmental data available quickly. As legal scholars Logan and Ferguson note: “today, the prevailing zeitgeist of governments is one of database expansion, not quality control or accountability, and a blasé acceptance of data error and its negative consequences for individuals” (2016: 3). Additionally, there is little evidence of public support (or a policy response) for restrictions on criminal history data. Crime website publishers contend that crimes and arrests are matters of great public concern, relying on popular conceptions of “newsworthiness” (Rostron 2013) in a world where public disclosure of private facts about an individual is widely accepted (Barbas 2010). In sum, the rapid and widely accepted availability of public crime data has outpaced the creation of legal protections for those who are marked with a criminal label (McKenzie 2016).

### ***Legal Protection, Legal Barriers and Stigma***

Although lawmakers have yet to legislate on the republication of criminal justice data, existing law tends toward protecting publishers of websites, while providing little recourse for those who appear on websites – even if the information is incorrect or outdated (McKenzie 2016). While this current framework benefits publishers, those who appear on websites face a hazy legal landscape. While courts have ruled at times that individuals have a privacy interest in their criminal histories, the practice of releasing information has continued relatively unchecked. Courts have also ruled that the First Amendment protects republication of information about crimes obtained from publically accessible sources (*Cox Broadcasting Corp v. Cohn* [1975]; *Florida Star v. B. J. F.*, 491 U.S. 524 [1989]). In other words, at the local level, arrest records and booking photos are fair game to publish online if a criminal justice agency makes them public first.

Crime victims have long been at the center of privacy issues. In *Cox Broadcasting Corp v. Cohn* (1975), the Court held that a Georgia statute prohibiting the release of a rape victim’s name and its common-law privacy action counterpart were unconstitutional because Cox’s reporter legitimately obtained the name in a public document in open court. Similarly, in *Florida Star v. B. J. F.*, 491 U.S. 524 (1989), the Court ruled against a law making it illegal for a publication to print a rape victim’s name, arguing the law violates the First Amendment by imposing damages for truthfully publishing public information.

Tort law is virtually useless for those who have been arrested or charged with a crime and seek to file personal grievances against publications that reveal their name, address, or photograph. The

Supreme Court has held that even the most “vile” of personal attacks are under Constitutional protection when they relate to matters of public concern (such as in *Snyder v. Phelps* [2011], protecting protests at soldier’s funerals). In a particularly relevant case, *Martin v. Hearst Corporation* (777 F.3d 546, 2d Cir. 2015), the Second Circuit protected online news sources from having to remove or modify a story that reports a person’s arrest if that arrest is later erased from the record through expungement law. The court held that news accounts of the arrest were not defamatory because the historical fact of the arrest remains true. While expungement law in Connecticut would allow Martin to swear under oath that she had never been arrested and bar the government from using this arrest in a later trial, this does not undo the historical fact of her arrest.

There are consequences to the seemingly permanent mark of a criminal record (Pager 2007). Research has shown how criminal justice contact impacts the life course through shaping relationships with social institutions (Brayne 2014; Goffman 2014; Lageson and Uggen 2013). Even low level or nonconviction records negatively impact employment opportunities, financial wellbeing, residential mobility, and prosocial behaviors, like voting or volunteering (Bernburg and Krohn 2003; Carey 2004; Lageson 2016a; Pager 2007; Thatcher 2008; Uggen et al. 2014; Uggen and Stewart 2015; Winnick and Bodkin 2008). These practical barriers and the psycho-social stigma of criminal histories contribute to how expungement seekers think about privacy and the law, and might lead to similar patterns of system avoidance.

### *The Culture of Crime Reporting in the U.S*

Finally, the public loves crime stories, and the Internet provides abundant opportunity for publication (Beckett and Sasson 2000; Best 2012; Dowler 2003; Eschholz, Chiricos, and Gertz 2003; Gilliam and Iyengar 2000; Greer 2010; Jewkes 2004; Katz 1987, 2016; Schlesinger and Tumber 1994; Surrette 2003; Tucher 1999). We watch the news and scour the Internet to assess our own moral compass, take cues from other’s digressions, and bear witness to justice and punishment (Black 1984; Durkheim 1893; Katz 1987). The criminal justice system is revered in popular culture and news media, and this reporting informs public opinion on one of the largest and most powerful institutions in the United States by producing knowledge, shaping culture, and influencing policy (Potter and Kappeler 2006; Greer 2010).

Historically, the public has learned about crime through agenda-setting media agencies. Yet, the Internet has dramatically

changed this landscape, shifting expert control into the hands of many (Klinenberg 2005; Lewis 2012). New forms of crime reporting include crowd-sourced investigations on Reddit (Wade 2014), thousands of low-level records mined and sold by private background check companies (Jacobs 2015), and social media feeds dedicated to real-time neighborhood crime updates (Lageson 2016b).<sup>1</sup> Corporations pay governmental agencies for massive loads of publicly available data, which they scrape (automatically copy from other websites), replicate, and redisseminate across the Internet (Ellis 2011; Hochberg 2014). As a result, Facebook pages, Twitter feeds, blogs, and criminal history websites are increasingly available to a crime-data hungry public (Hochberg 2014).

The notion that criminal histories should remain publicly accessible indefinitely may also become a uniquely American experience. The European Court of Justice recently ruled that individuals have a “right to be forgotten and allows EU citizens to request search engines remove links with personal information about them” (EU Court of Justice Case C-131/12 [2014]). This applies when the information is *inaccurate, inadequate, irrelevant, or excessive* for purposes of data processing (EU Commission 2014). In practice, EU citizens have only the right to clear their search results – any online publication is allowed to keep intact their original archive. The courts feel this strikes a balance, as the individual’s data is still “accessible but is no longer ubiquitous” (EU Commission 2014).

In summary, the explosion of digital crime data, coupled with a lack of legal recourse, leaves website subjects mostly powerless. Website publishers have both legal protection and an eager audience and the laws guiding their behavior were, for the most part, created before the recent eruption of crime websites. This produces new sets of questions: who is responsible for the accuracy of these data? What rights do website subjects have? This hazy legal framework creates fertile ground for both website publishers and website subjects to develop their own sets of legal consciousness around criminal justice data.

### **Legal Consciousness**

For this study, I ask the same question of these two distinct parties: How should the law govern public access to criminal

---

<sup>1</sup> The number of these websites is unknown and constantly changing. For examples, see [www.mugshots.com](http://www.mugshots.com), [www.bustedmugshots.com](http://www.bustedmugshots.com) (booking photos), [www.newsball.com](http://www.newsball.com) (independent, investigative crime reports), [www.chicagocrimeblotter.blogspot.com](http://www.chicagocrimeblotter.blogspot.com) (crime update blog).

history information via the Internet? I use the theoretical lens of legal consciousness to isolate several specific mechanisms at play: views on how law should apply, how context and experience shape understandings of what law is (or should be), and the way these views shape the decision to invoke law. This lens shows how law is intertwined with the lives of ordinary citizens, demonstrating how social actors understand and use law in their daily lives (Merry 1985; Silbey 2005).

Legal consciousness also describes how perceptions of law are translated into action (Blackstone, Uggen, and McLaughlin 2009; Ewick and Silbey 1998). This approach focuses on individuals' awareness and understanding of the law and legal rights, a process whereby people experience and understand "meanings, sources of authority, and cultural practices that are commonly recognized as legal" (Ewick and Silbey 1998: 22). Context is important: socioeconomic status, political power, and underlying systems of belief generate different perceptions of law (Hoffman 2003), and yet, these interpretations may be highly individualized, based on experiential factors like previous contact with the law (Cooper 1995).

In constructing legal consciousness, people create multiple meanings, including what they name as actual harm, what is appropriate blame, and what they claim as possible remedies (Felstiner, Abel, and Sarat 1980). This means that what people consider legality may or may not reflect institutionalized rules (Marshall and Barclay 2003), and instead reflect a constantly shifting construction of law based on social practices (Ewick and Silbey 1998; Sarat and Keams 1995). Ewick and Silbey caution that the "commonplace operation of law in daily life makes us all legal agents insofar as we actively make law, even when no formal legal agent is involved" (Ewick and Silbey 1998: 20). Thus, law is what people think it is, what they say it is, and what they do to implement the meanings they create (Marshall and Barclay 2003).

