

EXPUNGING AMERICA’S RAP SHEET IN THE INFORMATION AGE¹

JENNY ROBERTS*

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INTRODUCTION

“Getting a Second Chance After a Criminal Record.”² “Want to Expunge Your Record?”³ “South Carolina Debating If It Should be Easier to Expunge a Brush with the Law.”⁴ “Making a Fresh Start in

1. See Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J., Aug. 18, 2014, <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> (noting large numbers of individuals in United States with some type of criminal record and stating that “America has a rap sheet”).

* Professor of Law and Associate Dean for Scholarship, American University Washington College of Law. With thanks to the *Wisconsin Law Review* students who organized this symposium, to American University Washington College of Law students Joey Kavanagh and Soelma Shagdarova for research assistance, and to Mary Holland and Juliet Stumpf.

2. Alexandria Burris, *Getting a Second Chance After a Criminal Record*, SHREVEPORT TIMES (Sept. 30, 2014, 4:44 PM), <http://www.shreveporttimes.com/story/news/crime/2014/09/27/expungement-law-gives-second-chance/16371367/>.

3. *Want to Expunge Your Record?* (ABC television broadcast Sept. 25, 2014), available at <http://www.21alive.com/news/local/Want-To-Expunge-Your-Record-VIDEO-277142091.html>.

4. Cynthia Roldan, *South Carolina Debating If It Should Be Easier to Expunge a Brush with the Law*, POST & COURIER (Sept. 27, 2014, 9:00 PM), <http://www.postandcourier.com/article/20140927/PC1603/140929444/1031/south-carolina-debating-if-it-should-be-easier-to-expunge-a-brush-with-the-law>.

Little Village.”⁵ These are only some of the headlines of newspaper articles and television segments that came up in a Google Alert for “expungement” during one typical week in late 2014. The same week, in Cincinnati, Ohio, city council members backed expungement of low-level marijuana convictions.⁶ Expungement news that week was not limited to the United States. In Jamaica, the legislature passed a bill that allows expungement of some convictions records, including minor marijuana offenses, calling it “the beginning of the end for persecution.”⁷

There is good reason for all the media attention. Nationally, a number of states are now updating or considering new and broader sealing and expungement laws.⁸ Advocacy organizations and think tanks are calling for sealing and expungement of at least some criminal records.⁹ Public defender and civil legal aid offices are increasingly offering to help clients expunge or seal records,¹⁰ and there are reentry

5. *Making a Fresh Start in Little Village*, CHI. SUN TIMES (Sept. 25, 2014, 9:52 PM), <http://chicago.suntimes.com/?p=155087>.

6. Jay Hanselman, *Undoing Consequences of Now Repealed Cincinnati Marijuana Ordinance*, WVXU CINCINNATI (Sept. 29, 2014, 1:23 PM), <http://wvxu.org/post/undoing-consequences-now-repealed-cincinnati-marijuana-ordinance>; Ben Petracco, *Expungement Law Could Ease Burdens for Those with Marijuana Convictions*, CINCINNATI’S WLWT 5 (Sept. 29, 2014, 5:45 PM), <http://www.wlwt.com/news/expungement-law-could-ease-burdens-for-those-with-marijuana-convictions/28318382>.

7. Daraine Luton, *Lobbyists in High Spirits over Ganja Reform*, GLEANER (Oct. 1, 2014), <http://jamaica-gleaner.com/gleaner/20141001/lead/lead11.html> (quoting Lord Anthony Gifford).

8. *See, e.g.*, COLO. REV. STAT. ANN. § 24-72-305 (West 2008 & Supp. 2014); Trisha Volpe, *New Expungement Law Takes Effect in 2015*, KARE 11 (Dec. 31, 2014, 6:28 PM), <http://www.kare11.com/story/news/local/2014/12/31/new-expungement-law-takes-effect-in-2015/21119849/>; Press Release, Assemb. Democrats, Assembly Democratic Legislative Package to Reform NJ’s Expungement Laws Released by Assembly Panel (Dec. 11, 2014), <http://www.assemblydems.com/Article.asp?ArticleID=8919>.

9. *See, e.g.*, NAT’L ASS’N OF CRIM. DEF. LAWYERS, COLLATERAL DAMAGE: AMERICA’S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME 24–25 (2014), available at <http://www.nacdl.org/restoration/roadmapreport/> [hereinafter COLLATERAL DAMAGE]; REBECCA VALLAS & SHARON DIETRICH, CTR. FOR AM. PROGRESS, ONE STRIKE AND YOU’RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS 34 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

10. *See, e.g.*, *Clean Slate*, S.F. PUB. DEFENDER, <http://sfpublicdefender.org/services/clean-slate/> (last visited Feb. 13, 2015) (“Clean Slate is a program of the San Francisco Public Defender’s Office that can help people ‘clean up’ their criminal records.”); *Criminal Records*, E. BAY COMMUNITY L. CENTER, <http://www.eblc.org/crc.php> (last visited Feb. 13, 2015) (In Alameda County, California, Clean Slate Clinic “provides free legal help to eligible individuals who are seeking to clean up their Alameda County criminal records.”); *Criminal Records Program*, CABRINI GREEN LEGAL AID, <http://www.cgla.net/criminal-records> (last visited Feb. 13, 2015) (In Chicago, Illinois, “CGLA assists individuals in clearing their arrest and conviction records through a range of legal remedies, including expungement, sealing, clemency, health care

clinics handling criminal records matters and law school clinics and courses that cover expungement.¹¹ Recent expungement summits around the nation draw high attendance.¹² Researchers are studying the positive effects of sealing and expungement on individuals' ability to gain employment and housing.¹³

There is no one definition of sealing or expungement. These terms have a variety of definitions under different state laws, which can range from actual destruction of a record to leaving the record open to the public but marking it "expunged."¹⁴ Sealing or expungement is generally

waivers, certificates of good conduct, and certificates of relief from disability."); *Legal Advocacy*, COMMUNITY SERVICE SOC'Y, <http://www.cssny.org/advocacy-and-research/entry/legal-advocacy> (last visited Feb. 13, 2015) (stating that "[t]he [Legal] Department litigates against private and public employers who illegally deny employment and occupational licenses because of criminal convictions, and against private background check companies that facilitate discrimination" and "work[s] with and represent[s] clients who have been denied housing or rental assistance as a result of their conviction histories"); *Legal Services*, COMMUNITY L. OFF., <http://www.pdknox.org/writeup/2> (last visited Feb. 13, 2015) (stating that the Knox County, Tennessee, Public Defender's office "[p]rocesses expungement requests for all eligible clients"); *Sealing and Expungement of Records*, PUB. DEFENDER SERVICE FOR DISTRICT COLUMBIA., <http://www.pdsdc.org/Public/Expungement.aspx> (last visited Feb. 13, 2015) (offering assistance with expungements).

11. See, e.g., *Clinical Programs*, U. TENN. C. L., <http://law.utk.edu/centers-clinics/clinical-programs/> (last visited Feb. 13, 2015); *Clinics: Criminal Defense and Reentry Clinic*, NYU L., <http://www.law.nyu.edu/academics/clinics/year/criminaldefense> (last visited Feb. 13, 2015); *Collateral Conseq., Client Interviewing, and Expungement of Criminal Recs*, AM. U. WASH. C. L., https://www.wcl.american.edu/registrar/coursesapp/inf_course.cfm?number=LAW-795CE-001&time=spring_2015 (last visited Feb. 13, 2015); *Course Catalog: Reentry Seminar: Legal Theory and Practice*, U. MD. FRANCIS KING CAREY SCH. L., http://www.law.umaryland.edu/academics/program/curriculum/catalog/course_details.html?courseum=559D (last visited Feb. 13, 2015).

12. Jean Lotus, *Expungement Summit Draws 2500*, AUSTIN WKLY. NEWS (June 16, 2014, 2:46 PM), <http://www.austinweeklynews.com/News/Articles/6-16-2014/Expungement-summit-draws-2,500-/>; see also *Giving Help, Getting Help in the Midlands*, Dec. 30, STATE (Dec. 29, 2014), http://www.thestate.com/2014/12/29/3898913_giving-help-getting-help-in-the.html?rh=1 (detailing a local expungement information session held by a sorority from a South Carolina university).

13. See, e.g., Jeffrey Selbin & Justin McCrary, Abstract, *Got Clean Slate? New Study Suggests That Criminal Record Clearing May Increase Earnings* (Aug. 25, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486867.

