EXCAVATING EXPUNGEMENT LAW: A COMPREHENSIVE APPROACH*

I. INTRODUCTION

On July 30, 2013, the Philadelphia Mayor's Office of Reintegration Services for Ex-Offenders hosted the Ex-Offender Expo at the Pennsylvania Convention Center.[1] The expo featured various employers, service providers, and resources to help individuals obtain the tools necessary to lead an independent and productive life.[2] Philadelphia Lawyers for Social Equity[3] held an expungement clinic at the expo as part of this reentry effort. Throughout the day, individuals burdened by criminal records arrived at the clinic, hoping to erase marks of the criminal justice system from their identity. Some record holders walked away pleased, knowing they would have a much better chance at obtaining employment now that their record would be partially expunged. Others left disheartened and defeated, having been told by clinic volunteers that nothing in their criminal record was eligible for expungement.

The generally narrow scope of state expungement statutes provides limited opportunity to expunge a criminal record.[4] Most state legislatures have yet to fully appreciate the debilitating effects of a criminal record on nearly all aspects of an individual's life. Furthermore, the modern information age has created an uphill battle for any efforts to obtain criminal history privacy.[5] Most expungement statutes currently provide forms of relief that predate recent technological advances.[6]

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1. *Ex-Offender Expo 2013*, R.I.S.E. THE MAYOR'S OFFICE OF REINTEGRATION SERVICES FOR EX-OFFENDERS, http://rise.phila.gov/ex-offender-expo-2013/ (last visited Mar. 6, 2015).

2. *Id.*

3. See *infra* notes 343–47 and accompanying text for a description of Philadelphia Lawyers for Social Equity and its expungement work.

4. See *infra* Part II.D.2 for a discussion of current expungement law. Governor pardon is another means to expungement, but is rarely granted and not discussed in this Comment. *See* Margaret Colgate Love, *NACDL Restoration of Rights Resource Project, Jurisdiction Profiles*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, http://www.nacdl.org/ResourceCenter.aspx?id=25091 (last visited Mar. 6, 2015) (providing a state-by-state profile relating to relief from the collateral consequences of conviction, including the pardon process).

5. See *infra* Part II.C.2 for a discussion of the effects of mass digitization and information dissemination on criminal records.

6. *See, e.g.*, G.D. v. Kenny, 15 A.3d 300, 313 (N.J. 2011) ("The expungement statute—enacted at a time when law enforcement and court documents may have been stored in the practical obscurity of

The purpose of this Comment is to explore the legal framework surrounding criminal records, bringing to light necessary elements of expungement law reform. Through an examination of current expungement law, this Comment argues for a holistic approach to expungement that aims to minimize the collateral consequences of contact with the criminal justice system. Expungement law has the potential to chip away at our goliath system of mass incarceration while protecting the overlooked constitutional rights of those branded with a criminal record.

This approach calls for a rehabilitative criminal justice system, rather than one of punishment and retribution. It also requires creating reactive legislation that accounts for the current state of technology and mass digitization of information. However, a complete bar to access of criminal history is fruitless and antagonizes legitimate interests in public safety. Instead, by framing expungement as a tool to turn once-public criminal records into private data, legislatures can help prevent the dissemination of expunged records to an information-hungry public while keeping the records available to law enforcement.

II. OVERVIEW

A. The Scope of the Problem: Marginalization and Collateral Consequences

In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*,[7] Michelle Alexander argues that the American criminal justice system has institutionalized marginalization and racial control through mass incarceration. Substantially developed through the "War on Drugs" of the 1980s, the system continues to feed off of that war today.[8] By pushing individuals with criminal records into "second-class citizenship," the system of mass incarceration is self-perpetuating.[9] Criminal history records[10]—brands of inferiority—bar people from public and private housing, professional licensures, and social welfare, which often effectively locks them out of mainstream society and into a life of

a file room—now must coexist in a world where information is subject to rapid and mass dissemination.").

7. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

8. *See id.* at 49–53 (tracing the history of the War on Drugs).

9. *Id.* at 94; *see also* Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 18–19 (2005) (describing the "despised" group of people with criminal records who are "politically powerless, second-class citizens"); Dina Kopansky, Comment, *Locked Out: How the Disproportionate Criminalization of Trans People Thwarts Equal Access to Federally Subsidized Housing*, 87 TEMP. L. REV. 125, 128–133 (2014) (discussing the Department of Housing and Urban Development's One-Strike policy, which bars prospective tenants from admission to federally subsidized housing programs based on past instances of criminal activity).

10. The United States Code defines "criminal history records" as "information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, or release." 42 U.S.C. § 14616(4)(A) (2012).

recidivism.[11] Alexander argues that the length of a prison sentence is relatively inconsequential; the "system depends on the prison label, not prison time."[12] Yet the system depends not only on the specific label of prison time but also on the label that results from general contact with the criminal justice system.[13]

The stigmatized underclass of individuals with criminal records will continue to exist unless the cycle of status and crime is broken.[14] Because public perception of individuals with criminal records is influenced by societal discrimination, the public readily accepts, and even seeks out, the criminal history information widely disseminated through the Internet.[15] Law enforcement agencies have responded to public demands for criminal records based on the "right to know" by disseminating copious amounts of criminal history information.[16] Criminal record laws and public attitude toward criminal activity work hand in hand; they inform each other and together maintain the debilitating effect of a criminal record.[17]

This debilitating effect takes its form in collateral consequences. The American criminal justice system often turns "even a minor offense into a life sentence by permanently keeping [ex-offenders] out of a job."[18] Encounters with the criminal justice system bear costs that extend far beyond the obvious punishments of prison time, probation, and parole.[19] These collateral

11. ALEXANDER, *supra* note 7, at 94; *see also* Amy Shlosberg, Evan Mandery & Valerie West, *The Expungement Myth*, 75 ALA. L. REV. 1229, 1238 n.64 (2011–12) ("Research has established a strong positive link between job stability and reduced offending.").