A second component to socio-legal studies is to examine the point at which belief becomes action, or legal consciousness becomes mobilization or invocation of formal law. The mobilization framework asks how people *use* law, as opposed to focusing on how law is created by every day social practices, distinguishing the "constitutive" and "instrumental" nature of law. Of course, there is an indelible link between these elements, such as how an individual's perception of legality affects whether or not they mobilize (Blackstone, Uggen, and McLaughlin 2009). Individual qualities also shape the decision to invoke law, such as self-efficacy, socioeconomic resources, education, and knowledge of formal law (Blackstone, Uggen, and McLaughlin 2009). Often, a triggering event sets off this process of mobilization, such as being burglarized or



experiencing discrimination or harassment (Nielsen 2004). In their seminal work, Felstiner, Abel, and Sarat (1980) explicitly focus on the process of how a personal trouble becomes a legal issue through naming (perceiving an injurious experience), blaming (transforming an injurious experience into a grievance), and claiming (transforming a grievance into a legal dispute).

It is important to note that legal consciousness and legal mobilization approaches also elucidate how particular social groups elect *not* to name, blame, or claim. In this way, *not* mobilizing reifies inequities. For example, in her study of offensive public speech, Nielsen (2004) argues that while we celebrate free speech as a cornerstone of democracy, in protecting offensive public speech, the law protects a social practice that reinforces and actualizes hierarchies of race and gender. Traditionally disadvantaged groups – white women and people of color – are “well aware of the reality of the relationship between law and power” and “know not to look to the law for help” (pp. 12, 27). This may also lead to a sense of “legal cynicism” (Sampson and Jeglum Bartusch 1998), particularly for individuals who live in a context of concentrated disadvantage and have little ability to influence structures of power. In this way, the decision to retreat from law is indelibly linked to one’s views of society as unjust or untrustworthy (Sampson and Morenoff 2006). In summary, people’s view of law and procedural justice is shaped by their contact with the criminal justice system (Tyler 2003).

Finally, an overlapping component of legal consciousness and mobilization worth addressing for this study is that of ambiguous or nonexistent law. For instance, when social actors attempt to explain or invoke law, they may find the legal system difficult to understand or navigate, or learn that an official channel does not exist. Examples of this include managerial assessments of criminal records (Lageson, Vuolo, and Uggen 2015), street harassment (Nielsen 2004), and workplace compliance issues (Edelman 1992; Edelman, Uggen, and Elanger 1999). These interpretive accounts illuminate how legal consciousness develops in response to vague or nonexistent doctrine (Silbey 2005). For instance, Larson’s (2004) study of security exchanges shows how the indeterminacy of law in action generates (and is ultimately resolved by) different forms of legal consciousness. By positioning legal consciousness as a *response* to a lack of legal protection or unclear doctrine, socio-legal studies show how institutionalized practices are undertaken to demonstrate compliance (Edelman 1992; Edelman, Uggen, and Elanger 1999).

These socio-legal approaches allow for a rich and multifaceted analysis of how people understand law, invoke/do not invoke law, and (somewhat cyclically) develop legal consciousness as a response

to ambiguous, confusing, or nonexistent law. I engage all three overlapping angles: Because there is little formal legal regulation of criminal justice data, particularly in the dissemination of criminal records in the private sector, the law on the books does not fit neatly into the digital context. For both website publishers and website subjects, this indeterminacy provides fertile ground to develop understandings of law that resonate deeply with previously held opinions of justice, punishment, and experience with the criminal justice system. These understandings, in turn, shape action. For website publishers, this justifies their production of crime websites and their belief that criminal justice data should remain on privately-run, extralegal websites. For website subjects, this explains their decision *not* to mobilize law in seeking remedy for their extralegal criminal records and their belief that criminal records should be maintained by the government, with somewhat restricted access.

## Methodology

### Sampling and Analytic Approach

Using two unique sets of qualitative data, I describe distinct conceptions of privacy rights around criminal records made available online. For the first set of data, I draw upon in-depth interviews with 32 crime website publishers and content analyses of 100 crime watch websites; and for the second, I use fieldwork at criminal record expungement clinics and interviews with 27 criminal record expungement-seekers. I analyze arguments from both parties for openness versus privacy, examine how views of the criminal justice system and punishment shape these opinions, and ask both parties how law should be applied.

For the first set of interviewees, I constructed a database of the top 100 independently run crime websites as returned by Google's search return mid-year 2013. For inclusion in the broader sample, the site must have an explicit focus on crime, and have posted within the last month a crime update, a crime story, or a mug shot. For all 100 websites, the most recent 10 posts and all corresponding comments were archived and added to an Atlas.Ti database for qualitative content analysis. I contacted the administrator of the 68 websites that provided contact information and conducted preliminary research through email contact with 40. Of those 40, 32 participated in one to four in-depth interviews about their work. Initial in-depth interviews followed an interview schedule and lasted between 40 minutes to over two hours. Over the course of data collection, most interviewees

**Table 1.** Table of Publisher Interviewees

| Pseudonym   | Type of Site       | Gender | Approx Age | Years | Race             | Scope      |
|-------------|--------------------|--------|------------|-------|------------------|------------|
| Mindy       | Crime update blog  | Female | 40         | 12    | White            | Nationwide |
| Andy        | Crime update blog  | Male   | 30         | 10    | White            | Urban      |
| Paula       | Crime update blog  | Female | 40         | 20    | White            | Urban      |
| Jasper      | Crime update blog  | Anon   |            |       |                  | Suburban   |
| Sally       | Crime update blog  | Female | 40         | 16    | White            | Nationwide |
| Diego       | Crime issues blog  | Male   | 45         | 5     | Hispanic         | Nationwide |
| Todd        | Crime news site    | Male   | 40         | 13    | White            | Urban      |
| Marcus      | Crime news site    | Male   | 50         | 20    | African American | Urban      |
| Dan         | Crime update blog  | Male   | 40         | 8     | White            | Urban      |
| Sheila      | Crime update blog  | Female | 40         | 15    | White            | Nationwide |
| Anonymous 2 | Crime issues blog  | Anon   |            |       |                  | Urban      |
| Henry       | Crime issues blog  | Male   | 40         | 11    | White            | Nationwide |
| Benjamin    | Crime issues blog  | Anon   | 50         | 6     | White            | Urban      |
| Mark        | Crime update blog  | Male   | 50         | 8     | White            | Urban      |
| James       | Crime news site    | Male   | 50         | 3     | White            | Urban      |
| Luke        | Crime update blog  | Male   | 50         | 20    | White            | Urban      |
| Bob         | Crime update blog  | Male   | 50         | 15    | White            | Urban      |
| Kang Joo    | Crime issues blog  | Male   | 30         | 2     | Asian            | Urban      |
| Carin       | Crime issues blog  | Female | 40         | 5     | White            | Urban      |
| Tom         | Crime news site    | Male   | 40         | 20    | White            | Urban      |
| Meghan      | Crime issues blog  | Female | 35         | 2     | White            | Urban      |
| Marian      | Crime issues blog  | Female | 45         | 3     | White            | Nationwide |
| Joey        | Crime news site    | Male   | 70         | 50    | White            | Urban      |
| Sam         | Crime update blog  | Male   | 40         | 22    | White            | Rural      |
| Don         | Crime update blog  | Male   | 40         | 15    | Mixed Race       | Urban      |
| Sophia      | Crime social media | Female | 30         | 6     | White            | Suburban   |
| Benjamin    | Crime update blog  | Male   | 20         | 6     | White            | Urban      |
| Tim         | Crime update blog  | Male   | 30         | 1     | White            | Rural      |
| TJ          | Crime update blog  | Male   | 30         | 20    | White            | Nationwide |
| Clayton     | Crime issues blog  | Male   | 40         | 6     | White            | Nationwide |
| Jim         | Crime update blog  | Male   | 50         | 5     | White            | Rural      |
| Kari        | Crime issues blog  | Female | 40         | 6     | White            | Nationwide |

maintained contact and participated in additional interviews or email correspondence.