14. See, e.g., CONN. GEN. STAT. ANN. § 54-142a (West 2009 & Supp. 2014) (establishing that records pertaining to arrests that result in dismissal, "nolles," and not guilty verdicts may be erased—and even allowing for "physical destruction" of such records upon request); IND. CODE ANN. § 35-38-9-7(b) (LexisNexis Supp. 2014) (providing that, upon request, records relating to certain felony arrests, conviction, and sentencing will remain public but will be "visibly marked" as expunged); see also DOROTHY BROWN, OFFICE OF THE CLERK OF THE CIRCUIT COURT OF COOK CNTY., EXPUNGEMENT SUMMIT GUIDE: HELPING COUNTIES TO BRING SECOND CHANCE OPPORTUNITIES 4 (2014), available at http://12.218.239.52/newsite/GI_NEWS/ExpungementSummitGuide.pdf.

done by court order, and it can be automatic, mandatory upon request, or discretionary upon request.¹⁵ In general, the purpose of sealing and expungement laws is to limit public access to and use of specified types of records. A sealing or expungement order can apply not only to court records but also to law enforcement agency and other records relating to the arrest or conviction.¹⁶

Currently, almost all jurisdictions have some type of expungement laws, although they vary greatly in scope.¹⁷ Most allow for sealing or expungement of arrests that do not end in a conviction, some automatically and others only upon application.¹⁸ A number of jurisdictions allow for sealing or expungement of at least some misdemeanor convictions; a significant minority allow for sealing or expungement of certain felony convictions, many of them under newly-enacted or broadened statutes.¹⁹ The availability of sealing or

In general, the act of expunging refers to when a criminal record is deleted from all official electronic databases of the criminal justice agencies and the Clerks of Court, as if it never existed, and can be physically destroyed by the arresting agency, state police and prosecutor. However, the Clerk of Court retains the official court record, which can only be viewed pursuant to a court order.

The act of sealing refers to the act or practice of officially preventing access to particular criminal records in the absence of a court order; except that the law allows police agencies and prosecutors certain access to sealed records. However, when a criminal record is sealed, it is also deleted from the official electronic databases of the criminal justice agencies and the Clerks of Court, as if it never existed.

Id.

15. See, e.g., DEL. CODE ANN. tit. 11, § 4374 (Supp. 2012) (allowing for discretionary expungement of records where the case is terminated “in favor of the accused” and the charge is not a specific misdemeanor eligible for mandatory expungement); MD. CODE ANN., CRIM. PROC. § 10-106 (LexisNexis 2008 & Supp. 2014) (mandating that a court “shall” grant expungement, upon request, for a charge transferred to juvenile court); N.Y. CRIM. PROC. LAW § 160.55 (McKinney 2004 & Supp. 2015) (providing for automatic sealing for “noncriminal” offenses).

16. See, e.g., MD. CODE ANN., CRIM. PROC. § 10-101(c)(2)(ii) (LexisNexis 2008) (“Court record,” for expungement purposes, includes “an index, docket entry, charging document, pleading, memorandum, transcription of proceedings, electronic recording, order, and judgment.”).

17. Margaret Colgate Love, *Chart #4: Judicial Expungement, Sealing, and Set-Aside*, NAT’L ASS’N CRIM. DEF. LAWS. (Feb. 2015), http://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Judicial_Expungement_Sealing_and_Set-Aside.pdf.

18. *Id.*

19. *Id.* (listing more than 15 jurisdictions with expungement for some felony convictions); see also Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 31–34 & nn. 140–44 (2008) (listing various statutes, as of 2008, that allowed some type of sealing or expungement and noting the scope of each).

expungement usually depends on a variety of factors, including the seriousness and type of offense and the individual's previous and subsequent criminal record.²⁰ There is no general federal sealing or expungement statute and only one narrow provision allowing individuals who were under 21 at the time of the offense to expunge a federal record for a misdemeanor drug charge.²¹

While different approaches to sealing or expungement of specified criminal records have existed in state laws for decades in this country,²² there is new urgency in the movement for strengthening and expanding such laws. Four things drive that urgency: (1) mass criminalization, (2) mass collateral consequences of criminal records, (3) technological advances that make criminal records easily accessible, and (4) a national obsession with viewing all aspects of people's pasts.

Although mass incarceration is perhaps the most serious and pressing problem with the criminal justice system in the United States,²³ most criminal cases are misdemeanors and often do not result in jail or prison time.²⁴ The problem is thus better characterized as one of mass criminalization.²⁵ Mass criminalization over the past 40 years means that about one in three people in the United States has some type of criminal

20. See, e.g., IND. CODE ANN. § 35-38-9-2 (LexisNexis Supp. 2014) (mandating expungement for misdemeanor convictions where the court finds, by a preponderance of the evidence, the following: five years have passed since the date of the conviction; the person has not been convicted of a crime in those five years; the person has paid all fines, fees, and ordered restitution; and the person has no pending charges).

21. Mouzon, *supra* note 19, at 13; cf. 18 U.S.C. § 3607(c) (2012) (requiring a court to enter an expungement order upon application of a person convicted for certain first misdemeanor drug offenses, if that person was less than 21 at the time of the offense).

22. See Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *FORDHAM URB. L.J.* 1705, 1707–15 (2003) (providing historical background for sealing and expungement laws and explaining origins in 1940s in juvenile cases).

23. See *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* (David Garland ed., 2001).

24. ROBERT C. LAFONTAIN ET AL., NAT'L CTR. FOR STATE COURTS, *EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS* 24 (2012), available at <http://www.courtstatistics.org/Other-Pages/CSP2010.aspx> (describing 2010 analysis of 17 state courts, which revealed that misdemeanors comprised 77.6 percent of the total criminal caseload in those courts); Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, *SLATE* (April 27, 2012, 11:33 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged.html (acknowledging that misdemeanor guilty pleas often "result in a fine or probation, not prison").

25. See Jenny Roberts, *Crashing the Misdemeanor System*, 70 *WASH. & LEE L. REV.* 1089, 1090–94 (2013); see also Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 *U.C. DAVIS L. REV.* 277, 281 (2011).

record.²⁶ Law enforcement agencies have made more than a quarter of a billion arrests, and the FBI adds between 10,000 and 12,000 new names to its database each day.²⁷ The result is that “the FBI currently has 77.7 million individuals on file in its master criminal database.”²⁸

Calls for reversing mass criminalization and incarceration are increasingly urgent and from increasingly diverse quarters.²⁹ There has been reform in some jurisdictions. For example, a number of states have recently legalized or decriminalized minor marijuana possession,³⁰ an offense that makes up a significant percentage of lower criminal court dockets.³¹ In New York City, misdemeanor trespass arrests have fallen dramatically,³² and modest sentencing reform at the state level has led to

26. Fields & Emshwiller, *supra* note 1 (looking to the FBI’s criminal records database to find that nearly one in three adults in the United States has a record on file). The estimate that one third of adults have a record in the FBI database is surely underinclusive, as states do not send the FBI some minor criminal charges or convictions, such as offenses that are not included “due to differing state requirements for submission to state repositories.” See MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* § 5:41 (2013); see also 28 C.F.R. § 20.32(b) (2014) (stating that “arrests and court actions concerning nonserious offenses, e.g., drunkenness, vagrancy, disturbing the peace, curfew violation, loitering, false fire alarm, non-specific charges of suspicion or investigation, and traffic violations” are excluded from the FBI’s fingerprint file).

27. Fields & Emshwiller, *supra* note 1.

28. *Id.*; cf. Press Release, N.Y. Att’y Gen., A.G. Schneiderman Announces Agreement with Party City to End Discrimination in Hiring Based on Criminal Records (Oct. 2, 2014), <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreement-party-city-end-discrimination-hiring-based> (drawing on Department of Justice statistics to estimate that 100 million individuals have a criminal history on record).

29. See, e.g., Charles G. Koch & Mark V. Holden, *The Overcriminalization of America: How to Reduce Poverty and Improve Race Relations by Rethinking Our Justice System*, POLITICO MAG. (Jan. 7, 2015), <http://www.politico.com/magazine/story/2015/01/overcriminalization-of-america-113991.html#ixzz3O8bvRmUh>.

30. See, e.g., COLO. CONST. art. XVIII, § 16 (making “[p]ossessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana” legal for individuals 21 or older under the state constitution); WASH. REV. CODE ANN. § 69.50.4013(3) (West Supp. 2015) (making noncriminal “possession, by a person twenty-one years of age or older, of useable marijuana or marijuana-infused products in amounts” outlined in Revised Code of Washington section 69.50.360(3)).

31. AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 40 (2013), available at <https://www.aclu.org/sites/default/files/assets/100413-mj-report-rfs-re11.pdf> (stating that in New York in 2010, 59.4 percent of all drug arrests were for marijuana possession).

32. Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES, Sep 25, 2012, http://www.nytimes.com/2012/09/26/nyregion/in-the-bronx-resistance-to-prosecuting-stop-and-frisk-arrests.html?pagewanted=all&_r=0. From August 2011 to August 2012, trespass arrests in Bronx dropped nearly 25 percent, while in Manhattan and Brooklyn, trespass arrests were down by about five percent. *Id.*

lower levels of incarceration in New York state's prisons.³³ In California, the U.S. Supreme Court's *Brown v. Plata*³⁴ decision led to "realignment" of the state prison system and some relief from the mass incarceration crisis.³⁵ Despite these limited but meaningful reforms, the United States has a major long-term problem—a significant portion of the population with a seemingly permanent, crippling criminal record history—in urgent need of attention. As the *Wall Street Journal* recently put it, "America has a rap sheet."³⁶

In an unfortunate confluence of events, during the decades of steep rises in the criminalization curve, there has been an exponential increase in the collateral consequences of convictions and arrests. Collateral consequences are the purportedly nonpunitive, noncriminal consequences that can flow automatically or as a matter of discretion from a criminal conviction. These consequences affect a person's employment and housing prospects, parental rights, educational opportunities, freedom of movement, and just about every other aspect of daily life.³⁷ A new American Bar Association database, funded by the National Institute of Justice, has catalogued tens of thousands of collateral consequences.³⁸ These consequences can be found in federal and state laws and regulations,³⁹ and in some instances at the local or municipal level.⁴⁰ Many are mandatory, such as state laws that prohibit a

33. Mary Beth Pfeifer, *Analysis: NY Prison Population's Dramatic Drop*, 4 NBC N.Y. (Oct. 16, 2011), <http://www.nbcnewyork.com/news/local/Rockefeller-Drug-Laws-40-Years-Later-Prison-Population-Drug-Law-Reform-Act-131946193.html>. From 2000 to 2011, the overall New York prison population declined by 22 percent. *Id.*

34. 131 S. Ct. 1910 (2011).

35. *Id.* at 1947 (requiring California to remedy its longstanding constitutional deficits in prison medical and mental health care by reducing prison crowding); cf. Jennifer Medina, *California Sheds Prisoners but Grapples with Courts*, N.Y. TIMES, Jan. 21, 2013 (noting reductions in the California prison population from 2006 to 2013 but describing how "[m]ost of the inmates shed by the state prisons were lower-level offenders who were sent to county jails").

36. Fields & Emshwiller, *supra* note 1.

37. See LOVE, ROBERTS & KLINGELE, *supra* note 26, § 2 (describing many types of collateral consequences).

38. NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, <http://www.abacollateralconsequences.org> (last visited Mar. 27, 2015); see LOVE, ROBERTS & KLINGELE, *supra* note 26, § 9:7.

39. See, e.g., 42 U.S.C. § 13663 (2012) (prohibiting public housing for households with individuals subject to lifetime sex offender registration); 24 C.F.R. § 982.553(a)(2)(i) (2014) (same); WIS. STAT. § 304.078(3) (2013–14) (any felony or bribery conviction leads to loss of right to vote until completion of sentence).

40. *Standley v. Town of Woodfin*, 661 S.E.2d 728, 729 (N.C. 2008) (discussing "Woodfin Town Ordinance Section 130.03 . . . which prohibited registered sex offenders . . . from knowingly entering any 'public park owned, operated, or maintained' by Woodfin").

person with a felony conviction from becoming a notary.⁴¹ Most collateral consequences apply to convictions (e.g., sex offender registration for anyone convicted of particular sex offenses),⁴² but some can apply based on a mere arrest or a nonconviction disposition (e.g., deportation based on a deferred adjudication, even one that is later expunged).⁴³ As the number of people in United States with some type of criminal record grows alarmingly high, many individuals, families, and communities struggle with serious collateral consequences of that record.

This struggle with collateral consequences is widespread not only due to the number of individuals with records but also because recent technological advances have led to increased and easy access to criminal records. Just 15 or 20 years ago, an employer, landlord, or neighbor who wanted to know about someone's criminal record had to go to the local courthouse to view the physical file (and different courthouses if there were files in other jurisdictions).⁴⁴ Today, almost all states have publicly available Internet databases of criminal records.⁴⁵ For example, a Maryland employer can go to <http://casesearch.courts.state.md.us/> and search for court records by name (with date of birth, address, and other information on each entry).⁴⁶ There are also a growing number of private

41. See, e.g., VA. CODE ANN. § 47.1-4 (2013); see also CIV. IMPACTS CRIM. CONVICTIONS UNDER OHIO L., <http://civicohio.org/> (last updated Mar. 11, 2015) (search of “mandatory” on March 27, 2015, resulted in 566 hits, although many were duplicative).

42. See, e.g., MD. CODE ANN., CRIM. PROC. § 11-701 (LexisNexis 2008 & Supp. 2014).

43. See, e.g., 8 U.S.C. § 1101(a)(48)(A) (defining “conviction” expansively in federal immigration law); *Salazar-Regino*, 23 I. & N. Dec. 223, 235 (B.I.A. 2002) (holding that “a first-time simple drug possession offense expunged under a state rehabilitative statute is a conviction” under federal immigration law).

44. See UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT prefatory note (amended 2010), 11 U.L.A. 34 (Supp. 2014); James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. SAINT THOMAS L.J. 387, 401–02 (2006) (noting that in 2002 the E-Government Act pushed “federal agencies and federal courts to make their records available electronically,” and that several states followed suit with similar legislation).

45. *Privacy/Public Access to Court Records: State Links*, NAT. CENTER FOR ST. CTS., <http://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-links.aspx> (last visited Mar. 27, 2015) (listing 48 states that provide public access to state court records, while noting that some states require a subscription or fee); see also *Case Search Home*, HOWARD GENTRY CRIM. CT. CLERK, <https://sci.ccc.nashville.gov/> (last visited March 27, 2015) (allowing for public search of Nashville, Tennessee, criminal records by first and last name); *Background Checks*, MONT. DEPARTMENT JUST., <https://dojmt.gov/enforcement/background-checks/> (last visited Mar. 27, 2015) (stating that the general public, upon payment, can receive records on misdemeanor and felony charges, while noting that “information is limited by Montana’s privacy laws”).

46. *Maryland Judiciary Case Search*, MD. JUDICIARY, <http://casesearch.courts.state.md.us/> (last visited Mar. 5, 2015); see also *Kansas Criminal History Record Check*, KAN. BUREAU INVESTIGATION, <http://www.kansas.gov/kbi/criminalhistory/> (last visited

commercial information vendors that sell criminal background checking services.⁴⁷ And business is booming: one survey of employers showed that 92 percent of them performed criminal background checks on some job candidates, and 73 percent performed such checks on all job candidates.⁴⁸ One large company offering services to landlords advertises a wide variety of checks for its “resident background screening service,” including information about sex offender registration, prison and jail sentences, and felony and some misdemeanor records.⁴⁹

Unfortunately, the interest in a person’s criminal history is not limited to employers and landlords. The United States is in the grips of a national obsession with viewing other people’s dirty laundry. Reality shows are just the tip of the iceberg. “Mugshot” websites post photos from the day’s arrests, often free of charge except to those who must pay to get expunged charges taken off the site.⁵⁰ Websites like “Instant Checkmate” encourage a quick check of criminal records and social media before a date.⁵¹ The increasing coverage of, and entertainment based on, formerly deeply private facets of a person’s life, combined with technological ease of access to criminal records and relatively weak privacy laws in the United States,⁵² have helped create a tiered society in

Mar. 5, 2015) (“The state of Kansas allows the release of Kansas criminal history records to the general public as well as to a variety of users with specific rights and entitlements.”).

47. See Jacobs, *supra* note 44, at 388 n.6 (noting a number of private companies, including “CriminalWatchdog.com”; “Info Link Screening Services, Inc.,” a service that offers “comprehensive pre-employment background checks”; and “NetDetective,” which “boasts that its software will permit the user to ‘investigate anything about anyone online’”).

48. SOC’Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010).

49. *Multifamily Housing Solutions*, CORELOGIC, <http://www.corelogic.com/industry/multifamily-housing-solutions.aspx#container-Products> (last visited on Feb. 14, 2015).

50. See David Segal, *Mugged by a Mug Shot Online*, N.Y. TIMES, Oct. 5, 2013, <http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html>.

51. INSTANT CHECKMATE, <http://www.instantcheckmate.com/> (last visited Feb. 14, 2015) (“Our members turn to our website every day to learn the facts about the people in their lives. Join them so you can discover truths, expose lies, and get the real story about the people in your life.”).

52. See COLLATERAL DAMAGE, *supra* note 9, at 24 (comparing weak privacy protections in the United States to robust protections in Europe); James B. Jacobs & Elena Larrauri, *Are Criminal Convictions a Public Matter?: The USA and Spain*, 14 PUNISHMENT & SOC’Y 3, 11 (2012) (noting how in Spain, “[t]he vast majority of penal judgments, unless they involve a notorious case widely reported in the media, never become known”); Mark Scott, *‘Right to Be Forgotten’ Should Apply Worldwide*, E.U. PANEL SAYS, N.Y. TIMES, Nov. 26, 2014, <http://www.nytimes.com/2014/11/27/technology/right-to-be-forgotten-should-be-extended-beyond-europe-eu-panel-says.html> (“‘Under E.U. law, everyone has a right to data protection,’ the [European Union Data Protection Working Party] said in a statement on Wednesday. ‘Decisions must be implemented in

which individuals with a criminal history are effectively second-class citizens.⁵³

The convergence of mass criminalization, pervasive collateral consequences, ubiquitous criminal records, and broad interest in the deeply personal have fueled the crisis in the nation's criminal justice system. How to best deal with this crisis is a complex inquiry, and this Article is a modest exploration of only some of the issues. Sealing and expungement laws are just one way to help individuals ameliorate some of the crippling effects of a criminal record. Part I of this Article describes four reasons why well-crafted sealing and expungement laws matter: racial justice, economic justice, public safety, and individual dignity. Part II explores and responds to the major critiques of sealing and expungement. Finally, Part III situates sealing and expungement as part of a multi-faceted approach for effective avenues of relief from a criminal record. It describes measures that must make up other parts of that approach, such as regulation of the sale of records, guidelines for the use of records, and affirmative mechanisms like tax incentives to encourage hiring individuals with records.