12. ALEXANDER, *supra* note 7, at 94.

13. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1804 (2012) (arguing that focusing on "mass incarceration" overlooks the negative impact of any contact with the criminal justice system because most offenders do not serve jail time).

14. *See* Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT'G. REP. 6, 6 (2009) (arguing that widespread conviction rates have led to collateral consequences, which are becoming one of the primary methods of assigning legal status in the United States).

15. *See* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 387 (2006) (describing the criminal justice system as a system that "feeds on itself," reinforced by widely disseminated criminal history records through modern information technology and acceptance of discrimination against individuals with criminal records).

16. *See id.* at 388 (describing the role that criminal justice personnel, organizations, individuals, and private-sector entrepreneurs all play in perpetuating the increasing circulation of criminal records).

17. *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, 1707–08 (describing efforts in the 1960s and 1970s by "optimistic law reformers" who "recognized that it was not enough simply to restore legal rights" but that "they would also have to address the more subtle punishment represented by societal prejudice against the criminal offender that lingers long after the penalties prescribed by law have been fully satisfied").

18. Gregory I. Massing, *CORI Reform—Providing Ex-Offenders With Increased Opportunities Without Compromising Employers' Needs*, BOS. BAR J., Winter 2001, at 21, 21 (quoting Governor Deval Patrick of Massachusetts in Exec. 4701, 2008 Leg., (Ma. 2008)) (alteration in original).

19. *See* Love, *supra* note 17, at 1705 (asserting that the collateral consequences of criminal convictions last long after prison sentences have been served, "depriving ex-offenders of the tools

consequences stem from both public law[20] and social stigma.[21] They act as barriers both to individuals who have had a minor brush with law enforcement and those who have spent long periods of time in confinement.[22] Discrimination based on the existence of a criminal history record exists in the areas of civil rights,[23] employment,[24] housing,[25] public assistance,[26] occupational licenses,[27] and in every stage throughout the life of a criminal case.[28] Due to their elusive

necessary to reestablish themselves as law-abiding and productive members of the free community"). Shlosberg, et al., *supra* note 11, at 1237 ("Research consistently shows that having a criminal record has negative consequences that continue long after a sentence has been served.").

20. *See, e.g.*, 18 PA. CONS. STAT. § 9124(c)(2) (2014) (permitting licensing agencies to refuse a license to an individual with a felony conviction or conviction of a "misdemeanor which relates to the trade, occupation or profession for which the license, certificate, registration or permit is sought"); 35 PA. CONS. STAT. § 10225.503 (2014) (disqualifying any individual with certain types of convictions from working with the elderly).

21. *See* Journey v. State, 895 P.2d 955, 959 (Alaska 1995) (explaining that it is widely acknowledged that individuals with criminal records are burdened by social stigma); Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 5–6 (2008) (recognizing that ex-offenders face significant barriers to societal reentry regardless of the circumstances surrounding their interaction with the criminal justice system).

22. *See* Love, *supra* note 14, at 6 (noting that the "existence of an arrest record alone can be fatal to an individual's chances for a job, apartment, or loan").

23. In Alabama, for example, certain types of felony convictions cause a loss of voting rights, ALA. CODE § 15-22-36.1(g) (2014), as well as the right to hold public office, *id.* § 36-2-1.

24. Logan Danielle Wayne, Comment, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungment Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253, 259–60 (2012) (arguing that allegedly expunged criminal records can often still be accessed by employers, preventing the removal of the stigma associated with a criminal record); Shlosberg et al., *supra* note 11, at 1239 n.69 (citing a national survey of six hundred businesses which "revealed that employers are reluctant to hire ex-convicts, reporting they fear liability if a new crime is committed") (quoting JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 114–17 (2003)); *id.* at 1239 ("[F]ormerly incarcerated individuals have difficulty obtaining drivers' licenses, social security cards, and birth certificates—documents that are often necessary for employment.").

25. See Meghan L. Schneider, Note, *From Criminal Confinement to Social Confinement: Helping Ex-Offenders Obtain Public Housing with a Certificate of Rehabilitation*, 36 NEW ENG. J. CRIM. & CIV. CONFINEMENT 335, 336 (2010), for an in-depth look at the denial of admission to public housing as an acute collateral consequence of having a criminal record. *See also* Kopansky, *supra* note 9, at 128–33.

26. *See, e.g.*, 21 U.S.C. § 862(a) (2012) ("(1) Any individual who is convicted of any Federal or State offense consisting of the distribution of controlled substances shall (A) at the discretion of the court, upon the first conviction for such an offense be ineligible for any or all Federal benefits for up to 5 years after such conviction; (B) at the discretion of the court, upon a second conviction for such an offense be ineligible for any or all Federal benefits for up to 10 years after such conviction; and (C) upon a third or subsequent conviction for such an offense be permanently ineligible for all Federal benefits.").

27. *See, e.g.*, ARK. CODE ANN. § 17-1-103 (2014) (allowing convictions to be considered by licensing agency); *see also* Shlosberg et al., *supra* note 11, at 1239 (noting that individuals with criminal records are often ineligible for occupational and professional licenses).