For the second dataset, I conducted fieldwork and interviews at criminal record expungement clinics over the course of 1.5 years, including field observations of twice-monthly expungement clinics, observation of expungement court hearings, and in-depth interviews with expungement-seekers. I introduced potential interviewees to the study during the informational portion of the expungement clinic and then approached participants waiting for an attorney for an interview. Interviews were recorded, transcribed, and analyzed in Atlas.Ti.<sup>2</sup>

### Description of Sample

The groups are demographically distinct (displayed in Tables 1 and 2), particularly by race, as most website publishers are white and most expungement-seekers nonwhite. The publishers were mostly male, over the age of forty, and are quite adept at online research

<sup>2</sup> Interview instruments and coding schemes are available upon request from the author

**Table 2.** Table of Expungement Interviewees

| Pseudonym | Race/Ethnicity   | Gender | Approx. Age |
|-----------|------------------|--------|-------------|
| Matt      | White            | Male   | 20s         |
| Daryl     | African American | Male   | 40s         |
| Donna     | African American | Female | 50s         |
| Jaimeson  | African American | Male   | 20s         |
| Gladys    | African American | Female | 60s         |
| Jaci      | Native           | Female | 30s         |
| Michael   | African American | Male   | 50s         |
| Dante     | African American | Male   | 20s         |
| Lyonel    | African American | Male   | 50's        |
| Mark      | African American | Male   | 50s         |
| Melinda   | African American | Female | 40s         |
| William   | African American | Male   | 50s         |
| Marcus    | African American | Male   | 40s         |
| Trent     | African American | Male   | 30s         |
| Jason     | White            | Male   | 30s         |
| Polly     | White            | Female | 60s         |
| Jaiden    | Indian           | Male   | 30s         |
| Maddy     | Mixed Race       | Female | 30s         |
| Sandra    | White            | Female | 40s         |
| Rachel    | White            | Female | 50s         |
| Roger     | White            | Male   | 60s         |
| Randy     | White            | Male   | 40s         |
| Tom       | White            | Male   | 50s         |
| Theodore  | African American | Male   | 20s         |
| Jenny     | White            | Female | 20s         |
| Samuel    | African American | Male   | 30s         |
| Tammy     | White            | Female | 50s         |

and Internet culture. Because the expungement clinic is designed to serve those who cannot afford a lawyer, there are important class-based distinctions between the groups as well. These social characteristics certainly influence self-selection into the interview sample. By virtue of their pre-existing social location, interview subjects voluntarily enter into the website publishing world or the expungement clinic. Without making causal claims, my analysis takes into account this self-selection process and illuminates how participation in these distinct parties shapes legal consciousness.

Publisher's websites run the gamut from locally focused crime update websites to large database-driven websites that post jail-house rosters, booking photos, or full length court documents pertaining to a case of interest. The taglines used on a typical website explains the overarching tone of their work<sup>3</sup>:

“A blog devoted to reporting crime, particularly violent and lifestyle crimes, in Baltimore city neighborhoods and surrounding areas”

“This is an ongoing project to study crime in Chicago empirically. I collect raw line-item Chicago Police data and use an

<sup>3</sup> These websites are not included in the interview sample

excessively complicated series of spreadsheets to process it into usable data.”

“We are Neighbors Looking Out For Neighbors in the Creek Crossing Area of Mesquite, TX. Please Help Report and Prevent Crime Because Together We CAN Make a Difference in Our Neighborhood!”

“Greenville Dagnet is dedicated to covering crime news in Greenville County, South Carolina. The lackluster coverage of crime by much of the local media often serves to make it harder for Greenville residents, especially the many newcomers to the area, to put the crime stories in a perspective that allows them to live safer and happier lives. Greenville Dagnet seeks to rectify that by providing straightforward and reliable coverage and analysis of crime in Greenville County.”

Expungement clinic interviewees were more diverse in age, gender, and race composition. Expungement is a process by which a judge seals or destroys a criminal history, as allowed by the state, so that the subject of the record is no longer required to disclose this information and the record should no longer appear in routine background checks. Yet, the digital release of criminal histories means many records remain available even after this legal remedy.

Expungement clinics offer a unique research site because attendees are only eligible for judicial sealing of their records if they have a specific low-level offense or dismissal on their record. These records include all juvenile records, cases resolved in the defendant’s favor (acquittals and dismissals), cases resulting in diversion or stay of adjudication (one year after completion of sentence if crime free), a misdemeanor conviction (two years after completion of sentence if crime free for petty misdemeanors and misdemeanors, four years for gross misdemeanor), or a low-level, nonviolent felony conviction five years after sentence, if crime free (Minn. Stat. § 609A.01). It’s also important to highlight that many of the clinic attendees are racial minorities and poor. To receive free legal services, clients must fit all state-mandated expungement criteria, have an income less than 125% of the federal poverty guideline, and be off probation and parole. All expungement clinic attendees have had prior experience with the criminal justice system, though this ranged widely from a single misdemeanor event to a lengthy record that involved felony convictions in years past.

Thus, the two interview samples are unique in many ways, including race, class, and the triggering event(s) and beliefs that led them into publishing crime data or trying to seal their criminal histories. Yet, the groups converge on this singular issue of

access to or privacy for criminal history reports. By comparing and contrasting their views, it becomes possible to identify and explore the mechanisms that generate legal consciousness in a changing technological environment.

## **Findings and Analysis**

The analysis follows in three parts. I first explicate each group's views of the justice system, particularly in terms of how punishment is administratively documented and disseminated. Second, I detail different conceptions of what law in this area "should" be, given the experiences of each group and the lack of formal legal guidance. Third, I expound on this legal consciousness by demonstrating how each group invokes – and does not invoke – formal law. I close with a discussion of how this qualitative evidence contributes to theories of legal consciousness, with an explicit focus on how negative contact with criminal justice administration, ambiguous or nonexistent law, and feelings of relative powerlessness contribute to website subject's noninvocation of their rights. Conversely, positive experiences with administrative units of criminal justice, the lack of legal restrictions on publishing crime data, and a feeling of relative power contribute to website publisher's decisions to assert their conceptions of legality in a very public way. Ultimately, evidence shows that website subjects, though feeling the public burden of their online criminal history, ultimately choose not to remedy or remove their online criminal histories. This in turn reinforces a particular class based and racialized structure of who appears on websites and is ultimately impacted most by a digital trail.

### **Section I: Views of Criminal Justice Administration**

Following the theoretical logic of legal consciousness, an individual's place within and experiences of the world shape their understandings of law. Pursuant to the question at hand in this study – the legality of republishing criminal justice data online – foundational views and experiences with justice and punishment in the United States, generated two distinct sets of legal consciousness amongst publishers and subjects.

#### ***Website Publishers***

Three central themes emerge from interviews with website publishers: first, that the criminal justice system (though overburdened and inefficient) is ultimately fair; second, that punishment should be overtly public; and third, that crimes should not be

“forgotten.” Many website publishers saw their online efforts as supporting and enhancing a criminal justice system that was limited in its ability to function efficiently. Jasper, a rural blogger from the southeastern United States, described his website as:

Here to make citizens aware of the crimes going on and to ask for help to keep an eye out for these criminals... Our goal is to make the citizens aware of how bad the crime really is in our community and hope that they help us combat the crime and take a stand to take back our communities... Citizens are the most valuable resource for the police in the war against crime.

Interviewees view the Internet an essential tool to facilitate criminal punishment. Website publishers often framed their websites as combating “everyday crime,” and believed their efforts would help broader crime control efforts, as illustrated by Benjamin, a white male blogging in a high-crime urban area:

[My site is] a helpful tool for people who didn't have the time in their days to search each website and find the little story about someone [who] committed armed robbery in their neighborhood. And so, my goal was just to put as much information out there, identify the alleged criminals, and keep people up to date on trials, sentencing, and appeals that happen in major cases. Some of it is used as a tool to help people find out information on area crime. To cut the middleman, or be the middleman, for that sort of thing.

If the justice system works effectively, then by extension, criminal punishment should be swift and public. Website publishers are acutely aware of the digital trail their work creates. Ed, a neighborhood issues blogger, noted that: “If someone's not a public personality – if I write about them, whatever I write will probably pop up in Google pretty high.” Timothy, a young urban affairs blogger, describes several reasons why his website is successful:

Criminals I report about are young men in [city] who could care less if their information is put up there. But really I look at the case, I look if it's still active, I look at, ‘Is this person dangerous to the community?’ I look to see if this person has their information in a large number of other places. If my taking it down isn't going to cause a scratch in the search history of them, then that's not my main prerogative, especially

if they have been convicted of something. It's for the right of other people to know. It's public information anyways.

