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# Criminal Erasure Statute Does Not Expose Historically True Reporting To Post-Hoc Tort Liability

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*“There’s No Right To Have Your Arrest Forgotten”*

By Michael Beylkin

On January 28, 2015, the Second Circuit issued a decision affirming a trial court’s dismissal of Lorraine Martin’s lawsuit that had attempted to bring libel and other publication-related claims against media outlets that published accounts of her 2010 arrest, an arrest that was later expunged under the Connecticut Criminal Records Erasure Statute (“Erasure Statute”). [Martin v. Hearst Corp.](#), 2015 WL 347052 (2d Cir. Jan. 28, 2015).

The decision, written by Judge Richard C. Wesley for a unanimous panel of the court, addressed whether otherwise factually true reporting of Ms. Martin’s 2010 arrest on drug-related charges was subject to publication-related tort liability after those charges against her were subsequently dropped by prosecutors and the criminal record of her arrest “erased.” The court noted that the Erasure Statute operates purely in the “legal sphere” – that is, only with respect to an arrestees’ relationship with the State – and the statute cannot and does not “wipe from the public record the fact that certain historical events have taken place.” The court held that the Erasure Statute does not render tortious historically accurate news accounts of an arrest merely because the subject of those news accounts is later deemed, “as a matter of legal fiction,” to never have been arrested, and ultimately affirmed the district court’s grant of summary judgment in favor of the media defendants.

## Background

On August 20, 2010, Lorraine Martin was arrested after police executed a search warrant and was charged with possession of narcotics, possession of drug paraphernalia, and possession of a controlled substance. A little less than a week later, The Connecticut Post, The Stamford Advocate, and The Greenwich Time, all of which are newspapers owned by the Hearst Corporation, published articles in print as well as online, reporting that Ms. Martin was “arrested and charged with numerous drug violations [on] Aug. 20 after police received information that a pair of brothers were selling marijuana in town.” News 12 Interactive also published an online article reporting that Ms. Martin was arrested “after police say they confiscated 12 grams of marijuana, scales and trace of cocaine from [her] house” and that she was “freed on bond” and “did not enter a plea.”

More than a year after these media entities published these reports of Ms. Martin’s arrest, the State of Connecticut decided not to pursue the criminal charges against her, and a nolle prosequi was apparently entered in January 2012. Under Connecticut’s Erasure Statute, “[w]henver any charge in a criminal case has been nolle . . . all police and court records and records of the state’s . . . pertaining to such charge shall be erased” and “[a]ny person who shall have been the subject of such an erasure shall be deemed to have never been arrested within the meaning of the general statutes.” Conn. Gen. Stat. § 54-142a(c)(1), (e)(3). Thus, because the criminal case against Ms. Martin has been nolle, her arrest records were “erased” by legal operation of this statute.

Each of the media stories about Ms. Martin’s arrest, however, remained available online, even after the charges were nolle and even after Ms. Martin’s arrest had been allegedly “erased.” Thereafter, sometime later in 2012, Ms. Martin apparently submitted a request to the various media outlets to remove the online articles about her arrest, but they declined to do so.

In June 2012, Ms. Martin sued several media outlets, including the Hearst-owned newspapers and Cablevision’s News 12 Interactive in state court, claiming that “on or after January 11, 2012” the media’s new reports detailing her arrest, which had remained unchanged and available online, became defamatory because Ms. Martin “was

deemed never to have never been arrested” by operation of the Erasure Statute.

In addition to the libel claim, Ms. Martin’s complaint tacked on tort claims for false light, negligent infliction of emotional distress, and invasion of privacy. She also sought to represent a class composed of “similarly situated individuals” about whom the media defendants “have published and continue to publish” details of arrests in “police blotters and/or news sections” even after the Erasure Statute has “deemed” them to have not been arrested.

### **District Court**

After the media defendants removed the case to the federal district court in Connecticut, they moved to dismiss the complaint, arguing that their news accounts were substantially true. According to the media defendants, under the single publication rule, all of Plaintiff Martin’s claims accrued at the moment of the media defendants’ print and online publications – in August 2010, rendering the analysis of the truth of the reporting dependent solely on the facts as they existed at that time. And, the media defendants pointed out that Ms. Martin did not deny the fact of her arrest in 2010, nor allege that the media defendants’ news reports were inaccurate at the time of publication, but rather, her complaint was premised on a novel theory that the Connecticut Erasure Statute retroactively turned their true news reports into falsehoods.

Not only did the limited case law interpreting the Erasure Statute and other similar statutes in other states not support Plaintiff’s theory, the media defendants further argued that if her reading of the Erasure Statute were to be given effect, it would impermissibly invade the First Amendment protections for press and speech – especially on historically accurate reporting of facts related to the government’s enforcement of criminal law.

In opposition, Ms. Martin did not dispute that the news reports were true when they were published, but instead contended that because her arrest record qualified for erasure, and because the Erasure Statute “deemed [her] to have been never arrested” in the first instance, the legally-operative fact of her non-arrest was now a matter of true historical fact. As such, the media defendants’ reporting on her arrest, though true at the time, were now purportedly false and subject to tort liability.