28. *See* Commonwealth v. Malone, 366 A.2d 584, 588 (Pa. Super. Ct. 1976) ("An arrest record may be used by the police in determining whether subsequently to arrest the individual concerned, or whether to exercise their discretion to bring formal charges against an individual already arrested.") (quoting Menard v. Mitchell, 430 F.2d 486, 490–91 (D.C. Cir. 1970)); *Criminal Justice Data Improvement Program,* OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS,

nature, collateral consequences can prove even more detrimental than a period of confinement.[29] They are not specifically ordered by a sentencing judge but rather exist as a function of our system of retributive laws, inhibiting and discouraging productive engagement in society.[30]

Statutorily grounded collateral consequences are subject to constitutional review.[31] Because they are considered nonpunitive, however, such consequences have generally not been analyzed under precepts of proportionality or reasonableness.[32] So long as collateral consequences are deemed nonpunitive, they are subject to rational basis review by courts, which merely requires restrictions on civil rights to be "regulatory and rational."[33] Many restrictions, such as prohibitions on occupational licenses or denial of public welfare, are deemed to be in the public interest.[34]

Because collateral consequences are not considered punitive, a defendant need not be notified of these effects prior to pleading guilty. An exception can be found in the recent Supreme Court decision, *Padilla v. Kentucky*,[35] in which the Court set the stage for official acknowledgment of the collateral consequences that affect individuals who come into contact with the criminal justice system.[36] Padilla claimed that because he was not advised of the risk of deportation accompanied by a guilty plea, he did not have constitutionally effective

http://www.bjs.gov/index.cfm?ty=tp&tid=4 (last updated Feb. 14, 2015) ("Accurate, timely, and complete criminal history record . . . [e]nable criminal justice agencies to make decisions on pretrial release, career criminal charging, determinate sentencing, and correctional assignments.").

29. *See, e.g.*, Binyamin Appelbaum, *Out of Trouble, Out of Work*, N.Y. TIMES, Mar. 1, 2015, at BU1 (describing individuals who are still unable to find employment and housing years after their criminal convictions, which prevents them from meeting other obligations, such as paying child support).

30. *See* Love, *supra* note 17, at 1708 (noting that criminal offenders are subject to societal prejudice, which is a subtle punishment that lasts long after legal penalties have been satisfied); Schneider, *supra* note 25, at 335 (describing collateral consequences as "invisible punishments" since they are "imposed by operation of law rather than by decision of the sentencing judge and are not considered part of the ex-offender's sentence").

31. The Supreme Court has upheld statutes denying individuals with felony convictions the ability to exercise civil rights in many circumstances, such as the right to vote, Richardson v. Ramirez, 418 U.S. 24, 54–56 (1974), and the right to possess firearms, District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

32. Chin, *supra* note 13, at 1806–07.

33. *Id.* at 1809–11.

34. *Id*. at 1810. Chin reasons that

> "[i]t would seem that virtually all denials of public benefits or services are rational because such benefits direct scarce resources to the most deserving. . . . Courts could find virtually all employment and licensing restrictions rational, as long as the job or occupation is one for which honesty, integrity, and moral character are relevant . . . ."

Id. at 1811–12.

35. 559 U.S. 356 (2010).

36. *Padilla*, 559 U.S. at 359–60. See Gabriel J. Chin & Margaret Love, *The "Major Upheaval" of* Padilla v. Kentucky: *Extending the Right to Counsel to the Collateral Consequences of Conviction*, CRIM. JUST., Summer 2010, at 36, 37 (finding that the *Padilla* decision now requires defense attorneys to consider the collateral consequences of their clients' criminal convictions and predicting that "the '*Padilla* advisory' may become as familiar a fixture of a criminal case as the *Miranda* warning").

counsel.[37] The Supreme Court of Kentucky, however, had held that Padilla's claim concerned merely collateral matters, not within the sentencing authority of the court.[38]

The U.S. Supreme Court refused to credit the distinction between direct and collateral consequences in the scope of the Sixth Amendment's right to counsel.[39] Because deportation is a severe civil penalty, the Court held that under the right to counsel, defense attorneys must advise their clients if they face a risk of deportation.[40] Thus, for the first time, the Court found a need to make defendants aware of consequences that are not specifically part of their criminal sentence.[41] Some lower courts have expanded upon *Padilla*'s holding and have found that certain other collateral consequences, such as employment termination, necessitate advising defendants of those repercussions prior to taking a plea.[42] However, as the Supreme Court has yet to decide the breadth of the *Padilla* decision, many individuals pleading guilty are not advised of the consequences implicated by their plea.[43]

B. Expungement as a Tool for Relief

The source of collateral consequences—the criminal record—results from almost any contact with the criminal justice system, including from cases of nonconviction and dropped charges.[44] In most states, to expunge a criminal record, an individual may petition the court of the judicial district where the charges were disposed.[45] The state attorney has a certain number of days to file a consent or objection to the petition, and the court will then deny the petition or

37. *Padilla*, 559 U.S. at 359.

38. *Id.* at 364–65.

39. *Id.* at 365.

40. *Id.* at 374.

41. Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 720 (2012).

42. *Id.* at 720–21 (citing Bauder v. Dep't of Corr., 619 F.3d 1272, 1273 (11th Cir. 2010); Taylor v. State, 698 S.E.2d 384, 385 (Ga. Ct. App. 2010); Commonwealth v. Abraham, 996 A.2d 1090, 1095 (Pa. Super. Ct.), *rev'd*, 9 A.3d 1133 (Pa. 2010)).