Publishers felt their websites also facilitate a process that has always existed. Mindy, who runs a nationwide website that follows criminal cases, argued that "the Internet is nothing more than an online coffee shop. People chatting back and forth, just like they used to in the 'olden days,' or sitting at the bar and talking. It's just that now there's a bigger audience."

Website producers found this digital archive both alluring and utilitarian. Henry said: "Having a more vast electronic media does help even the playing field in a way and hopefully overall more accurate information comes out to the public. . . . that accuracy and justice is served in the long run." Sam feels his website would eventually lead to a better system of governance: "I think more information is good. . . . Get some basic information about the crime. That kind of transparency is good in building this community partnership." Sheila, who maintains an online repository of accused and recently arrested (but not yet convicted) sex offenders, says: "[my site] is probably hated, or will be hated by civil liberties supporters, but I would much rather support a world that exposes sex offenders than to sit on my hands waiting on the justice system to convict before our children are safe. And, by the way, I am a registered Liberal, always have been. Crime is the one area where I believe our country is lacking."

Through their mission-driven work, publishers are adept at using governmental databases and conducting online administrative research. In turn, they feel they are contributing to better systems of public safety. By creating a permanent archive, they facilitate criminal punishment, grounded in a belief that laws and criminal justice systems are ultimately functional, though the government could use assistance in disseminating information to the public. In this way, their websites fulfill both a personal and public function. For publishers, arrestees who appear on websites have self-selected into criminal justice system channels, and though it may not be a pleasant experience to have one's record made publicly available, publishers feel protected by law and their right to republish governmental data.

### *Website Subjects*

The expungement clinic attendees shared a deep frustration with the administrative processes around their criminal histories. As part of the expungement process, clients were required to obtain copies of their criminal records from various state and local agencies. Many also conducted informal searches online.



Overwhelmingly, interviewees claimed the reports from governmental agencies and private industry were riddled with errors, misidentifications, or showed charges that had been dropped, arrests that never led to charges, and long ago convictions that had already been sealed or expunged. For the interviewees, the flawed reporting was another outgrowth of a flawed criminal justice system. In addition, many felt strongly that they had “paid” for their crime, and that after some point of time, public accessibility to their record was detrimental to their effort to move on from their low-level offense, failing to reflect the person they are today.

The ways criminal justice data are made public felt like a violation of the presumption of innocence to many interviewees. For instance, Donna viewed her online record as another step in a series of injustices that involved several arrests that never led to charges—yet resulted in her booking photo appearing online:

Mind you, they take you down there, they fingerprint you, they don't have enough evidence and they have to let you go. But it still goes on your record and you have to get it expunged and it shouldn't even have to be like that. It should automatically be dismissed if it was wrongful... But a lot of people don't even know about that. So they just have it on [their record] forever. There just really needs to be a change. It's just not good for someone that's really trying to get their life together. It just keeps dragging on.

Others noted that criminal record items that were to be removed after a period of nonoffending also did not go away as promised. Michael was granted a stay of adjudication for a minor offense, where a judge assigns probation before an actual conviction and tells the defendant that if all conditions are met, the charge will be dropped. Yet, Michael found this still appeared as a conviction on various reports:

It was creepy to Google myself. . . There's a lot of information that should not be out there. There was a few things that were dropped that shouldn't have still been on there. And the question is, do they ever go away? . . . I have the paperwork here for a traffic ticket two years ago. They said, 'stay clean for a year and we'll take it off your record.' And here it still is.

Maddy recently spent a night in jail after an altercation with a partner, though no charges were filed. To her dismay, that booking photo appeared online, accompanied by a set of charges she was not aware of: “I just recently looked at a jail booking

[website], and seen stuff I've never been charged with. I've never been charged with assault, and now I see assault on my record."

William was visibly frustrated with a website that posted an incorrect criminal record, claiming he committed a serious offense in 1901, a clear data entry error: "I mean seriously, you see it? 1901... I haven't done no time at all, never been arrested or anything since 1982... I get frustrated and angry because this is too hard to comprehend about something that I didn't do. I say somebody is using my name, they got to be." Marcus faced a similar issue with a mistaken identity. He has a common name, and when he conducted a Google search for his criminal record, "at least three people came up with the exact same name," all with criminal histories. He had a potential employer also run a background check: "He pulled out my record and he kept saying, 'well you got like six charges here.' I kept looking at that and said, 'no I don't.' Then we looked at the birthdate." Marcus is left unsure if a potential landlord or employer will take due diligence to check the birthdate in the future, or if various websites even report these demographic identifiers. Daryl relates to this experience, also because of his relatively common name: "You go on Google and put your name on there, and there comes up two or three, ten people with the same name will pop up."

Interviewees hold clear mistrust of the administrative arm of criminal justice, intensified by the swift reposting of these data across platforms, often unbeknownst to the website subject who is in the midst of in-person administrative webs as they navigate the actual, lived arrest, booking, and release. For instance, Lyonel learned after his release from jail that his booking photo was published online and in the print publication *Busted*, while simultaneously learning his identity had been stolen. Once he began researching online, he saw his booking photo on various websites, as well as "different people with my name using my credit for social security purposes. I would say the information isn't accurate at all."

Given the sheer number of arrests each year, there are millions of others who face the posting of their criminal justice interactions online. While slightly more than 1.5 million persons were held in U.S. prisons in 2013, there were more than 7 times that of arrests that year – about 11.3 million (U.S. Department of Justice 2014a, 2014b). Brame et al. (2012) estimate that a full 30 percent of U.S. youth are arrested by age 23, unevenly distributed by race and sex, with about 49 percent of African American males, 44 percent of Hispanic males and 38 percent of White males arrested by age 23 (Brame et al. 2014). Thus, arrests are concentrated and common for particular groups.

This concentration of repeated arrests for particular demographic groups is precisely what concerned Jaiden most. Jaiden is

a military veteran who recently completed his first year of nursing school, but is nervous about what might appear in a criminal history search after being arrested multiple times in a suburban area near his home in years past:

That's what I am worried about. A police officer makes contact with you, takes your license and says we have a complaint about something and comes and talks to you. If you go pull your records after he writes his report, it says you were arrested. Every contact they have comes up as arrested... If I falsify information to [an employer], that's a criminal offense, but how come it's on my record as an arrest?

Overwhelmingly, expungement seekers report fundamental flaws with their criminal history information – due in part, of course, to their reason to pursue a record expungement. Their conception of the legality around this release of their information is one of both frustration and confusion. Ambiguous interpretations of law abound – what is publicly available, what information is already out there, and what is the recourse? Interviewees were already burdened by working through “official” channels to remedy or seal their records. The public reposting of these data left interviewees both incredulous and exhausted at the prospect of attempting to clear their digital trail.

## **Section II: What Should Law Be?**

Legal consciousness theory examines law beyond the codified and written, and instead asks how people conceive of law. For this study, beliefs about law are based in two different Constitutional issues. For the website publishers, this involved First Amendment protections, shaped by a belief that governmental data should be governed by free speech principles and should remain public, transparent, and readily available. In stark contrast, the website subjects invoke the Constitution by pointing to a potential due process violation. These views, of course, shape beliefs of how law should govern criminal justice data. In contrast to the website publishers who advocate for the archive, website subjects felt their digital trail of low-level, long ago criminal justice information has become a form of permanent punishment.

### ***Publishers***

Publishers overwhelmingly support openness to governmental data, and believe records should be public indefinitely. Given that these data are already available, interviewees view their

website as providing a function to the public – specifically, bridging the gap between public criminal justice data and the public's access to it. Publishers argue their work is legal because criminal justice data are public and their websites fall under the umbrella of free speech protections, with the added bonus of providing a public safety benefit. These three lines of defense provide a somewhat bulletproof justification for their work. Bob, who publishes a weekly jailhouse roster on his website, explains:

The fact that our society knows who has been jailed – that citizens are not jailed secretly by the government – is an aspect of democratic transparency. There is, however, a gap between transparency as it exists theoretically and legally, versus transparency as it exists actually and in reality. For example, if the record of who was in jail is hard and inconvenient to obtain, do we really have transparency? [My website] stands in the gap between theoretical and actual transparency. This is where public records rubber meets the road of actual data access. This is free speech, this is freedom of information, and in a 'copy and paste' dissemination kind of way, this is grassroots journalism.