I. WHY SEALING, EXPUNGEMENT, AND OTHER METHODS OF MITIGATING CRIMINAL RECORDS MATTER

The United States has been heralded as “the land of second chance,”⁵⁴ and the idea of redemption is deeply rooted in traditions of legal and religious doctrine.⁵⁵ But the reality is that convincing people to hire, house, educate, or live next door to someone with a criminal history is much easier said than done.⁵⁶ Yet allowing an individual to fully participate in society after successfully completing a sentence for a crime

such a way that they guarantee the effective and complete protection of data subjects' rights and that E.U. law cannot be circumvented.”).

53. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

54. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 81, 88 (Jan. 20, 2004) (“America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.”).

55. See Meg Leta Ambrose et al., *Seeking Digital Redemption: The Future of Forgiveness in the Internet Age*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 99 122–23 (2013) (arguing that “[b]asic American values and ideas of fairness stemming from pioneer histories, including allowing individuals to start afresh or wipe the slate clean, are in stark contrast with existing data production, collection, retention, and retrieval practices” associated with criminal records); Mouzon, *supra* note 19, at 1–2 (citing verses from the Laws of Teshuvah, the Bible, and the Qur’an relating to forgiveness).

56. See Whitney Jones, *Study: Americans Crave Forgiveness But Are Not Very Forgiving*, HUFFINGTON POST (Nov. 3, 2010), http://www.huffingtonpost.com/2010/11/03/study-americans-crave-for_n_778544.html.

is critical to racial and economic justice, public safety, and individual and collective dignity.

The dominating feature of the American criminal justice system is its deep racial disparities. For example, although marijuana is used at similar rates across all age groups in black and white communities, blacks are almost four times more likely to be arrested for marijuana possession than whites across the United States and thus to suffer the many collateral consequences of that arrest.⁵⁷ In Iowa and the District of Columbia, the two jurisdictions with the highest rates of disparity, blacks are more than eight times more likely than whites to be arrested for marijuana possession.⁵⁸ Marijuana possession is a particularly important example because of the minor, victimless nature of the crime (and of course, it is not a crime in a growing number of jurisdictions) and the sheer volume of marijuana cases that come through the criminal courts. In 2010 alone, police made 1,717,064 drug arrests in the United States, and 784,021 of them were for marijuana possession.⁵⁹

The combination of a criminal record and racial bias in the job market is particularly striking. One large-scale study showed how men with a felony drug conviction were 50 percent less likely than men without any record to receive a callback or be offered an entry-level job; black men with a record who applied were twice as likely as white men to be saddled with this “criminal record penalty.”⁶⁰ Even a minor marijuana arrest not resulting in conviction can have drastic effects on the ability to compete in the job market.⁶¹

The opportunity to achieve economic security and upward mobility is a defining and deep-seated value in the United States.⁶² Yet even in a

57. AM. CIVIL LIBERTIES UNION, *supra* note 31, at 17.

58. *Id.* at 18.

59. *Id.* at 37.

60. Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AMER. ACAD. POL. & SOC. SCI. 195, 199 (2009), available at <http://ann.sagepub.com/content/623/1/195>.

61. See, e.g., *How This Beloved NYC Teacher’s Life Was Turned Upside Down by a Bogus, Petty Marijuana Arrest*, HUFFINGTON POST (Dec. 9, 2013), http://www.huffingtonpost.com/2013/12/09/alberto-willmore_n_4412610.html; cf. Gary Fields, *Retiree’s Phantom Arrest Record Is Finally Expunged*, WALL ST. J., Nov. 1, 2014, <http://www.wsj.com/articles/retirees-phantom-arrest-record-is-finally-expunged-1417478846> (describing how a woman was denied a part-time job as a school cafeteria worker in Maryland’s school system when a routine check turned up an arrest record from 1963 that did not result in a conviction).

62. Senator Barack Obama, *Reclaiming the American Dream*, Remarks in Bettendorf, Iowa (Nov. 7, 2007) (“Americans share a faith in simple dreams. A job with wages that can support a family. Health care that we can count on and afford. A retirement that is dignified and secure. Education and opportunity for our kids. Common hopes. American dreams.”).

time of economic growth in the United States, a study of state-level poverty and incarceration statistics from 1980 to 2004 shows that “had mass incarceration not occurred, poverty would have decreased by more than 20 percent, or about 2.8 percentage points. At the national scale, this translates into several million less people in poverty had mass incarceration not occurred.”⁶³ Now, at a time when Americans struggle to compete in a global economy,⁶⁴ it is particularly harmful to weigh down a broad swath of the population with criminal records. And the business community has taken notice. In November and December 2014, the *Wall Street Journal* ran at least three stories exploring the harm criminal records can cause and the need for effective expungement relief in appropriate cases.⁶⁵ Charles Koch, one of the “lightning-rod capitalist brothers”⁶⁶ who is hardly known for his progressive views, recently coauthored *The Overcriminalization of America: How to Reduce Poverty and Improve Race Relations by Rethinking Our Justice System*.⁶⁷

Support for broader sealing and expungement laws can also be found across the political spectrum. Senators Corey Booker and Rand Paul recently cosponsored an act that would include the first federal law

63. Robert DeFina & Lance Hannon, *The Impact of Mass Incarceration on Poverty*, 59 CRIME & DELINQ. 562, 581 (2013), available at <http://cad.sagepub.com/content/59/4/562.abstract>; see also *id.* at 565–66 (noting how the analysis “produce[d] a conservative estimate of incarceration’s poverty-producing effects in that it does not adjust for the artificial decline in poverty due to the exclusion of prisoners from measurement” because prisoners are counted as “nonrecorded institutionalized population”). A similar study found that—given the number of individuals with a criminal record and studies estimating lowered levels of employment among those individuals—“in 2008 the U.S. economy lost the equivalent of 1.5 to 1.7 million workers, or roughly a 0.8 to 0.9 percentage-point reduction in the overall employment rate.” JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 1 (2010), available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>. “[T]he resulting loss of output that year was likely somewhere between \$57 and \$65 billion.” *Id.*

64. Shobhana Chandra & Vince Golle, *U.S. Exports Decline in Sign of Global Slowdown*, BLOOMBERGBUSINESS (Nov. 4, 2014, 8:04 AM), <http://www.bloomberg.com/news/2014-11-04/trade-deficit-widens-to-four-month-high-as-u-s-exports-decline.html> (chronicling a growing U.S. trade deficit as exports to Europe, Latin America, and Japan have all slowed).

65. See Gary Fields & John R. Emshwiller, *Fighting to Forget: Long After Arrests, Criminal Records Live On*, WALL ST. J., Dec. 25, 2014, <http://www.wsj.com/articles/fighting-to-forget-long-after-arrests-records-live-on-1419564612> [hereinafter Fields & Emshwiller, *Fighting to Forget*]; Fields, *supra* note 61; Gary Fields, *The Short Answer: What to Know About Expungement of Criminal Records*, WALL ST. J., Dec. 26, 2014, <http://blogs.wsj.com/briefly/2014/12/26/what-to-know-about-expungement-of-criminal-records-the-short-answer/>.

66. *The World’s Most Powerful People: #24 Charles Koch*, FORBES, <http://www.forbes.com/profile/charles-koch/> (last visited Jan. 12, 2015).

67. Koch & Holden, *supra* note 29.

for discretionary sealing of nonviolent adult convictions.⁶⁸ Named the “REDEEM Act,” it stands for “Record Expungement Designed to Enhance Employment Act of 2014.”⁶⁹ A former prosecutor sponsored recent legislation in Indiana that became one of the broadest sealing and expungement approaches in the nation; a number of conservative Republicans also backed the Indiana law.⁷⁰

Despite evidence demonstrating the economic harm caused by overly-punitive and overly-broad criminal justice policy, “it [i]s surprising ‘how little people know about [the economic impact of a criminal record] and how little it gets talked about in terms of anti-poverty.’”⁷¹ Yet law enforcement and corrections officials are talking about it, focusing on the negative effect a permanent criminal record can have on public safety when there is no opportunity for relief. At a series of hearings held by the National Association of Criminal Defense Lawyers’ Task Force on the Restoration of Rights and Status After Conviction, “[w]itness after witness”—including prosecutors, a police chief, a probation commissioner in a major city, and the head of a state correctional department—“testified about how restoring a person’s rights and status and letting a person move beyond a conviction will reduce recidivism and thus increase public safety.”⁷² There are also studies showing that individuals with criminal records who are able to work have lower recidivism rates.⁷³ These analyses and attitudes about

68. REDEEM Act, S. 2567, 113th Cong. (2014).

69. *Id.*

70. Fields & Emshwiller, *supra* note 1.

71. Fields, *supra* note 61 (quoting Rebecca Vallas from the Center for American Progress).

72. See COLLATERAL DAMAGE, *supra* note 9, at 25–27; see also BROWN, *supra* note 14, at 6 (stating that “[i]t is a win-win situation when counties help . . . individuals with criminal histories become employable, self-supporting, stable citizens within communities”).