43. Chin, *supra* note 13, at 1815.

44. *See* Commonwealth v. Malone, 366 A.2d 584, 587–88 (Pa. Super. Ct. 1976) (noting the serious difficulties that may result from an arrest record, including economic loss, injury to reputation, and restricted opportunities for schooling, employment, or professional licenses); Ryan A. Hancock, *The Double Bind: Obstacles to Employment and Resources for Survivors of the Criminal Justice System*, 15 U. PA. J.L. & SOC. CHANGE 515, 515–16 (2012) (stating that individuals who come into contact with the criminal justice system are "marked for life," regardless of the outcome of their case, and that in Pennsylvania, a criminal history record includes nonconviction data).

45. The burden generally is on the individual to seek an expungement of his or her criminal record, as most state statutes do not provide for automatic expungement. *See, e.g.*, MINN. STAT. § 609A.03 subd. 2 (2014); PA. R. CRIM. P. 790(A)(1) (2014); PA. R. CRIM. P. 490(A)(1) (presenting examples of state statutes that require individuals to pursue expungement of his or her criminal record).

grant an order of expungement.[46] Each criminal justice agency listed in an expungement order is served a copy of the order.[47]

The meaning and effect of expungement, however, vary greatly by state.[48] Generally, expungement aims to restore individuals with criminal records to their former legal status.[49] "Expungement" of a record is defined as the "removal of a conviction (esp. for a first offense) from a person's criminal record."[50] In practice, expungement more commonly removes nonconviction records.[51] Further, an expunged record is almost never completely removed and often remains available for law enforcement purposes.[52] Some state statutes use the term "sealing" to refer to the expungement process.[53]

C. Limitations to Expungement

1. The Right of Access to Criminal History Information

Effective criminal record expungement faces a significant double-sided obstacle: the constitutional right of access to public records and the right to disseminate those records. In the 1970s, the Supreme Court recognized a

46. *See, e.g.*, PA. R. CRIM. P. 490(B) (mandating that the attorney for the Commonwealth has thirty days after an individual files a petition for expungement to consent, object, or decide to take no action).

47. *See, e.g.*, PA. R. CRIM. P. 490(C)(1) ("Every order of expungement shall include . . . the criminal justice agencies upon which certified copies of the order shall be served"). Criminal justice agencies may include "organized State and municipal police departments, local detention facilities, county, regional and State correctional facilities, probation agencies, district or prosecuting attorneys, parole boards, pardon boards, [and] the facilities and administrative offices of the Department of Public Welfare that provide care, guidance and control to adjudicated delinquents . . . ." 18 PA. CONS. STAT. § 9102 (2014).

48. *See* Love, *supra* note 14, at 6 & n.4 (noting that in some jurisdictions, expunged records are not destroyed and are available to law enforcement agencies, employers, and licensing boards, while in other jurisdictions, expunged records are completely sealed, leaving no evidence that the person was ever charged).

49. *See* State v. N.W., 747 A.2d 819, 823 (N.J. Super. Ct. App. Div. 2000) (noting that the purpose of the expungement statute was to provide an offender with a "second chance"); *see, e.g.*, ARK. CODE ANN. § 16-90-1417 (2014) (restoring the "privileges and rights" of an individual whose record has been sealed, and directing that the sealed record "shall not affect any of his or her civil rights or liberties").

50. BLACK'S LAW DICTIONARY 662 (9th ed. 2009).

51. See *infra* Part II.D.2 for a discussion of the general state practice of more readily expunging nonconviction records as opposed to conviction records.

52. *See, e.g.*, ARK. CODE ANN. § 16-90-1416(a) (permitting a sealed record to be released upon request by a criminal justice agency, a court, a prosecuting attorney, or the Arkansas Crime Information Center); City of Pepper Pike v. Doe, 421 N.E.2d 1303, 1306–07 (Ohio 1981) (acknowledging that expunged records are not completely removed from an individual's criminal record, because expunged records can be inspected by law enforcement agencies for subsequent charges and used as evidence in criminal proceedings).

53. *E.g.*, ARK. CODE ANN. § 16-90-1417 (addressing the legal effect of sealing an individual's criminal record); MINN. STAT. § 609A.01 (2014) (stating that the remedy available for expungement of criminal records is "limited to a court order sealing the records and prohibiting the disclosure of their existence or their opening except under court order or statutory authority").

common law right to access judicial records and documents,[54] and determined that there is no constitutional right to privacy that prohibits a state from publicizing criminal records.[55] Based on a criminal trial's presumption of openness," the Court also found constitutional support for the qualified common law right to attend criminal trials and preliminary hearings.[56] Further, once information is made available to the public, neither the press nor the public can be enjoined from its use and dissemination.[57] Many lower courts have followed suit, recognizing a constitutional right to access public records while leaving the dissemination of such records unregulated.[58]

Furthermore, while state expungement laws provide individuals with the right to remove particular arrests and convictions from a criminal record, as statutory law, they clearly do not provide a constitutional right to privacy in expunged records.[59] In *Nilson v. Layton City*,[60] the Tenth Circuit explained the lack of privacy protection:

> An expungement order does not privatize criminal activity. While it removes a particular arrest and/or conviction from an individual's criminal record, the underlying object of expungement remains public. Court records and police blotters permanently document the expunged incident, and those officials integrally involved retain knowledge of the event. An expunged arrest and/or conviction is never truly removed from the public record and thus is not entitled to privacy protection.[61]

The Eighth Circuit in *Eagle v. Morgan*[62] utilized *Nilson*'s reasoning to hold that a person does not have a legitimate expectation of privacy in an expunged record

54. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597–98 (1978).

55. *See* Paul v. Davis, 424 U.S. 693, 713 (1976) (holding that no constitutional right of privacy inhibited government disclosure of criminal record information).

56. Press-Enter. Co. v. Superior Court, 478 U.S. 1, 13–14 (1986); Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 573 (1980).