There is little patience for bulky criminal justice databases that prevent easy dissemination of data. Andy is among the most tech-savvy interviewees and developed his own crime mapping mobile app, which he offers for free online. As he describes it, his efforts to translate governmental data were often made more difficult by local law enforcement – for instance, when police began exporting data as PDF files instead of data files, and thus were not exportable to Andy's app. Overall, he is frustrated by the inability of laws to keep up with digital accessibility, including FOIA and the 1976 'Government in the Sunshine Act', which aimed to create greater transparency in government. In his words:

People don't understand that open data is about digital accessibility. The bigger picture is that the Data Privacy Act and our laws about public access to data have no sense of the Internet. ... the Internet has become such an important part of our culture, especially in the sense of data, but I feel like a lot of open data policies that have been made are not changing the law. FOIA and 'Sunshine Laws' don't encompass what is in our lives now.

Paula, a journalist who works for an online community news source, echoed Andy's frustration with governmental claims to access and the reality of obtaining data:

I think there's just more interest in [transparency], there are more eyes on the street in that way. I don't think the government has gotten any better about providing information. I mean, even with Obama, before he was elected, one of the things he said was that he wanted to be transparent and increase transparency, but he's done some of the worst stuff transparency-wise. So, it's so interesting that on the one hand, you have this 'village' online and things should be more available. But they're not.

There is little patience for website subjects' complaints. The First Amendment functions as a strategy for publishers to distance themselves from potential criticism for their online work. This was a reflective process for some. Andy, who produced the crime mapping application, described how he felt that most people should "let go" of privacy concerns:

It's really tough. My personal view of privacy is to let it go. But that comes from privilege. Essentially, I'm an affluent white male. I don't know what it's like to go to court or go to jail. And I also work on the Internet. It accumulates for me to say I don't care, I have nothing to hide.

Overall, website publishers did not invoke individual speech rights in the traditional sense of the First Amendment. Instead, they frame it as a necessary protection in their pursuit to combat crime. In this way, they rely on an interpretation of the First Amendment not for individual free speech, but for the greater good – in this case, public safety. To use Mindy's words: "free speech protection is not about unicorns and birthday cakes. It's the ugly stuff that needs to be protected."

### ***Subjects***

Overwhelmingly, website subjects called for limited and tempered reform, instead of complete dissolution of their criminal record. This was a pervasive theme. Expungement seekers were not interested in destroying their record and instead sought oversight to prevent erroneous records, a reasonable time frame for their record to remain publicly accessible, and a system in place for remedying errors. They felt that laws governing criminal record data should evolve with changing technologies *and* the life course of the individual. Gladys said, "I think laws should keep up with the times. It should change. People should review them and have this many different laws or statutes that relate to one law – something – just to give us a break. The people who have

moved on.” Jason felt torn as he searched for words to describe how he might change laws that govern access to criminal record data: “If I could change the law, I guess I would be selfish to sit there and try to say just specifically for myself. That’s why I guess I won’t say anything. That’s kind of a deep question.”

Tom recently lost a job after a group of coworkers Google searched his name and found a misdemeanor offense from twenty years ago that triggered another background check by his company. He felt a sense of disbelief as he watched the events unfold: “There should be an easier way as you move on in your life, to seal it from the public. I have no desire to seal anything I have ever done from law enforcement, FBI, CIA, I could care less, I mean you make a mistake, you make a mistake.” Jameison, who has a relatively extensive history of arrests and dismissed charges that appear online (which he attributes to discretionary tactics by police in his neighborhood), thought laws should reflect the severity of the crimes: “I think if you have a violent criminal history, that most definitely should be to the public. Sex offenders, to the public. Stuff like that to the public. But if you have something like petty misdemeanors, gross misdemeanors, don’t even include that to the public because that’s not their business. If it’s the court’s business that’s fine, but not the public.”

Others thought law could facilitate a consent process, much like credit reports. Michael described his dismay at a dismissed case that repeatedly shows up online and thought that, “there should be consent. I should have some kind of control over who I want to see these records. I don’t think it should just be anyone. I want the legislature to change these laws, instead of it coming down to, here’s this person, here’s what they did.”

Gladys, who is in her sixties, described a situation at her church where members began to covertly research one another’s criminal histories online after an unfortunate situation at the Canadian border during a missionary trip, where several members were turned away due to their records. She was unaware that her criminal history (a misdemeanor conviction from the early 1990’s) might be publicly available online. She worked to articulate a definition of privacy law that also allowed for access:

I don’t think our history should be on the computer. Because it’s private. It’s confidential. So, I think a lot of things on the Internet, its good in some sense and in some sense its bad. So, I think there should be a privacy law where only if you have authorization to use information that you should be able to. It shouldn’t be to a point where a random person just searching should be able to pull up anything about me. ... It’s

like we do our time, but the society never forgives you and always holds you accountable. What they are saying is that you can never change, and that's not true. Because a person needs to move on. And those that don't, then they always have a new criminal record. That's the only thing I have issues with, that you can go back for years and see your history, and that's not who I am.

Website subjects felt helpless. While they recognized the necessity for their records to be available to governmental officials, they were unsure how to articulate the public's right to disseminate these records to broader audiences. While they felt there should be a fundamental difference between public and private, they struggled to find legal language that made this distinction clear. While there was a sentiment of what law *should* be, the terminology at hand has not yet developed to match current social practices.

### **Section III: How Should Law Be Used?**

A final component to legal consciousness theory asks when people actually invoke – or do not invoke – law. This analysis thus far has shown how views on crime and punishment provide context for two sets of legal beliefs, providing foundation for how both parties believe what law should be. This final section asks how law is *used* in action.

Website publishers have a strong sense of what they believe to be their legal rights. Part of this is a self-selection effect: they actively produce crime websites and have therefore taken at least some steps to think about the legality of their work. The public nature of these websites, however, have a chilling effect on website subjects' decision to invoke a right to privacy. The lack of a formal legal framework further compounds this tendency to retreat. While some are tempted to invoke their rights, many others choose to ignore their digital trail to avoid inadvertently making it worse – a nod to the power of the website publishers.

#### ***Publishers***

Publishers often developed a particular type of legal-sounding language on their websites to defend their practices. They are also enmeshed in the language of criminal justice administration. To do their research, publishers make in-person trips to the courthouse, submit FOIA requests, and cull jailhouse rosters and booking photos made available online. They share tips and conduct research on what they are legally allowed to obtain. Thus, their sense of being on the “right” side of the law is



**Figure 1. Screenshots of Crime Websites using Legalese. [Color figure can be viewed at [wileyonlinelibrary.com](http://wileyonlinelibrary.com)]**

palpable, which contributes to their sense of being legally protected. Their argument is that the information is “already out there” – they are just aiming to make it more accessible, available, and digestible. As Sally, a cold case blogger, says: “Most of [the people on my website] are in prison already, and almost all sites have an inmate locator that is available online and I just copied from there, cause that’s all public information.” Jasper uses the language of government itself: “We obey policies set out by law enforcement, general statutes. . . Everything that we share on our page is public record. We don’t have an ‘inside’ person giving us any information. All wanted individuals and arrests are all public information and can be found via the Internet.”

Figure 1 shows two screenshots from a blog that claims legal protection in reposting a booking photo. Because of the ambiguous legal status of booking photos, website publishers develop their own set of legalese to defend their practice. Popular criminal history websites often post elaborate statements to address their own legality in order to deter potential grievances. For instance, Mugshots.com defends its business practices through various forms of legal compliance, claiming protection under the First and Sixth Amendments, copyright laws, and FOIA (Wolfe 2013).

Using the language of FOIA and mimicking legal-sounding language, the website publishers assure themselves of their right to publish. This operates as a convenient, official sounding line of defense when confronted by website subjects. Publishers also counter complaints by threatening to “make things public” through their website. Marcus, who produces an urban affairs website, recounted a complaint about information from a woman in his community:

I ended up calling her up and saying, ‘Hey, we’re just going to have to go to court with this. I’m not taking any



information down off my site.’ And later, I get a letter that’s, ‘Hmm, ok well never mind.’ Because if it would have went to court, I would have done it *pro se*, subpoenaed all these people and put them on the stand to prove my point, and they didn’t want that. I gave them a list of people I would have subpoenaed to scare the hell out of them.

