EXPUNGING AMERICA’S RAP SHEET IN THE INFORMATION AGE

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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


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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

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clinics handling criminal records matters and law school clinics and courses that cover expungement.\textsuperscript{11} Recent expungement summits around the nation draw high attendance.\textsuperscript{12} Researchers are studying the positive effects of sealing and expungement on individuals’ ability to gain employment and housing.\textsuperscript{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.”\textsuperscript{14} Sealing or expungement is generally

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\textsuperscript{14} See, e.g., \textit{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); \textit{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 \textit{DOROTHY BROWN, OFFICE OF THE CLERK OF THE CIRCUIT COURT OF COOK CTY., 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. 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.

Currently, almost all jurisdictions have some type of expungement laws, although they vary greatly in scope. Most allow for sealing or expungement of arrests that do not end in a conviction, some automatically and others only upon application. 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. 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.

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).


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. 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.

While different approaches to sealing or expungement of specified criminal records have existed in state laws for decades in this country, 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, most criminal cases are misdemeanors and often do not result in jail or prison time. The problem is thus better characterized as one of mass criminalization. Mass criminalization over the past 40 years means that about one in three people in the United States has some type of criminal

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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).


record. 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. The result is that “the FBI currently has 77.7 million individuals on file in its master criminal database.”

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


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)).


lower levels of incarceration in New York state’s prisons. In California, the U.S. Supreme Court’s *Brown v. Plata* decision led to “realignment” of the state prison system and some relief from the mass incarceration crisis. 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.”

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. A new American Bar Association database, funded by the National Institute of Justice, has catalogued tens of thousands of collateral consequences. These consequences can be found in federal and state laws and regulations, and in some instances at the local or municipal level. Many are mandatory, such as state laws that prohibit a


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”).


40. *Stanley 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.\textsuperscript{41} Most collateral consequences apply to convictions (e.g., sex offender registration for anyone convicted of particular sex offenses),\textsuperscript{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).\textsuperscript{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).\textsuperscript{44} Today, almost all states have publicly available Internet databases of criminal records.\textsuperscript{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).\textsuperscript{46} There are also a growing number of private

\begin{footnotesize}
\begin{enumerate}
\item 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://sc1.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”).
commercial information vendors that sell criminal background checking services. 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. 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.

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. Websites like “Instant Checkmate” encourage a quick check of criminal records and social media before a date. 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, 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’”).


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.”).

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


\(^{54}\) 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).

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.
\(^61\) 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.”\(^\text{63}\) Now, at a time when Americans struggle to compete in a global economy,\(^\text{64}\) 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.\(^\text{65}\) Charles Koch, one of the “lightning-rod capitalist brothers”\(^\text{66}\) 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.\(^\text{67}\)

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.


\(^{67}\) 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 [is] 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


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)." 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.”

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. At the core of the arguments that sealing and expungement deal
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.” 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.” 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.” 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.”

Those who overcome the high hurdle of a criminal record in the workplace are undoubtedly change agents. 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,
and many other activities of daily life. 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, 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. Although employers often cite the risk involved in hiring a person with a criminal record, 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. 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).

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.

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.


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

97. LOVE, ROBERTS & KLENGEL, 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, and the fact that more than 75 percent of criminal court caseloads are misdemeanors, 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. 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. 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).


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

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), 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.

But in a society in which occupying more than one seat on a subway or sleeping in a cardboard box are criminal offenses, 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. 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.”).
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).
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.\footnote{See, e.g., \textsc{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.").} 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.\footnote{\textsc{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 \textsc{Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor} 19–21 (2007).} 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.”\footnote{Cf. Ted Gest, \textit{Choice: Cut Prison Population, or Accept New Normal}, \textsc{Crime Rep.} (Apr. 30, 2014, 2:29 PM), \url{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’").} 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.”\footnote{\textsc{Michael Pinard, Criminal Records, Race and Redemption}, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 990 (2013).} 111 Pinard acknowledges moral and practical arguments against sealing and expungement but argues that “taking the criminal record off the table” advances a “redemptive-focused approach to criminal records” and is “critically important for individuals of color.”\footnote{\textit{Id.} at 992.}

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

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. 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. 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. 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. Keir reported that the bank only asked him about convictions, so he did not list a recent criminal arrest record that ended in acquittal. The bank fired him after doing a background check some weeks later, which revealed the arrest.

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.”).
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, and not every employer sends applicant or employee fingerprints to the FBI. 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. 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."

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. 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.”

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).


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/RNTFCSCIRI.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).

nonconviction records is automatic; in other jurisdictions, an individual must apply and often pay a fee.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 Act\textsuperscript{133} and the Accurate Background Check Act\textsuperscript{134}—have not moved forward.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{131} COLLATERAL DAMAGE, supra note 9, at 54–61.


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

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). 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,” 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. 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.

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
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

137. See COLLATERAL DAMAGE, supra note 9.


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.\textsuperscript{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.”\textsuperscript{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.

\textbf{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

\textsuperscript{142} See Segal, supra note 50; see also Mike DeForest, Mugshot Websites Under Fire: Sen. Proposes Legislation That Allows Suits over Mugshot Removal Charges, \textsc{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.”).

\textsuperscript{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.