57. *See* Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) ("[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order"); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 105–06 (1979) (finding the state interest did not justify the statute's imposition of criminal sanctions for the truthful publication of lawfully obtained information).

58. *See, e.g.*, Holman v. Cent. Ark. Broad. Co., Inc., 610 F.2d 542, 544 (8th Cir. 1979) ("No right to privacy is invaded when state officials allow or facilitate publication of an official act such as an arrest."); Baker v. Howard, 419 F.2d 376, 377 (9th Cir. 1969) (finding no constitutional violation in police officer releasing report suggesting plaintiff committed crime, despite the police having concluded no crime had been committed); Gates v. Discovery Commc'ns, Inc., 101 P.3d 552, 562 (Cal. 2004) (holding that a corporation was not liable for publication of facts obtained from public records of a criminal proceeding).

59. *See* Eagle v. Morgan, 88 F.3d 620, 626 (8th Cir. 1996) ("[S]tate laws, such as Arkansas' expungement provisions, do not establish the parameters of constitutional rights, like the right to privacy, that are grounded in substantive theories of due process.").

60. 45 F.3d 369 (10th Cir. 1995).

61. *Nilson*, 45 F.3d at 372; *see also* G.D. v. Kenny, 15 A.3d 300, 311 (N.J. 2011) ("The relief provided by the expungement record . . . does not include the wholesale rewriting of history. . . . A court order of expungement does not result in the destruction of criminal records.").

62. 88 F.3d 620 (8th Cir. 1996).

and thus the record is not protected against public dissemination.[63] The court noted, "Just as the judiciary cannot 'suppress, edit, or censor events which transpire in proceedings before it,' neither does the legislature possess the Orwellian power to permanently erase from the public record those affairs that take place in open court."[64] In other words, the expungement of a record does not alter its public nature.[65] While acknowledging the unwarranted disclosure in that case, the Eighth Circuit stated that "[t]he Constitution cannot act as a shield to protect [the plaintiff] from his own previous indiscretions."[66] Expunged criminal history information, therefore, does not itself warrant federal constitutional protection.[67]

2. Data Proliferation

The modern era of rapidly expanding technology has thwarted attempts of reentry and rehabilitation.[68] In the 1990s, in conjunction with the mass digitization of information, for-profit information brokers and local criminal justice agencies increased pressure to grant easier and wider access to criminal history information.[69] As a result, criminal justice information, once difficult to obtain, has become largely automated and widely available.[70] The modern "Information Culture" has simultaneously created a market in criminal justice

63. *Eagle*, 88 F.3d at 626.

64. *Id.* (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

65. *See, e.g.*, Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 115 (1983) ("[E]xpunction under state law does not alter the historical fact of the conviction."); Nunez v. Pachman, 578 F.3d 228, 231 (3d Cir. 2009) (finding expunged information "never truly private" as the criminal record is publicly available prior to expungement and "[n]ews accounts of a defendant's criminal record acts . . . may persist after obliteration of formal records"); Rogers v. Slaughter, 469 F.2d 1084, 1085 (5th Cir. 1972) (refusing to order expungement where it would give the "defendant more relief than if he had been acquitted" and finding that "[t]he judicial editing of history is likely to produce a greater harm than that sought to be corrected").

66. *Eagle*, 88 F.3d at 627.

67. *See Nunez*, 578 F.3d at 233 ("New Jersey law . . . is not determinative of the scope of the *constitutional* right to privacy"); Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir. 1995) (noting that the "disclosed information itself must warrant constitutional protection" but an expunged criminal record is not protected by the constitutional right to privacy).

68. *See* Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES, Oct. 17, 2006, at A1 ("[E]normous commercial databases are fast undoing the societal bargain of expungement, one that used to give people who had committed minor crimes a clean slate and a fresh start").

69. *See* LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 187669, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION 14 (Aug. 2001).

70. *See id.*; Wayne, *supra* note 24, at 262 (noting that prior to the widespread use of the Internet, the only way for an employer or landlord to obtain an individual's criminal record was to physically go to a state agency). Not only has access to information increased, but the types of conduct that can result in the creation of a criminal record have also expanded. *See* James Jacobs, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 178 (2008) (noting the FBI's steady increase in types of criminal categories included in the National Crime Information Center, including arrests of adults and juveniles for minor offenses, immigration law violators, subjects of domestic violence restraining orders, and suspected members of violent gangs and terrorist organizations).

information while diminishing the perception of control over personal information and privacy.[71]

There are three primary sources of criminal records—executive branch record repositories,[72] courts and offices of court administration,[73] and commercial information vendors—which work independently and create difficulties in maintaining accurate data.[74] In each state, criminal justice agencies must report internal dispositions to a central state repository.[75] While state repositories primarily provide records to criminal justice personnel, some states, upon request, provide portions of "rap sheets" to the public for a small fee.[76] Some of those states offer this service online, either for a fee or free of charge.[77] In Pennsylvania, for example, the state repository charges a fee for access to requested information, while criminal court docket sheets are free and made available to the public by the Administrative Office of the Pennsylvania Courts.[78]

While private employers may process background checks through state criminal record repositories, a booming private sector industry in background-

71. GREENFELD, U.S. DEP'T OF JUSTICE, *supra* note 69, at 36–37.

72. At the federal level, the FBI acts as a criminal history record repository and maintains a comprehensive system of databases that allow interstate access and communication. *Criminal Justice Data Improvement Program*, *supra* note 28. The FBI administered system includes the National Crime Information Center, a digitalized crime database maintained by every state and available to nearly every single law enforcement agency. Zainab Wurie, *Tainted: The Need for Equity Based Federal Expungement*, 6 S. REGION BLACK L. STUDENTS ASS'N L.J. 31, 39-40. The database is compiled with information obtained from federal, state, and local criminal justice agencies. *Id.*

73. Every federal, state, and local court keeps an individual's record (called a docket) of arraignments, adjudications, sentences, and other judicial events. Jacobs, *supra* note 70, at 183 n.32. State court documents are gathered and stored in centralized databases maintained by state offices of court administration. *Id.* at 184.