Nearly all of the publishers said they receive requests that information be removed. Several directly shared examples of this correspondence with me. It was clear from the examples they shared that instead of invoking law, the website subjects tend to use a set of emotional and personal appeals. Several examples of email requests include:

The reason I’m emailing you is because my name has been published on your blog and is currently showing up in Google searches for my name. I respect what you’re trying to do to improve your neighborhood. And I also understand it is completely within your right to publish items of public record. You’re also a pretty savvy guy when it comes to law, and I’m sure you’re aware that if what I’ve told you is true I can (and plan to) have the arrest expunged from the record. In the meantime, I wonder if I might talk you into editing my name out from your post? I’ve recently been applying for jobs, had a promising lead and it quickly fizzled out. I suspect it may be at least partially as a result of your blog and a few other ‘mug shot’ type sites.

Could you please delete this above information? Trying to find employment after being laid off with young kids to feed is hard enough. I wasn’t aware that my mug shot and arrest info was even online until a potential employer told me he couldn’t hire me because of what he has found on your blog and a mug shot web site. Your blog is the last of anything regarding my arrest.

I understand what you’re doing, and it’s probably a great thing for people like child molesters to be exposed, etc. But, could you please delete my name off of your blog? I was never convicted of anything - my record is clear besides speeding tickets - and am trying to apply for different jobs and this is deterring me from finding employment. I also do not feel comfortable with my exact home address on your blog, which is kind of creepy. I have young children that I wish to protect from an abusive ex-husband.

In response, publishers rely on folk definitions of law and their own discretion. As Diego describes, “Sometimes the laws

have not caught up with the Internet. . . I'm just trying to do stuff that is credible and legit, but eventually the law will have to determine, okay, where's the difference?" One blogger who requested strict anonymity said it was a discretionary process:

Sometimes people ask me to remove it because they're trying to move on from something or because they're ashamed of something they did. How I react to it depends on the post and the reason for the requested removal. I'm not blogging to harm anyone's livelihood or lives, so if it's an innocuous post and they want it taken down, I'll consider it. [If they] want the post removed 'just because,' it ain't happening.

Website publishers are not lawyers, nor are they journalists or legal experts. They are technically proficient, ordinary citizens who have a personal interest in publishing websites that are of deep interest to an American public. Often, interviewees did not cite a specific law for their defense, but instead used extralegal language, legal threats, and discretion to defend their work and deflect criticism. These leaves them in a powerful position vis-à-vis website subjects.

### *Website Subjects*

Website subjects retreat from law. Already in precarious legal situations, subjects are reticent to invoke formal law or to pursue official channels. While some publishers asserted in interviews that the website subjects do not "care," most expungement-seekers certainly cared about their record, but were confronted with the reality that there was no legal avenue for them to pursue. Roger noted the futility of this practice: "Let's just imagine that I am successful. There is like three-thousand [websites] out there." When Maddy first discovered her booking photo online, she immediately tried to ignore it: "I just seen [the photo] and was like, 'ugh' and just shut it off and took off."

The extralegal scope of these websites mean subjects often do not know where to turn. As Jameison describes it: "I'm going to this source, that source, that source. It's like, can I just go to the primary source? I want to go to the primary source instead of all these middlemen people... It's exhausting." William said: "I haven't bothered. It's too much. It's too frustrating... You know you ain't do nothing in thirty-something years and then all of a sudden you want to get an apartment and you can't. You're just stuck the way you are at. That's just terrible. It's a bad feeling. It's like I've been on a stand still."

Roger was clear about the legal ambiguity he faces: “I can draft up a pretty good document. But legally, what you think makes sense, doesn’t make sense to the law. It’s not always the same thing.” Roger tried to send letters to publishers of several websites who posted information about a conviction from several years ago, but was not able to navigate systems of website property ownership and could not make sense of his rights. He said he received several “blank letters stating, ‘we grabbed data from a public source and we are not responsible for the data that we grabbed.’ But somebody’s got to take responsibility for it. There is no legal recourse.”

Several interviewees also felt that getting their online record straightened out was not a priority for criminal justice agencies, of which they are already distrustful. Daryl said, “They don’t wanna fight. Because they already know that it’s controlled. It’s set in place for certain reasons. Even if we were able to get our records expunged, somebody can still see it.” Jameison said he has left “thousands of messages” in his pursuit to remedy his criminal record, particularly several charges that had been dropped but still appear online, but has not yet received the help he needs. He noted: “I am calling three times a week. And its like, you know, sometimes people are busy and can’t get back to you, but there should be somewhere where you can get legal advice.”

Because formal law in this area is mostly nonexistent and sits in a blurred line between criminal and civil law, it is ambiguous and unclear to subjects. In the absence of positive legal restrictions, both parties fill this vacuum with folk definitions of privacy, First Amendment rights, and access to information. Central to this difference is a tension in whether access to criminal records benefit broader society versus the harm publicly accessible criminal records bring to the website subject. In other words, what feels like a privacy violation to a website subject is simultaneously seen as a benefit by those who circulate criminal records.

## **Discussion**

This study shows how a lack of formal legal guidance in a newly emerging technological landscape aids in the construction of legality around public access to criminal records. This work expands the current sociolegal literature on legal consciousness by describing how views on punishment and experience with the criminal justice system generate legal beliefs regarding privacy and criminal records, particularly in the absence of formal regulation. I argue that views for or against public access to criminal

histories are deeply engrained in one's views of punishment and are (at least partly) generated by the lack of a formal legal framework to draw from, contributing to divergent spheres of legal consciousness. I close with a discussion of limitations and theoretical and practical implications of this work.

### **Limitations of Self-Selection and Causality**

Issues of self-selection and questions of causality are endemic to interview-based studies (Maxwell 2013; Seiman 2013). The two interview samples used in this study are especially unique in that to be considered in the pool of potential respondents, individuals must have taken action at one point – either to sit down and construct a website, or to physically attend an expungement clinic. This raises two questions: first, does participation in either activity signal a pre-existing view of law that is reflected in interview data? Or, does participation in these activities create one's legal consciousness? While this study is not designed to test a causal argument (as would be suggested by the latter question) both issues merit methodological discussion.

The interview data speaks to this process of self-selection into the interview pools. First, respondents had a sense that official channels were inadequate in addressing crime. Sophia, who runs a Facebook crime watch page for her affluent neighborhood said her motivation came from being victimized: “We had our cars were broken into three times and I just really got fed up and said, enough was enough. And I didn't know what to do, but I know I had to do something, you know, to put a stop to it.”

The website subjects were most often led to the expungement clinic after experiencing a barrier to employment or housing due to their record, after suffering an embarrassing confrontation with their record at their workplace or church, or after learning their record was easy to find online. For example, Trent came to the clinic frustrated and suspicious after he found yet another erroneous record online: “I don't know if someone used my name. But I think I've been maliciously targeted.”

Interview subjects are included in this study because of a triggering event, a way of thinking, or a combination of the two. While this complicates any claims of causality, the “mutual and simultaneous shaping” (Lincoln and Guba 1985) of these divergent experiences with criminal justice also shapes the ways respondents answer interview questions. In other words, while self-selection into the interview sample was often sparked by a personal experience, pre-existing views also contributed to the decision to begin to take initial action. Once in, each party has quite different experiences that shape (and perhaps generate)

legal consciousness. Publishers find that within a legal vacuum, they can assert their right to publish. Subjects are initially confronted with an ambiguous legal landscape, and then learn through time that there is very little ambiguity – the law will not protect them. In this way, respondents engage in a two-way causal street of consciousness and experience. Future research should further consider this process by explicitly considering those individuals who do not self-select into the expungement clinic setting and therefore develop legal consciousness through a different set of mechanisms.

### **Legal Consciousness in New Context**

For some time, criminal histories have existed in the broader realm of publicly available information, with booking photos and prior records regularly appearing in print and television news. The online context has amplified this dramatically. In preinternet society, courts warned of the potential harm of clearinghouses of individual-level crime data and have since sent mixed signals regarding the release of these types of data. We are left with millions of booking photos, criminal histories, and arrest records publicly available and easily disseminated. It should come as no surprise that, in a society captivated by crime media, website publishers feel they have stumbled upon a legally protected niche that comes with a built-in audience.