73. See, e.g., John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, in 28 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 17–25 (Michael Tonry ed., 2001), available at <http://www.ncjrs.gov/pdffiles1/Digitization/192542-192549NCJRS.pdf> (finding a correlation between factors such as stable employment, family and community involvement, and substance abuse treatment, as well as a decreased risk of recidivism); ECON. LEAGUE OF GREATER PHILA., ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA 8 (2011), available at http://economyleague.org/files/ExOffenders_-_Full_Report_FINAL_revised.pdf (“Connecting the formerly incarcerated to employment has been shown to reduce recidivism and results in three different types of positive economic impacts: 1) *increased earnings*, 2) *increased tax revenues* from employment, and 3) *avoided costs* in the form of avoided spending on criminal justice agencies, social services, and government cash transfers, as well as prevented victim costs.”); see also ILL. DEP’T OF EMP’T SEC., RE-ENTRY EMPLOYMENT SERVICES PROGRAM: REDUCING RECIDIVISM THROUGH EMPLOYMENT, available at http://www.ides.illinois.gov/IDES%20Forms%20and%20Publications/RESP_Brochure.pdf.

the relationship between criminal records and public safety push back against the more commonly-held, entrenched view (a view that evidence does not support) that giving the public full access to information about individuals' criminal history advances public safety.⁷⁴

In Philadelphia, “Lois Jones sat dejected outside Courtroom 504 of the Juanita Kidd Stout Center for Criminal Justice” after a judge denied her request to expunge assault convictions from 1985 relating to a fistfight with her relative that ended in a probationary sentence.⁷⁵ For Ms. Jones, the old record “has turned into a 30-year sentence.”⁷⁶ The experience has left her embarrassed.⁷⁷ “I’m a criminal and I can’t get a job.”⁷⁸ Jones was voicing the loss of dignity she felt at the permanent label and the failure to earn the right to move on. By contrast, Barbara Ann Finn—a 74 year old Philadelphia woman with a shoplifting arrest from 51 years ago following which charges were never even filed—was able to expunge her record.⁷⁹ Ms. Finn was “ecstatic” about the expungement, which she sought after the record proved a barrier to a job opportunity.⁸⁰ “You have no idea how happy I am right now. I am over the top. I feel blessed.”⁸¹

In a study underway in California, preliminary survey data suggests that individuals seeking expungement “place a high dignity value on clearing their criminal records.”⁸² In the surveys, as well as in focus groups and interviews, “people who’ve had their records cleared express a sense of accomplishment (increased confidence and self-esteem), a sense of hope (a focus on the future), and a sense of agency (control over

74. See, e.g., N.J. STAT. ANN. § 2C:7-1 (West 2005) (requiring a system of registration that will help law enforcement and permit it to notify the public “when necessary for the public safety”). But see Greg Allen, *Sex Offenders Forced to Live Under Miami Bridge*, NPR (May 20, 2009), <http://www.npr.org/templates/story/story.php?storyId=104150499> (noting how local zoning ordinances effectively force dozens of sex offenders to live under a bridge and that “[s]tate prison officials and probation officers are not happy . . . [as] [t]hey believe it is leading sex offenders to stop registering with the state and go underground”); Ben Finley, *Court Rules Against Pa. List of Juvenile Sex Offenders*, PHILA. INQUIRER, Jan. 6, 2015, http://articles.philly.com/2015-01-06/news/57711023_1_state-police-registry-adam-walsh-act-nicole-pittman; Renée C. Lee, *Texas Won’t Participate in National Sex Offender Registry*, HOUS. CHRON., Oct. 5, 2012, <http://www.chron.com/news/houston-texas/article/Texas-won-t-participate-in-national-sex-offender-3923910.php>.

75. Fields & Emshwiller, *Fighting to Forget*, *supra* note 65.

76. *Id.*

77. *Id.*

78. *Id.*

79. Fields, *supra* note 61.

80. *Id.*

81. *Id.*

82. Selbin & McCrary, *supra* note 13, at 5.

their lives).”⁸³ The researchers conducting the survey note how programs that help individuals seal and expunge records “should be assessed more broadly than their impact on employment outcomes alone. In fact, the status enhancement that comes with record clearing may be a critical element in providing people with criminal records the confidence and ease of mind they need to be more successful in the job market.”⁸⁴

II. THE PROS AND CONS OF SEALING AND EXPUNGING CRIMINAL RECORDS

There are a number of arguments for and against sealing and expungement of criminal records, and this Part explores several. The major critiques are that expunging a record is essentially lying about the past; sealing and expungement are useless because once a record is on the Internet, it is impossible to truly hide it; there are some types of convictions or even arrests that should never be expunged or sealed; and legislating to forget through sealing or expungement is inferior to encouraging forgiveness through measures that acknowledge an individual’s record but allow the person to move on. While there is some merit to these critiques, all can be addressed in a scheme of sealing and expungement that is part of a broader, multi-faceted approach to giving individuals the opportunity to move beyond contact with the criminal justice system while allowing appropriate access to criminal records where necessary.

A. Forgiving and Forgetting are Both Central to Solving the Criminalization Crisis

Expungement has been described as permission to lie, to rewrite history.⁸⁵ At the core of the arguments that sealing and expungement deal

83. Keramet Reiter, Jeffrey Selbin & Eliza Hersh, Op-Ed., *Should a Shoplifting Conviction Be an Indelible Scarlet Letter? Not in California*, L.A. TIMES, Dec. 28, 2014, <http://www.latimes.com/opinion/op-ed/la-oe-selbin-prop-47-criminal-records-20141229-story.html> (op-ed authored by researchers conducting qualitative study).

84. Selbin & McCrary, *supra* note 13, at 5.

85. See, e.g., Bernard Kogon & Donald L. Loughery, Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L. & CRIMINOLOGY & POLICE SCI. 378, 385 (1970) (arguing that the system of sealing and expungement processes throughout the country “institutionalize[] a lie” and “falsify history” by allowing “an offender to deny that he has a criminal record when in fact he has one”); see also James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. SAINT THOMAS L.J. 387, 411 (2006) (arguing that expungement “seeks to rewrite history, establishing that something did not happen although it really did”); Margaret Colgate Love, *Expungement of Criminal Records: “The Big Lie,”* CRIME REP. (June 23, 2011), <http://www.thecrimereport.org/viewpoints/2011-06-expungement-of-criminal->

a moral blow to the integrity of the judicial system is the belief that “[s]uch suppression of truth ill befits a democratic society,” and that “[g]ood intentions are no defense.”⁸⁶ Many of those opposed to sealing and expungement share the same general goals as those in favor, namely giving individuals with a record the opportunity to succeed while attending to public safety concerns. Yet, as one much-cited critique of sealing and expungement puts it, those opposed generally believe “that it is the society, not the record, which must be changed.”⁸⁷ This is not simply to avoid the lie, but also because “[t]o enable an offender to deny that he has a criminal record . . . is to help him deny a part of his identity.”⁸⁸ The authors of that statement were advancing a practical as well as anthropological thesis. Writing in 1970, they heralded individuals with criminal convictions as “change-agents” who are “increasingly being sought as such, so that the record becomes a passport to a job, in many cases, and no longer the stigma it once was.”⁸⁹

Those who overcome the high hurdle of a criminal record in the workplace are undoubtedly change agents.⁹⁰ There is also no doubt that public education is a critical component of any meaningful reform aimed at restoring the rights of individuals with a criminal record. But even if it was true in 1970 that a criminal record was a “passport to a job,” making the “change-agent” mantle less burdensome to shoulder, that is most certainly not the case today. As described above, today any type of criminal record is a serious barrier to employment, housing, parenting,

records-the-big-lie (stating that “[t]here remains a romantic fascination with expungement, but experience teaches that this is a remedy of another era”; “[t]he challenge for modern-day reformers is to develop a new approach to restoring rights and removing the stigma of conviction”; and “bet[ting] . . . that [this approach] will be based on acknowledging and forgiving the crime, rather than attempting to conceal and deny it”).

86. Kogon & Loughery, Jr., *supra* note 85, at 385; *see also* Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 750 (1981) (“Dishonesty, whether explicit or implicit . . . is a fundamental aspect of expungement.”).

87. Kogon & Loughery, Jr., *supra* note 85, at 389.

88. *Id.* at 385.