74. *See id.* at 179 (noting that the separate systems for maintaining criminal records "make the formulation and effective implementation of criminal records policy extremely complicated"); Liptak, *supra* note 68 (quoting a Miami lawyer's remarks that because of the high number agencies with access to criminal records, an expunged record may still be released to a private entity by one those agencies).

75. See *supra* note 47 for examples of criminal justice agencies.

76. Jacobs, *supra* note 70, at 203–04; *see* Wayne, *supra* note 24, at 263–64, 264 n.65 (noting that many state and local agencies garner a profit from selling public records to data brokers, although some states have passed ineffectual laws limiting or prohibiting the sale of criminal records).

77. *E.g.*, Criminal History Information, *Fla. Dep't of Law Enforcement,* https://web.fdle.state.fl.us/search/app/default (last visited Mar. 6, 2015). Depending on the state office, a record search may be password restricted and require a fee from the public to retrieve individual criminal history records. *See, e.g.*, *Criminal History Records Search*, NEW YORK STATE UNIFIED COURT SYSTEM, http://www.courts.state.ny.us/apps/chrs (last visited Mar. 6, 2015). However, some offices make their databases available to the general public, allowing a searcher to obtain a record by merely entering select information such as the name or birthdate of the subject. *See, e.g.*, *Criminal Information Search*, RHODE ISLAND JUDICIARY, http://courtconnect.courts.state.ri.us/pls/ri_adult/ck_public_qry_main.cp_main_idx (last visited Mar. 6, 2015).

78. Hancock, *supra* note 44, at 522.

checking services usually provides a cheaper alternative.[79] Private information companies purchase records in bulk from government repositories,[80] conduct sweeps of certain databases using data collection software, or dispatch "runners" to courts to collect the information.[81] These companies run largely unregulated and are generally not required to update their records.[82] Because of this lack of oversight, criminal records are often produced with omitted or misinterpreted information.[83]

Other private initiatives exist that enhance dissemination and exacerbate reentry efforts. The growing "mug shot industry" profits from posting mug shots obtained from local agencies' websites.[84] Individuals are charged a considerable removal fee to have the images removed.[85] Additionally, "local arrest blogs" continuously post information about the most recent arrests in the area.[86] Some

79. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 187663, PUBLIC ATTITUDES TOWARD USES OF CRIMINAL HISTORY INFORMATION 8–9 (2001) (noting the emerging industry of commercial distribution systems, making available information databases on the Internet, and often advertising access to criminal records). Examples of such companies include National Background Data, Choicepoint, and Maximum Reports, Inc. Jacobs, *supra* note 70, at 186; *see also Wholesale County Criminal Program*, MAXIMUM REPORTS, http://www.maximumreports.com/index.cfm?fuseaction=Content.WholesaleProgram (last visited Mar. 6, 2015). The Maximum Reports website states: "We provide county criminal histories at deep discounts to you. Our county criminal history is the most comprehensive in the industry. We can provide all felony and misdemeanor information . . . . Some courts have mandatory access fees, which we pass on." *Id.* See *infra* notes 312–315 and accompanying text for an example of state statutory reform that provides incentive to access official data through a central state repository.

80. *See* Wayne, *supra* note 24, at 263 (describing "bulk data purchases" as entailing "the bulk purchase of criminal records for multiple individuals all at one time from state or local recordkeeping agencies and then storing that information in proprietary databases 'for instant searches'"); Hancock, *supra* note 44, at 529 ("[C]ommercial criminal background screening companies are able to purchase 'bulk data' directly from the [Administrative Office of the Pennsylvania Courts]." (citing 204 PA. CODE § 213.74 (2014))).

81. *See* Jacobs, *supra* note 70, at 185–86 (describing several private information companies and the services they offer).

82. *See* Wayne, *supra* note 24, at 259, 266 n.76 (noting the lack of mechanisms and incentive for vendors to update their databases, which would call for proactive ordering and payments to the courts and local agencies).

83. *See id.* at 259.

84. *See* Frank Main, *Mug Shot Companies May Have Crashed Sheriff's Site*, CHICAGO SUN TIMES, Feb. 19, 2014, *available at* 2014 WLNR 4558165.

85. *Id.*

86. "Philly Rap Sheet" is one such website, which states, "I scan Philly's court systems every half hour and post our newest (alleged) criminals here." PHILLY RAP SHEET, http://phillyrapsheet.com/ (last updated Mar. 6, 2015, 10:00 PM). Under its "Policies," Philly Rap Sheet notes that it "doesn't remove entries," as "it's important the record remain intact for statistical and historical purposes." *Id.* However, the website does make an effort to keep up to date, providing an email address to contact in the case of not guilty dispositions or in the event of expungement. In those cases, the arrests would be removed from the website. Furthermore, the website states that as of September 1, 2013, it stopped showing names for entries older than one month. "Because of the overwhelming number of requests to remove names, many of them legitimate, we've decided to eliminate them." *Id.*

of these websites have "breaking news services" that provide users with email alerts that include newly added names of arrestees.[87]