Extending theories of legal consciousness into the invocation of formal law, I describe how website publishers externalize their views on criminal records and the efficacy of eternal punishment on a public platform. They quickly invoke their First Amendment rights when challenged and pepper their websites with pseudo-legal language defending their use of criminal history data. In sum, they invoke law not only to protect themselves, but also to help others by revealing “criminals” who live in our communities.

Mobilization and invocation, while central to most studies of legal consciousness, is put into a new light in this study. This study located interview subjects who self-selected into a grievance structure (an expungement clinic), but are powerless to pursue similar grievances in the extralegal, online setting. Subjects internalize their views of privacy, feeling helpless amidst a justice system they view as broken and unfair. Typically, they do not invoke formal law beyond the rare empty threat to sue a website publisher, and instead seek band-aid legal remedies, such as expungement clinics or free legal services. This makes sense: already haunted by a public display of their criminal past, website subjects are lax to confront website publishers, thus leaving their digital trail intact. This is especially frustrating for those who are

low-level offenders, or for those who were charged or convicted of a crime many years ago, because they do not expect a digital trail for their transgression. In sum, they do not invoke formal law because they do not believe it will protect them in the end.

### **The Reinforcement of Social Hierarchies**

Finally, the unlimited distribution of criminal justice data reinforces social inequalities already present in the criminal justice system. Arrest statistics are unevenly distributed across racial groups, as are the negative consequences of online criminal records. Thus, it is clear that the production of online crime reports has deleterious effects for particular socio-demographic groups. Although the public celebrates access to governmental data as essential to democracy, the unfettered distribution of arrest records and booking photos “reinforces and actualizes” hierarchies of race and social class (Nielsen 2004).

The differential treatment of minority individuals by the criminal justice system is reflected on crime reporting websites. In turn, the popularity of these websites reinforces racial stereotypes and popular conceptions about who and what we deem criminal in society. In a cyclical sense, repeated negative contact with the criminal justice system leads people to develop a particular legal consciousness that in turn contributes to their noninvocation of their legal rights. In the same vein of why the “haves” come out ahead, those who lack the social, political, or economic capital to challenge current data practices will bear the biggest burden of the negative effects (Galanter 1974). In this way, crime websites have the potential to not only increase racialized notions of crime and criminals, but produce new forms of legal cynicism for those profiled in such a starkly public manner.

There’s room to debate whether this is a public benefit or a breach of privacy and this area is ripe for policy intervention, as interviews with expungement seekers attest above. Legislators could disallow the sale or unfettered distribution of criminal records to private vendors or corporate data management services. The federal government could license criminal history databases in a manner similar to the credit reporting industry (Jacobs 2015; Lauer 2011), or processes could be put in place to streamline an individual’s request to remove information about arrests that never led to charges or convictions from long ago, similar to the EU’s “Right to be Forgotten.”

Using crime websites as a case to examine legal consciousness also helps reveal how taken-for-granted assumptions about First Amendment and Due Process are pushed into an uncomfortable and ambiguous new light in the age of the Internet. Laws

governing public access to criminal justice data have not been adapted to how the Internet has changed the production and reproduction of data. Although the courts have warned of the dangers of repositories of criminal histories and booking photos, the collusion of digitization, data mining, and transparency in government have coalesced into the current situation.

However, change may be on the horizon: in July 2016 the 6th Circuit overturned a two-decade-old legal precedent that allowed news organizations and others to obtain federal booking photos. Judge Deborah Cook noted: “A disclosed booking photo casts a long, damaging shadow over the depicted individual... Today, an idle internet search reveals the same booking photo that once would have required a trip to the local library’s microfiche collection” (*Detroit Free Press Inc. vs. U.S. Department of Justice*, 2016: 5). While it remains difficult to balance government transparency and personal privacy, courts are beginning to note the negative consequences of the digital trail.

Finally, amongst the collateral consequences of criminal histories, we must now include extralegal forms of criminal punishment, such as these websites. Today, digital criminal histories have increased the “stickiness” of criminal histories and expanded the realm of collateral consequences (Uggen and Blahnik 2015; Uggen and Stewart 2015). Ultimately, the diffusion of punishment in all realms of life, even for minor offenses, diminishes the ability to move on from one’s past – especially once it is online, easily searchable, and publicly archived indefinitely.

#### *Acknowledgments*

*For their help and guidance, the author would like to sincerely thank Gabrielle Ferrales, Seth A. Klein, Wenjie Liao, Josh Page, Amy Kristin Sanders, Sarah Shannon, Robert Stewart, Chris Uggen, and three anonymous reviewers.*

## REFERENCES

- Barbas, Samantha (2010) “The Death of the Public Disclosure Tort: A Historical Perspective,” 22 *Yale J. of Law & the Humanities* 171–215.
- Beckett, Katherine & Theodore Sasson (2000) *The Politics of Injustice: Crime and Punishment in America*. Thousand Oaks, CA: Sage.
- Bernburg, Jon, & Marvin Krohn (2003) “Labeling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood,” 41 *Criminology* 1287–317.
- Best, Joel. (2012) *Social Problems*. 2nd ed. New York: W.W. Norton.
- Black, Donald (1984) *Toward a General Theory of Social Control. Volume 1: Fundamentals*. Orlando: Academic Press.
- Blackstone, Amy, Christopher Uggen, & Heather McLaughlin (2009) “Legal Consciousness and Responses to Sexual Harassment,” 43 *Law & Society Rev.* 631–68.

- Brame, Robert, et al. (2012) "Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample," 129 *Pediatrics* 21–7.
- (2014) "Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23," 60 *Crime & Delinquency* 471–86.
- Brayne, Sarah. (2014) "Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment," 79 *American Sociological Rev.* 367–91.
- Carey, Corinne A. (2004) "No Second Chance: People with Criminal Records Denied Access to Public Housing," 36 *University of Toronto Law Rev.* 545–94.
- Conley, Amanda, et al. (2012) "Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry," 71 *Maryland Law Rev.* 772–847.
- Cooper, Davina (1995) "Local Government Legal Consciousness in the Shadow of Juridification," 22 *J. of Law and Society* 506–26.
- Dowler, Ken (2003) "Media Consumption and Public Attitudes toward Crime and Justice: The Relationship Between Fear of Crime, Punitive Attitudes, and Perceived Police Effectiveness," 10 *J. of Criminal Justice and Popular Culture* 109–26.
- Durkheim, Emile (1893) *The Division of Labor in Society*. New York: Free Press.
- Edelman, Lauren B (1992) "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Law," 97 *American J. of Sociology* 1531–76.
- Edelman, Lauren B., Christopher Uggen, & Howard S. Erlanger (1999) "The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth," 105 *American J. of Sociology* 406–54.
- Ellis, Justin (2011) *How Public is Public Data? With Public Engines v. ReportSee, New Access Standards Could Emerge*. NiemanLab 17 February. Available at: <http://www.niemanlab.org/2011/02/how-public-is-public-data-with-public-engines-v-reportsee-new-access-standards-could-emerge/> (accessed 26 January 2015).
- Eschholz, Sarah, Ted Chiricos, & Marc Gertz (2003) "Television and Fear of Crime: Program Types, Audience Traits, and the Mediating Effect of Perceived Neighborhood Racial Composition," 50 *Social Problems* 395–415.
- European Commission (2014) *Factsheet on the Right to be Forgotten Ruling (C-131/12)*. Available at: [http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet\\_data\\_protection\\_en.pdf](http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf) (accessed 10 March 2015).
- Ewick, Patricia, & Sharon Silbey (1998) *The Common Place of Law: Stories of Everyday Life*. Chicago: Univ. of Chicago Press.
- Felstiner, William L.F., Richard L. Abel, & Austin Sarat (1980) "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming. . .," 15 *Law & Society Rev.* 631–54.
- Galanter, Marc (1974) "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Rev.* 95–160.
- Gilliam Jr, Franklin D., & Iyengar, Shanto (2000) "Prime suspects: The Influence of Local Television News on the Viewing Public," 44 *American J. of Political Science* 560–73.
- Goffman, Alice (2014) *On the Run: Fugitive Life in an American City*. Chicago, IL: Univ. of Chicago Press
- Greer, Chris, ed. (2010) *Crime and Media: A Reader*. New York: Routledge.
- Hochberg, Adam (2014) *Disputes Over Crime Maps Highlight Challenge of Outsourcing Public Data*, Poynter 24 November. Available at: <http://www.poynter.org/news/mediawire/213443/disputes-over-crime-maps-highlight-challenge-of-outsourcing-public-data/> (accessed 26 January 2015).
- Jacobs, James B (2015) *The Eternal Criminal Record*. Cambridge, MA: Harvard University Press.
- Jewkes, Yvonne (2004) *Media and Crime: A Critical Introduction*. Thousand Oaks, CA: Sage Publications.
- Katz, Jack. (1987) "What Makes Crime 'News?'" 9 *Media, Culture & Society* 47–75.