89. *Id.* at 389.

90. *See, e.g.*, Dawn Turner Trice, *CPS: Good Conduct Certificate Not Good Enough*, CHI. TRIB., July 29, 2010, http://articles.chicagotribune.com/2010-07-29/news/ct-met-trice-cps-0728-20100728_1_cps-boiler-room-second-chance; Dawn Turner Trice, *CPS Reverses Itself, Gives Job Candidate a 2nd Chance*, CHI. TRIB., Sept. 26, 2010, http://articles.chicagotribune.com/2010-09-26/news/ct-met-trice-langdon-0926-20100926_1_cps-for-four-years-darrell-langdon-cps-spokeswoman-monique-bond (follow-up to July 29, 2010, article); Ohio Justice & Pol’y Ctr., *Gene’s Story*, VIMEO (Apr. 4, 2014, 8:54 AM), <http://vimeo.com/90968959>.

and many other activities of daily life.⁹¹ Although consideration of a criminal record by employers, landlords, schools, occupational licensing boards, and others is theoretically justified by the desire to advance public safety,⁹² in many instances the record is old or unrelated to the work or activity. For example, Jessica Chiappone's first (and only) felony drug conviction meant she could not volunteer at her children's Florida school, even 15 years later.⁹³ Although employers often cite the risk involved in hiring a person with a criminal record,⁹⁴ recent research shows that individuals with a conviction have the same likelihood of recidivism as the general population after a certain number of years have passed.⁹⁵ For example, an individual arrested for burglary at age 18 has the same likelihood of remaining arrest-free as someone in the general population after 3.8 years (in other words, by age 21.8).⁹⁶

I have spent years as a public defender and then later teaching and supervising students in criminal defense clinics. In my experience, clients want expungement of their records, understanding the imperfect nature of the mechanism, over often futile attempts to find a job with a record. Similarly, while it is true that 45 years ago collateral consequences appeared to be on the wane, today they are ever increasing.⁹⁷

91. See *infra* notes 37–43, 60–61 and accompanying text; see also James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 211 (2008) (“The problem, then, is how to promote the reintegration of ex-offenders into a society apt to reject criminals”).

92. See COLLATERAL DAMAGE, *supra* note 9, at 29.

93. *Id.* at 21–22; Jessica Chiappone, *I Haven't Voted in Years Because I Went to Prison Years Ago. Give Me My Rights*, GUARDIAN (Mar. 19, 2014, 12:17 PM), <http://www.theguardian.com/commentisfree/2014/mar/19/felon-voting-rights-back-florida-un> (describing Chiappone's conviction).

94. SCOTT H. DECKER ET AL., CRIMINAL STIGMA, RACE, GENDER, AND EMPLOYMENT: AN EXPANDED ASSESSMENT OF THE CONSEQUENCES OF IMPRISONMENT FOR EMPLOYMENT 4–5 (2014), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/244756.pdf> (noting that employers “view ex-offenders as the least desirable applicants, in part because of concerns about the legal ramifications if ex-offenders deal inappropriately with the public or mishandle the public's property”).

95. Alfred Blumstein & Kiminori Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, NAT'L INST. JUST. J. 10 (June 1, 2010), available at <https://www.ncjrs.gov/pdffiles1/nij/226872.pdf>; see also Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQ. 64 (2007); Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483 (2006).

96. Blumstein & Nakamura, *supra* note 95, at 12.

97. LOVE, ROBERTS & KLINGELE, *supra* note 26, § 1:5 (“The optimistic belief of the 1970s-era reformers that collateral consequences would soon go the way of the rule against perpetuities turned out to be wildly off the mark.”); see also *infra* notes 37–43 and accompanying text.

Further, to seek forgiveness, one must have committed a wrong. The sheer volume of arrests and convictions,⁹⁸ and the fact that more than 75 percent of criminal court caseloads are misdemeanors,⁹⁹ undermines claims that embracing one's criminal history is central to identity and the ability to move on with life. In today's criminal justice system, a criminal record is part of a regime that focuses on "quality of life" crimes.¹⁰⁰ People are arrested, prosecuted, and sometimes convicted—and thus given a permanent criminal record absent expungement—for things like littering, disorderly conduct, possession of paraphernalia, driving with a license that has been suspended for failure to pay parking tickets, trespassing, turnstile jumping, or being drunk and causing people to stop and become annoyed or harassed.¹⁰¹ Many others have criminal records for minor drug possession. In Virginia, for example, possession of any

98. Fields & Emshwiller, *supra* note 1 (explaining that "[b]etween 10,000 and 12,000 new names are added each day" to the FBI criminal records database).

99. See ROBERT C. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012), available at http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx (describing a 2010 analysis of 17 state courts revealing that misdemeanors averaged 77.5 percent of the total criminal caseload in those courts).

100. Cf. K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 279 (2009) ("Order-maintenance policing as described in *Broken Windows* neither demands nor suggests that zero tolerance arrest policies are efficient, desirable, or effective methods to achieve order and reduce fear."); George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31–32 (linking visible public disorder, like broken windows, to the neighborhood residents' perception of safety and, more tenuously, to violent crime in the neighborhood).

101. See, e.g., ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIM. DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 25–26, 29 (2009), available at <https://www.nacdl.org/reports/misdemeanor/> (finding that driving while suspended charges occupied 34.6 percent of the misdemeanor docket in Lynwood, Washington, in January 2008, while the same charge occupied 41 percent in Lower Kittias, Washington, district court); J. David Goodman, *Crime Dips in New York as Misdemeanor Arrests Rise, Report Says*, N.Y. TIMES, Oct. 28, 2014, <http://www.nytimes.com/2014/10/29/nyregion/crime-dips-in-new-york-as-misdemeanor-arrests-rise-report-says.html> (tracking the 190 percent increase in low-level arrests in New York City since 1989, ending in 2013 with 225,684 low-level arrests); Barry Paddock & Sarah Ryley, *Fare Evasion Arrests Surge in Recent Years, Making It Among City's Top Offenses Leading to Jail: Daily News Analysis*, N.Y. DAILY NEWS, Aug. 18, 2014, <http://www.nydailynews.com/new-york/nyc-crime/fare-evasion-arrests-surge-years-article-1.1906667> (stating that "[t]he turnstile has become one of [New York City]'s biggest pipelines to the jail cell," and analyzing state government statistics to find that arrests "where fare-beating was the most serious charge . . . increased 69%—from 14,681 in 2008 to 24,747 in 2013—and are on pace to be slightly higher this year").

amount (including residue) of cocaine or heroin is a felony.¹⁰² In 2012, 30 percent of all federal convictions were immigration offenses (almost all for unlawful reentry), and 33 percent were drug offenses.¹⁰³

To be sure, there are violent crimes, property offenses, fraud, and other crimes that are both serious and the type of act for which one might seek forgiveness or redemption. In these more serious cases (many of which are not eligible for expungement or sealing in any case),¹⁰⁴ one scholar's description seems apt:

The process leading to forgiveness is an important social ritual. Family members, friends, and colleagues routinely express remorse, apologize, and seek forgiveness from those whom they have wronged. Forgiveness, while acknowledging the wrongfulness of the act, separates that act from the actor and paves the way for the offender to return to the moral fold. Having forgiven, victims can heal, move on with their lives, and go back to living and working with the offender more normally.¹⁰⁵

But in a society in which occupying more than one seat on a subway or sleeping in a cardboard box are criminal offenses,¹⁰⁶ the criminal justice system has become untethered from notions of forgiveness. Further, with respect to arrests that do not lead to a conviction, there should be no need to forgive; the moral argument against expungement does not apply to nonconvictions. Indeed, most jurisdictions have some mechanism for the expungement of nonconvictions, although not all are free or automatic.¹⁰⁷ Some of those jurisdictions, demonstrating a strong

102. VA. CODE ANN. §§ 18.2-250(A), 54.1-3446, -3448 (2014) (“Any person who violates this section with respect to any controlled substance classified in Schedule I or II of the Drug Control Act shall be guilty of a Class 5 felony.”).

103. MICHAEL T. LIGHT, MARK HUGO LOPEZ & ANA GONZALEZ-BARRERA, PEW RESEARCH CTR., *THE RISE OF FEDERAL IMMIGRATION CRIMES: UNLAWFUL REENTRY DRIVES GROWTH* 7–9 (2014), available at http://www.pewhispanic.org/files/2014/03/2014-03-18_federal-courts-immigration-final.pdf.

104. See, e.g., ARK. CODE ANN. § 16-90-1408 (Supp. 2013) (listing “[f]elony convictions ineligible for sealing”); see also Love, *supra* note 17 (listing a limited number of states allowing for sealing or expungement of felony cases and noting exceptions for serious or violent offenses even in those states).

105. Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 329 (2007).

106. See, e.g., BORUCHOWITZ ET AL., *supra* note 101, at 25; *Too Many Laws, Too Many Prisoners*, ECONOMIST, July 22, 2010, <http://www.economist.com/node/16636027> (reporting the story of a 65-year-old man who was arrested for purchasing flowers from abroad).