3. The Public Interest

Criminal records are "matters of public concern" and their availability is viewed to be in the public interest, particularly for use by employers and law enforcement.[88] Employers often require background checks to assess the risk involved in hiring certain individuals.[89] Avoidance of harm, including from dishonesty, theft, and fraud, drives many employers to acquire applicants' criminal history information.[90] Employers also have a common law duty of care to prevent foreseeable harm to others, and thus will look to criminal history records as a predictor of future dangerous behavior.[91]

In the area of law enforcement, a person's criminal record is relevant in determining bail and sentencing.[92] Bail determinations have evolved from the guarantee of the right to bail before trial under common law to the routine disallowance of bail where the defendant is deemed a flight risk or dangerous to society.[93] State statutes instruct state court judges to consider a defendant's criminal history, along with the present offense charged and the defendants' character and circumstances, when determining bail release.[94] While some states allow judges to only consider the portions of a defendant's record that relate to a dangerous determination, others allow review of the entire criminal record, or even all "past conduct."[95] Following the Bail Reform Act of 1984,[96] federal

87. *Id.*

88. *See* Doe v. New York Univ., 786 N.Y.S.2d 892, 900 (App. Div. 2004) ("The public interest in openness is particularly important on matters of public concern."); *see also* State v. Ambaye, 616 N.W.2d 256, 261 (Minn. 2000) (noting the compelling public interest in maintaining criminal records of violence).

89. *See* Terence G. Connor & Kevin J. White, *The Consideration of Arrest and Conviction Records in Employment Decisions: A Critique of the EEOC Guidance*, 43 SETON HALL L. REV. 971, 972, 974 (2013) (noting factors employers consider when selecting candidates for employment, including an applicant's "history of criminal misconduct that [the candidate] might repeat while employed").

90. *Id.* at 977.

91. *See id.* at 974 (citing the RESTATEMENT (SECOND) OF TORTS § 283 (1965)); *id.* at 972 (referencing criminological studies demonstrating the accuracy of past criminal activity as a predictor of future criminal activity).

92. *See* Jacobs, *supra* note 70, at 184 (explaining that criminal court judges use records in administrative office databases in their consideration of cases "at the pre-trial, trial, or sentencing stage").

93. *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 503–05 (2012) (noting that under early American law, "due process rights combined with the pretrial presumption of innocence to guarantee defendants the right to bail before trial," but that twentieth-century federal legislation shifted bail considerations to "preventative detention").

94. *E.g.*, PA. R. CRIM. P. 523(A) (2014) (instructing the bail authority, in deciding whether to release a defendant, to consider information "relevant to the defendant's appearance or nonappearance at subsequent proceedings," including prior criminal record).

95. Baradaran & McIntyre, *supra* note 93, at 509–10.

96. 18 U.S.C. §§ 3141–3156 (2012).

judges are required to craft bail to assure public safety and future court appearance while not setting bail beyond an arrestee's ability to pay.[97] Under the Act, a judge must consider the nature of the offense charged, the weight of the evidence against the individual, and the history and characteristics of the person.[98] Relevant criminal history encompasses both past convictions and past arrests.[99] Judges vary in the weight they assign to the elements of a defendant's record, which may lead to disparity in bail determinations or misuse of criminal records.[100]

In crafting a sentence, a judge generally has wide discretion to admit additional evidence outside of the present crime, including prior crimes and even expunged records, which may enhance a defendant's sentence.[101] The Arkansas Supreme Court rationalized the use of expunged records to enhance sentences: "The public policy of expungement is intended to promote the offender's progress toward rehabilitation, to encourage him to apply for a job and to assert his civil rights . . . but it is not intended to encourage him to commit another crime."[102] The benefits of expungement, the court reasoned, must be balanced against the need to punish repeat offenders.[103]

D. The Authority to Expunge

1. Inherent State Court Authority

Courts have long recognized the serious harm that may be caused to an individual by the state's retention of his or her criminal record.[104] This harm

97. *Id.* § 3142(c)(2), (d)(2).

98. *Id.* § 3142(g)(1)–(3).

99. *See* Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800, 834-35 (2012) (describing the role prior arrests and convictions play in bail determinations).

100. *See* id. at 835 (describing a case in which a thirty-eight-year-old defendant, convicted of attempted murder at age sixteen, had served a ten-year sentence, and fifteen years after being released, the new judge set a very high bail for a drug arrest because he "could not get [past] the [twenty] year old attempted murder conviction") (alterations in the original).

101. *See, e.g.*, McClish v. State, 962 S.W.2d 332, 333–34 (Ark. 1998) (noting that Arkansas law allows the introduction of "additional evidence relevant to sentencing" and that a "trial court has wide discretion in admitting evidence of other crimes or wrongs" (internal quotation marks omitted) (citing ARK. CODE ANN. § 16-97-103(2) (Supp. 1995))); N.J. STAT. ANN. § 2C:52-19 (West 2014) (allowing expunged records to "be used for purposes of sentencing on a subsequent offense after guilt has been established"); *see also* Williams v. New York, 337 U.S. 241, 250 (1949) (explaining at length the rationale for distinguishing the evidential procedure in the trial and sentencing processes, namely that judges imposing sentences require the best available information from a wide range of sources "concerning every aspect of a defendant's life," including his or her criminal record).

102. *McClish*, 962 S.W.2d at 334.

103. *Id.* at 335 (citing the MODEL PENAL CODE § 7.05 cmt. 1, 2 (1962)).