After converting the motions to ones for summary judgment, the court rejected Plaintiff Martin’s formulation of the Erasure Statute, finding her view was neither a plain and sensible reading of the text of statute, nor an interpretation that was permissible under “basic canons of statutory construction.”

First, the district court noted that the express language of subsection (e)(3) of the Erasure Statute was qualified to only effect a change with respect to the fact of one’s arrest “within the meaning of the general statutes,” and merely allowed such individuals “lawfully to deny the fact of the arrest in court and other official proceedings.” And while the Erasure Statute was silent as to how broad a concept of an erasure “within the meaning of the general statutes” was to be, the court found compelling that the text merely discussed “[e]rasure of criminal records” after a subject of an arrest is acquitted, the charge dismissed, or receives a pardon. The court moreover noted that the statute is “addressed to court and law enforcement personnel” by imposing restrictions as to their conduct and their retention of records, but “[n]othing in the statute, however, suggests any intent to impose requirements on persons who work outside courts or law enforcement agencies.” The court concluded that there was simply no evidence from the text of the Erasure Statute that the Connecticut legislature intended to constrict the conduct of private individuals who might otherwise have obtained the underlying arrest information.

Second, the court found that Plaintiff Martin’s “history-altering” interpretation of the Erasure Statute would otherwise raise significant “constitutional infirmities.” Even if the Erasure Statute had been ambiguous on its effects (or lack thereof) on private parties, the court found that if such “erasure laws operated to allow defamation liability to be imposed on true and newsworthy statements, it would run afoul of the First Amendment” protection for truthful statements in the public domain.

Indeed, the district court noted that this was not the first time such an interpretation had been rejected both as a matter of textual interpretation and First Amendment principles, and quoted the Connecticut state trial court’s decision in *Martin v. Griffin*, 2000 WL 872464, at \*12 (Conn. Super. Ct. June 12, 2000) (emphasis added):

The erasure statute operates in the legal sphere, not the historical sphere. That is, the erasure statute is designed to return a person’s criminal record to the status quo when that person is found not guilty as a consequence of a final judgment, or a charge is dismissed. The erasure statute does not, and could not, purport to wipe from the public record the fact that certain historical events have taken place. Only in a totalitarian system could law purport to have such a sweeping effect.

Because Plaintiff Martin’s four claims all hinged on a finding that the media defendants’ reporting of her arrest was historically false, which it was not, the court granted judgment to the media defendants as a matter of law.

Plaintiff Martin then appealed the district court’s decision to the Second Circuit.

### **Second Circuit**

On appeal to Second Circuit, Ms. Martin recapitulated her argument that by operation of the Erasure Statute, once her arrest had been “erased in January 2012, the media defendants’ reports became false. She also nuanced her prior argument that even if the media defendants’ reporting remained true after her arrest was “erased,” their

failure to update their news accounts to include the fact of her arrest’s erasure gave rise to a claim for defamation by implication. The Second Circuit rejected both of these arguments and largely adopted the district court’s thorough analysis.

While recognizing that the Erasure Statute was intended to “wipe[] the slate clean” for an arrestee, the Second Circuit noted that all the statute could accomplish was a “legal fiction” – that in the eyes of the state government, the individual is no longer considered to have been arrested. Thus, the government (and only the government) is prohibited from relying on such “erased” records in a later trial against that individual, or to enhance a sentence for a subsequent criminal offense. But, as the Second Circuit quoted the district court’s opinion, there was nothing in the Erasure Statute that evinced “any intent to impose requirements on persons who work outside courts or law enforcement agencies, and nothing suggests any intent to mandate the erasure of records held by such persons.”

The Second Circuit avoided any discussion of the constitutional implications of a broader erasure provision, holding instead that the statute at issue, like others across the country, simply did not render historically accurate news accounts of an arrest subject to defamation-related liability merely because the subject of those accounts is later deemed by the state as never having been arrested. Nor did the Court find that the media’s news reports imply any fact about Ms. Martin that was not true, as “reasonable readers understand that some people who are arrested are guilty and that others are not” and there can be no requirement to avoid liability that true reporting be updated to include all manners of the eventual resolution of such arrests.

In what is likely just an opening salvo in an attempt to import a “right to be forgotten” akin to what is spreading from the European Union, the Second Circuit’s decision, though avoiding the thorny First Amendment question, signals clearly that historically accurate reporting will likely not be subject to tort liability, even when states are increasingly inclined to impose legal fictions to protect their citizens’ reputations from a perceived stigma.

Indeed, as the Court succinctly noted:

[T]he uncontroverted fact is that Martin was arrested on August 20, 2010, and that the reports of her arrest were true at the time they were published. Neither the Erasure Statute nor any amount of wishing can undo that historical truth. The Moving Finger has written and moved on.

*Jonathan R. Donnellan and Courtenay O’Connor represented defendant-appellee Hearst Corporation on the appeal. David A. Schulz, Cameron Stracher and Michael Beylkin of Levine Sullivan Koch & Schulz, LLP represented defendant-appellee News 12 Interactive, Inc. Eugene Volokh of the UCLA School of Law First Amendment Amicus Brief Clinic filed an amicus brief in support of the media defendants-appellees on behalf of the Reporters Committee for Freedom of the Press. Plaintiff-appellant was represented by Ryan O’Neill and Mark Sherman of The Law Offices of Mark Sherman, LLC.*

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