107. See, e.g., ALA. CODE § 15-27-4 (LexisNexis Supp. 2014) (“In addition to any cost . . . for filing the petition . . . , an administrative filing fee of three hundred

preference for forgetting, allow individuals to deny the fact of any expunged nonconviction.¹⁰⁸

The need to seek and grant forgiveness is also conceptually problematic in a system that is racially and economically disparate across all levels of offenses.¹⁰⁹ While calling attention to the number of people in the United States with such minor records might be an effective part of a public education campaign, it should be a campaign aimed at stopping such indiscriminate overcriminalization in the first instance and not on accepting the situation as a “new normal.”¹¹⁰ As Professor Michael Pinard has noted, “Despite substantial criticism, expungement and sealing are perhaps the most viable measures—short of a gubernatorial pardon, which is essentially impossible to obtain—to ensure that a person will not be judged forever by his or her record.”¹¹¹ Pinard acknowledges moral and practical arguments against sealing and expungement but argues that “tak[ing] the criminal record off the table” advances a “redemptive-focused approach to criminal records” and is “critically important for individuals of color.”¹¹²

Mechanisms of forgetting, such as expungement, are not unrelated to forgiveness. Indeed, the almost complete lack of privacy when it comes to criminal records surely drives the difficulty people have allowing others to move on with life after contact with the criminal justice system. As one group of scholars explained, “Assuming information remains indefinitely accessible to a search engine, ‘forgiving’ anyone, including oneself, may be incredibly problematic.

dollars (\$300) shall be paid at the time the petition is filed and is a condition precedent to any ruling of the court pursuant to this chapter. The administrative filing fee shall not be waived by the court.”); MD. CODE ANN., CRIM. PROC. § 10-105(a) (LexisNexis 2008 & Supp. 2014) (requiring an individual to file a petition for expungement of a charge that ended in acquittal or was “otherwise dismissed”).

108. See, e.g., CONN. GEN. STAT. ANN. § 54-142a (e)(3) (West 2009 & Supp. 2015) (“Any 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 with respect to the proceedings so erased and may so swear under oath.”).

109. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 97–139 (rev. ed. 2012) (offering, in chapter entitled “The Color of Justice,” numerous examples and statistics of racial disparities in the criminal justice system); see also ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 19–21 (2007).

110. Cf. Ted Gest, *Choice: Cut Prison Population, or Accept New Normal*, CRIME REP. (Apr. 30, 2014, 2:29 PM), <http://www.thecrimereport.org/news/inside-criminal-justice/2014-04-incarceration--embargoed> (noting how either sentencing policies can be reformed to significantly reduce incarceration rates “or the quadrupling of prisoner numbers in the last few decades could be accepted as the ‘new normal’”).

111. Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 990 (2013).

112. *Id.* at 992.

The perpetual memory of the Internet hinders forgetting, thereby stifling forgiveness.”¹¹³

B. The Challenges of Sealing and Expungement in the Current Information Environment

“It’s far easier to get a criminal record than to eradicate one,” one news article noted.¹¹⁴ A common practical critique of sealing and expungement laws is that they are essentially useless in our current information environment. Once information is released, it is disseminated into the digital world in so many potential venues that a person can never fully “expunge” anything.¹¹⁵ This is particularly problematic, the critique continues, when an individual denies the fact of an expunged conviction or arrest, only to be considered to have lied if the criminal record later pops up. While an expunged or sealed conviction will not show up in a public search of an official court database, a background checking company may have gathered the data before the expungement and failed to update it afterwards.¹¹⁶ For example, John Keir claimed to have lost his well-paid job as an information security official at a bank for allegedly lying on his application.¹¹⁷ Keir reported that the bank only asked him about convictions, so he did not list a recent criminal arrest record that ended in acquittal.¹¹⁸ The bank fired him after doing a background check some weeks later, which revealed the arrest.¹¹⁹

An individual who voluntarily discloses a criminal record is likely to lose opportunities based on that record, however. Indeed, my clinic students recently represented an individual who did disclose a nonconviction record to a bank, only to have an offer withdrawn. It

113. Ambrose et al., *supra* note 55, at 111.

114. Fields & Emshwiller, *Fighting to Forget*, *supra* note 65.

115. Jacobs & Crepet, *supra* note 91, at 211 (“The informational infrastructure is too large, too entrenched, and too useful to too many people to make its contraction even a remote possibility.”); cf. Jeffrey Rosen, *Free Speech, Privacy, and the Web That Never Forgets*, 9 J. ON TELECOMM. & HIGH TECH. L. 345, 345 (2011) (“Around the world citizens are experiencing the difficulty of living in a world where the Web never forgets, where every blog and tweet and Facebook update and MySpace picture about us is recorded forever in the digital cloud.”).

116. See REBECCA VALLAS & SHARON DIETRICH, CTR. FOR AM. PROGRESS, ONE STRIKE AND YOU’RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS 14 (2014), available at <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf> (describing how commercial background screeners often “report[] mismatches of cases belonging to someone else, report[] expunged cases, and fail[] to report outcomes of old arrests”).

117. Fields & Emshwiller, *supra* note 1.

118. *Id.*

119. *Id.*

seems like a lose-lose proposition: disclose and fail to get the job because of the record or deny and fail to get the job for being untruthful. However, not every employer is as heavily regulated as a bank,¹²⁰ and not every employer sends applicant or employee fingerprints to the FBI.¹²¹ Employers that are not required to do background checks may decline to pay a private data company, instead relying on free or low-cost official court databases. In Kansas, for example, a landlord or employer can simply go to <https://www.kansas.gov/criminalhistory/>, quickly create an account, and pay \$20 for a state-wide criminal record search.¹²² In such an instance, a job applicant with an expunged arrest record may not lose a job for failing to disclose the record because the employer will never see it. Further, Kansas law states that “a person whose arrest records have been expunged as provided in this section may state that such person has never been arrested.”¹²³

As described in the next Part, sealing and expungement are just one mechanism in what must be a multi-pronged approach to allowing a person to move beyond a criminal record. In particular, tighter regulation of data brokers—especially measures to ensure that brokers update their databases often so as to purge them of expunged records—will offer more people relief from a record.

Private background screening companies and official court records are not the only sources for employers, landlords, and others who want to learn about a person’s background. A simple Google search might turn up one of the many for-profit websites that post mug shots and list arrest information.¹²⁴ However, here too there has been movement toward more protection. Google recently “changed its search algorithm to de-emphasize many so called ‘mug-shot’ websites, giving them less prominence when someone’s name is searched.”¹²⁵

The Internet has caused a sea change in the recording of information, comparable to “the development of written record practices

120. Under the Federal Deposit Insurance Act, individuals who have been convicted of a crime of dishonesty, breach of trust, or money laundering are barred from working in, owning, or controlling a bank absent a waiver from the Federal Deposit Insurance Corporation. 12 U.S.C. § 1829(a) (2012). The rule also applies to individuals who have agreed to enter pretrial diversion or similar programs that result in nonconviction. *Id.*

121. Fields & Emshwiller, *supra* note 1 (describing how the bank in Mr. Keir’s case sent his fingerprints to the FBI, as is the bank’s practice).

122. *Conducting a Record Check*, KAN. BUREAU INVESTIGATION, <http://www.kansas.gov/kbi/criminalhistory/ConductRecordCheck.html> (last updated 2013).

123. KAN. STAT. ANN. § 22-2410 (2013).

124. Segal, *supra* note 50.

125. Fields & Emshwiller, *supra* note 1.

and the invention of the printing press.”¹²⁶ The complexity of the information environment and the fact that not everyone is able to move beyond an expunged record are not reasons to deny the mechanism to the many individuals who do benefit from sealing and expungement.

III. CRIMINAL RECORD PROLIFERATION IS A COMPLEX PROBLEM REQUIRING A MULTIFACETED SOLUTION

To be effective in the digital era, with its robust market for arrest and conviction records, sealing and expungement laws must be part of a multifaceted approach to alleviating harmful consequences of such records. For many of the reasons explored in Part II, sealing and expungement alone cannot solve the problems mass criminalization has created.¹²⁷ Such laws will be most effective if jurisdictions take a holistic approach to the goal of allowing individuals the opportunity to fully reintegrate into society after completing any punishment for a conviction, or to move on quickly after a nonconviction or minor conviction.¹²⁸ Even the broadest sealing and expungement law will not fulfill its limiting purpose unless it works in conjunction with a number of directly-related mechanisms.

On their own, sealing and expungement laws operate to limit access to a criminal record. As noted in the Introduction, these laws vary greatly from jurisdiction to jurisdiction, resulting in a variety of levels of limitations on access to a record. Some states limit sealing or expungement to nonconviction or a small selection of minor misdemeanor records, while other states allow expungement of felony convictions after a waiting period and fulfillment of other conditions.¹²⁹ In some jurisdictions, sealing or expungement for at least some types of

126. Ambrose et al., *supra* note 55, at 103–04 (citing GEOFFREY C. BOWKER, *The Past and the Internet*, in STRUCTURES OF PARTICIPATION IN DIGITAL CULTURE 20, 21 (Joe Karaganis ed., 2007)).