- (2016) "Culture Within and Culture about Crime: The Case of the "Rodney King Riots," 12 *Media, Culture & Society* 233–251.
- Klinenberg, Eric (2005) "Convergence: News Production in a Digital Age," 597 *The ANNALS of the American Academy of Political and Social Science* 48–64.
- Lageson, Sarah Esther, & Christopher Uggen (2013) "Crime, Punishment and Employment Over the Life Course." in: Krohn M. and C. Gibson, eds., *Handbook of Life Course Criminology*. New York, NY: Springer. 201–12.
- Lageson, Sarah E., Mike Vuolo, & Christopher Uggen (2015) "Legal Ambiguity in Managerial Assessments of Criminal Records," 40 *Law and Social Inquiry* 175–204.
- Lageson, Sarah E. (2016a) "Found Out and Opting Out: The Consequences of Online Criminal Records for Families," 665 *The ANNALS of the American Academy of Political and Social Science* 127–41.
- (2016b) "Digital Punishment's Tangled Web," 15 *Contexts* 22–7.
- Larson Erik W. (2004) "Institutionalizing Legal Consciousness: Regulation and the Embedding of Market Participants in the Securities Industry in Ghana and Fiji," 38 *Law & Society Rev.* 737–67.
- Lauer, Josh (2011) "Surveillance History and the History of New Media: An Evidential Paradigm," 14 *New Media & Society* 566–82.
- Lewis, Seth C. (2012) "The Tension Between Professional Control and Open Participation: Journalism and its Boundaries," 15 *Information, Communication & Society* 836–66.
- Lincoln, Yvonna S., & Egon G. Guba. *Naturalistic Inquiry*. Newbury Park, CA/London: Sage Publications.
- Logan, Wayne A., & Andrew Guthrie Ferguson. (2016) "Policing Criminal Justice Data." *Minnesota Law Rev.* (Forthcoming).
- Marshall, Anna-Maria, & Scott Barclay. (2003) "In their Own Words: How Ordinary People Construct the Legal World," 28 *Law & Social Inquiry* 617–28.
- Maxwell, Joseph A. (2013) *Qualitative Research Design: An Interpretive Approach*. Thousand Oaks, CA: Sage.
- McKenzie, Laura K. (2016) "The Right to Domain Silent: Rebalancing Tort Incentives to Keep Pace with Information Availability for Criminal Suspects and Arrestees," 69 *Vanderbilt Law Rev.* 875–907.
- Merry, Sally Engle. (1985) "Concepts of Law and Justice Among Working Class Americans," 9 *Legal Studies Forum* 59–69.
- National Consumer Law Center (2012) *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses*. Boston: National Consumer Law Center.
- Laura Beth, Nielsen (2004) *License to Harass: Law, Hierarchy, and Offensive Public Speech*. Princeton, NJ: Princeton Univ. Press.
- Pager, Devah (2007) *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*. Chicago, IL: Univ. of Chicago Press.
- Potter, Gary W., & Victor E. Kappeler, eds. (2006) *Constructing Crime: Perspectives on Making News and Social Problems*, 2nd ed. Long Grove, IL: Waveland Press, Inc.
- Reporters Committee for Freedom of the Press (2008) "Police Records: A Reporter's State by State Access Guide to Law Enforcement Records." Available online: <http://www.rcfp.org/rcfp/orders/docs/POLICE.pdf> (accessed 10 March 2015).
- Rostron, Allen (2013) "The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business," 90 *Washington University Law Rev.* 1321–34.
- Sampson, Robert J., & Dawn Jeglum Bartusch (1998) "Legal Cynicism and (subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences," *Law & Society Rev.* 777–804.
- Sampson, Robert J., & Jeffrey D. Morenoff (2006) "Durable inequality." in: Bowles, S., S. N. Durlauf, & K. Hoff, eds. *Poverty Traps*. Princeton, NJ: Princeton Univ. Press. 176–203.

- Sarat, Austin, & Thomas R. Keams (1995) *Law in Everyday Life*. Ann Arbor: Univ. of Michigan Press.
- Schlesinger, Philip, & Howard Tumber (1994) *Reporting Crime: The Media Politics of Criminal Justice*. New York: Oxford Univ. Press.
- Seiman, Irving (2013) *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences*. New York: Columbia Univ. Teachers College Press.
- Shephard, Kathryn (2014) "Mug Shot Disclosure Under FOIA: Does Privacy or Public Interest Prevail?" 108 *Northwestern Law Rev.* 343–78.
- Silbey, Susan (2005) "After Legal Consciousness," 1 *Annual Rev. of Law and Society* 323–68.
- Surette, Ray (2003) "The Media, the Public, and Criminal Justice Policy," 2 *J. of the Institution of Justice and International Studies* 39–52.
- Thatcher, David (2008) "The Rise of Criminal Background Screening in Rental Housing," 33 *Law and Social Inquiry* 5–30.
- Tucher, Andie (1999) "Framing the Criminal: Trade Secrets of the Crime Reporter," 43 *New York Law School Law Rev.* 905–13.
- Tyler, Tom R. (2003) "Procedural Justice, Legitimacy, and the Effective Rule of Law," 30 *Crime and Justice* 283–357.
- Uggen, Christopher, et al. (2014) "The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment," 52 *Criminology* 627–54.
- Uggen, Christopher, & Lindsay Blahnik (2015) The increasing stickiness of public labels. In J. Shapland, S. Farrall, & A. Bottoms, eds., *Global Perspectives on Desistance*. London: Routledge.
- Uggen, Christopher, & Robert Stewart (2015) "Piling On: Collateral Consequences and Community Supervision," 99 *Minnesota Law Rev.* 1871–912.
- United States Bureau of Justice Statistics (2005) "Improving Access to and Integrity of Criminal History Records."
- United States Department of Justice (2014a) *Prisoners in 2013*. Washington DC: Bureau of Justice Statistics.
- (2014b) *Crime in the United States 2013*. Washington DC: Bureau of Justice Statistics.
- Wade, Chris (2014) *The Reddit Reckoning*. Slate.com, 15 April. Available at: [http://www.slate.com/articles/technology/technology/2014/04/reddit\\_and\\_the\\_boston\\_marathon\\_bombings\\_how\\_the\\_site\\_reckoned\\_with\\_its\\_own.html](http://www.slate.com/articles/technology/technology/2014/04/reddit_and_the_boston_marathon_bombings_how_the_site_reckoned_with_its_own.html) (accessed 10 March 2015).
- Watstein, Ryan D. (2009) "Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects," 61 *Florida Law Rev.* 581–610.
- Winnick, Terri A., & Mark Bodkin (2008) "Anticipated stigma and stigma management among those to be labeled "ex-con," 29 *Deviant Behavior* 295–333.
- Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).
- Department of Air Force v. Rose*, 425 U.S. 352 (1976).
- Detroit Free Press Inc. v. United States Department of Justice*, 2:13-cv-12939 (6<sup>th</sup> Cir., (2016).
- European Union Court of Justice. *Judgment of the Court (Grand Chamber) of 13 May* (2014).
- Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*. Case C-131/12. ECLI identifier: ECLI:EU:C:2014:317.
- Florida Star v. B. J. F.*, 491 U.S. 524 (1989).
- Martin v. Hearst Corporation*, 777 F.3d 546, 2d Cir. (2015).
- United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).
- Snyder v. Phelps*, 562 U.S. \_\_\_ (2011).