127. *See supra* Part II; *see also* SEARCH, THE NAT’L CONSORTIUM FOR JUSTICE INFO. & STATS., REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 82 (2005), *available at* <http://www.search.org/files/pdf/RNTFCSCJRI.pdf> (noting that “[o]ne means of promoting reintegration is to have [a criminal] record sealed or expunged”).

128. *See* COLLATERAL DAMAGE, *supra* note 9, 30–65 (setting out a number of recommendations for the restoration of rights and status of individuals with a criminal record).

129. *Compare* MD. CODE ANN., CRIM. PROC. § 10-105 (LexisNexis 2008 & Supp. 2014) (nonconvictions and a small group of minor nuisance crimes), *with* LA. CODE CRIM. PROC. ANN. art. 978 (Supp. 2015) (allowing for expungement of certain felony convictions after 10-year waiting period and fulfillment of other conditions).

nonconviction records is automatic; in other jurisdictions, an individual must apply and often pay a fee.¹³⁰

There are three main ways in which sealing and expungement laws' limits on access to criminal records can be made more effective: ensuring the accuracy of records, restricting ways in which decision makers with access can use records, and effective regulation of background screening companies and private companies that sell mugshots and other arrest and conviction information.¹³¹

There are a number of methods to ensure the accuracy of official records. An important starting point would be requiring the FBI to clean up its notoriously inaccurate master criminal records database. Despite the fact that approximately half of the records in this database “are incomplete and fail to provide information on the final outcome of an arrest,” it was used for almost 17 million employment and licensing background checks in 2012.¹³² Sealing and expungement will only go so far if the nation's largest criminal records database is not accurate, complete, and current. Unfortunately, two recent bills aimed at cleaning up the FBI database—the Fairness and Accuracy in Employment Background Checks Act¹³³ and the Accurate Background Check Act¹³⁴—have not moved forward.¹³⁵

Laws and regulations that limit how decision makers use criminal records, even when those records are accessible, are critical complements to any sealing or expungement scheme. States must prohibit employers, landlords, licensing authorities, and other decision makers from asking

130. Compare N.Y. CRIM. PROC. LAW § 160.55 (McKinney 2004 & Supp. 2015) (providing for automatic sealing for “non-criminal” offenses), with MD. CODE ANN., CRIM. PROC. § 10-105 (allowing for expungement of certain nonconviction records three years after the disposition and only after a petition has been filed in the court in which the proceedings began).

131. COLLATERAL DAMAGE, *supra* note 9, at 54–61.

132. MADELINE NEIGHLY & MAURICE EMMELM, THE NAT'L EMP'T LAW PROJECT, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 3, 5–7 (2013), available at <http://www.nelp.org/page/-/SCLP/2013/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf?nocdn=1>.

133. Fairness and Accuracy in Employment Background Checks Act of 2013, H.R. 2865, 113th Cong. (1st Sess. 2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr2865ih/pdf/BILLS-113hr2865ih.pdf>.

134. ABC Act of 2013, H.R. 2999, 113th Cong. (1st Sess. 2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr2999ih/pdf/BILLS-113hr2999ih.pdf>; *ABC Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr2999> (last visited Mar. 2, 2015).

135. *ABC Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr2999> (last visited Mar. 2, 2015); *Fairness and Accuracy in Employment Background Checks Act of 2013*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr2865> (last visited Mar. 2, 2015).

about or considering sealed or expunged records.¹³⁶ There may be limited instances where state or federal laws require consideration of sealed or expunged records.¹³⁷

Perhaps the most difficult challenge when it comes to limiting access to sealed or expunged records is effective regulation of companies that buy and sell criminal records for profit. Many data collection companies that offer background checking services to employers and other decision makers qualify as “consumer reporting agencies” (CRAs) and are thus regulated by the Fair Credit Reporting Act (FCRA).¹³⁸ Because the FCRA requires CRAs to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates,”¹³⁹ there is at least the possibility of keeping sealed and expunged records from being erroneously reported by a CRA. However, not all CRAs use reliable sources for their reports, and they certainly do not always update expunged records from their databases through removal. Thus the potential for, and indeed incidents of, error can be high.¹⁴⁰ Some states also have their own credit reporting acts, and these offer another avenue of limiting access to and use of sealed and expunged records.¹⁴¹

In regulation of companies that are not CRAs, such as mugshot websites, the challenges are much greater, as these companies buy and sell arrest photos and records and post them before any disposition in the case occurs. While some of these companies will remove arrest

136. See, e.g., 20 ILL. COMP. STAT. ANN. 2630/12(a) (West 2015). Further, laws or regulations limiting the use of records should include clear guidelines for those instances in which consideration of a nonsealed or nonexpunged record is relevant. There are a number of sources for such guidance, including the U.S. Equal Employment Opportunity Commission’s 2012 “Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964.” EQUAL EMP’T OPPORTUNITY COMM’N, EEOC ENFORCEMENT GUIDANCE NO. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, *AS AMENDED*, 42 U.S.C. §§ 2000e *ET SEQ.* (2012), available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf; see also COLLATERAL DAMAGE, *supra* note 9, at 35–38; NAT’L HIRE NETWORK, LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW & NAT’L WORKRIGHTS INST., BEST PRACTICE STANDARDS: THE PROPER USE OF CRIMINAL RECORDS IN HIRING (2013), available at http://www.lawyerscommittee.org/admin/employment_discrimination/documents/files/Best-Practices-Standards-The-Proper-Use-of-Criminal-Records-in-Hiring.pdf [hereinafter THE PROPER USE OF CRIMINAL RECORDS IN HIRING].

137. See COLLATERAL DAMAGE, *supra* note 9.

138. 15 U.S.C. §§ 1681–1681x (2012).

139. *Id.* § 1681e(b).

140. See THE PROPER USE OF CRIMINAL RECORDS IN HIRING, *supra* note 136, at 12.

141. See NAT’L CONSUMER LAW CTR., FAIR CREDIT REPORTING § 10.7 (7th ed. 2010) (most states have credit report act-type statutes).

information when the case was later expunged, they often charge a fee to do so.¹⁴² As one reporter has put it, “[I]t was only a matter of time before the Internet found a way to monetize the humiliation that came with an arrest.”¹⁴³ Still, it does not have to be so easy for such predatory companies to thrive. Banning the sale of criminal records and allowing these companies—as well as CRAs—to get aggregated data from official electronic databases only upon a showing that they are updating to remove expunged records is another way to advance the purposes of sealing and expungement laws.

All of these suggested mechanisms exist in one form or another in various jurisdictions, although a few states have managed to effectively combine them. Sealing and expungement of specified criminal records, combined with these other methods of advancing the same goals, is a timely and well-tailored response to mass criminalization in the data era.

CONCLUSION

Mass criminalization, exponential growth in the number of collateral consequences, technology that makes criminal records easily and instantly available, and a national obsession with viewing such records are all core factors in the nation’s current criminal justice crisis. This crisis raises issues of racial and economic justice, evidence-based approaches to public safety, and individual dignity.

For many individuals, particularly those whose arrests result in a nonconviction disposition or conviction on minor charges, sealing or expungement of a criminal record can be critical to securing housing and employment and accessing higher education. The stories of these individuals demonstrate that immediate action must be taken in favor of sealing and expungement laws, particularly when combined with other mechanisms for dealing with harmful consequences of criminal records.

The need for immediate action also weighs heavily against moral and practical arguments against sealing and expungement, such as claims that the country should learn to forgive those with a criminal record rather than effectively to forget that record. Indeed, this country has proved itself largely unable to forgive individuals who have been

142. See Segal, *supra* note 50; see also Mike DeForest, *Mugshot Websites Under Fire: Sen. Proposes Legislation That Allows Suits over Mugshot Removal Charges*, CLICK ORLANDO (Jan. 14, 2015, 11:15 PM), <http://www.clickorlando.com/news/mugshot-websites-under-fire/30701932> (describing Florida state senator’s plan to reintroduce a bill that “would allow Floridians to sue websites that demand money for mugshot removal”); Fields & Emshwiller, *supra* note 1 (“On Friday, California Gov. Jerry Brown signed into law a bill making it illegal for websites to charge state residents to have their mug shot arrest photos removed.”).

143. See *id.*

convicted, even for minor offenses. And there should be no need to forgive arrests that do not lead to a conviction.

At the same time, there must be public education about low recidivism rates after a certain number of years has passed since a conviction, and about the lack of connection between many convictions and the ability to perform many jobs safely and effectively. The country must also be steered away from its harmful criminalization obsession. Public education and a move away from mass criminalization are critical, but they are also long-term goals. Sealing and expungement laws do not undercut these goals. Rather, such laws serve an important, immediate need for individuals otherwise relegated to second-class citizen status.