104. *See, e.g.*, Menard v. Mitchell, 430 F.2d 486, 490–91 (D.C. Cir. 1970) (noting an arrest record "may subject an individual to serious difficulties," including substantial injury to reputation, "direct and serious" economic losses, restricted or nonexistent opportunities for schooling, employment, or professional licenses, and use by the police in determining whether to arrest or bring charges);

alone, however, is insufficient to require expungement of criminal history information.[105] When faced with a petition for expungement, state courts often rely on their inherent authority to expunge criminal records.[106] Inherent judicial authority "governs that which is essential to the existence, dignity, and function of a court because it is a court."[107] Within this inherent authority lies the "power to fashion relief necessary to prevent serious infringement of constitutional rights"[108] or the power to act for the sake of fairness to individuals, outside of what is constitutionally required.[109] Some state court decisions to expunge criminal records, therefore, have been based on the protection of due process rights.[110]

If relying on their inherent power to expunge, courts most commonly utilize a balancing test to weigh the petitioner's rights against the public's interest in retaining the criminal records.[111] In *City of Pepper Pike v. Doe*,[112] the Supreme Court of Ohio found that the circumstances surrounding the appellant's criminal charge[113] met the standard of "unusual and exceptional" so as to warrant the trial court's jurisdiction to expunge the record.[114] The court engaged in a

Commonwealth v. Malone, 366 A.2d 584, 588 (Pa. Super. Ct. 1976) (noting effects of maintaining an arrest record, including economic and noneconomic losses and injury to reputation).

105. *See* RICHARD S. WASSERBLY & BETSY MOORE, 16C WEST'S PA. PRAC., CRIMINAL PRACTICE § 35:4 (2013) (noting that while state courts have recognized the harm caused by arrest record retention, the fact of this harm is insufficient to require expungement of the record).

106. *See, e.g.*, Farmer v. State, 235 P.3d 1012, 1014 (Alaska 2010) ("Court decisions finding inherent judicial authority to expunge criminal records suggest that the power to expunge inheres either in the court's expressly conferred authority to preside over trials and sentencings in criminal cases or in its traditional role as enforcer of constitutional guarantees." (internal quotation omitted)).

107. *In re* Clerk of Court's Compensation for Lyon Cnty. v. Lyon Cnty. Comm'rs, 241 N.W.2d 781, 784 (Minn. 1976).

108. State v. C.A., 304 N.W.2d 353, 358 (Minn. 1981); *see also In re* R.L.F., 256 N.W.2d 803, 808 (Minn. 1977) ("[I]n cases to which our statutory scheme does not extend, the court's inherent power is limited to instances where the petitioner's constitutional rights may be seriously infringed by retention of his records.").

109. *See C.A.*, 304 N.W.2d at 358 ("Part of that function is to control court records and agents of the court in order to reduce or eliminate unfairness to individuals, even though the unfairness is not of such intensity as to give a constitutional dimension.").

110. *See, e.g.*, *In re* Interest of Jacobs, 483 A.2d 907, 910 (Pa. Super. Ct. 1984) (finding that expungement is a question of due process); Commonwealth v. Malone, 366 A.2d 584, 587–89 (Pa. Super. Ct. 1976) (remanding the case for a hearing after finding that an individual's right to petition expungement of an arrest record is "an adjunct to due process").

111. *See, e.g.*, *Farmer*, 235 P.3d at 1014 n.9 (observing that some state courts weigh the individual's right to privacy against the state's interest in maintaining records when considering expungement); *C.A.*, 304 N.W.2d at 358 (stating that when no constitutional implications arise, the court must decide whether petitioner's interest in expungement outweighs the potential disadvantages to the public "from the elimination of the record and the burden on the court in issuing, enforcing and monitoring an expungement order").

112. 421 N.E.2d 1303 (Ohio 1981).

113. The appellant's assault charge resulted from a domestic dispute. *City of Pepper Pike*, 421 N.E.2d at 1306. The charge had been dismissed with prejudice, but the appellant's husband later used the charge to harass the appellant. *Id.*

114. *Id.*

balancing test, weighing the interest of the appellant in retaining a "good name" and to be "free from unwarranted punishment" against the state interest in maintaining the record.[115] The court found a compelling state interest was lacking due to the circumstances of the case: a schoolteacher with a previously "unblemished" reputation, suffering from vindictive use of a record that resulted from a domestic quarrel.[116] The court emphasized, however, the "exceptional" circumstances of the case, and that retention of criminal justice records—even in the case of acquitted defendants—will generally overcome the private interests asserted by a defendant.[117] *City of Pepper Pike*, decided under the precepts of due process, represents a narrow view of expungement and thus demonstrates the necessity for legislatures to provide greater judicial authority to expunge records.[118] For example, numerous states, by statute, currently allow for expungement of nonconviction records in nonexceptional circumstances.[119]

2. State Criminal Record and Expungement Statutes

Outside of their inherent authority to expunge criminal records, courts turn to criminal record or expungement statutes for guidance.[120] Expungement legislation varies widely from state to state. Some states provide little opportunity to expunge a criminal record,[121] while others allow individuals to expunge nonconviction records and certain conviction records.[122] While a few

115. *Id.*

116. *Id.*

117. *Id.*

118. Three years after the Supreme Court of Ohio decided *City of Pepper Pike*, the Ohio state legislature codified the court's balancing test. State v. Radcliff, Nos. 2012-1985, 2013-0004, 2015 WL 361046, at ¶ 22–24 (Ohio 2015). The state statute governs the sealing of records of *acquitted* defendants and requires that courts "weigh the applicant's interests in having the records sealed against the legitimate needs, if any, of the government to maintain the records." OHIO REV. CODE ANN. § 2953.52(B)(2)(d) (LexisNexis 2015).

119. See *infra* notes 141–50 and 172–75 for a discussion of expungement of nonconviction records in Pennsylvania and Minnesota.

120. *See* Mobile Press Register, Inc. v. Lackey, 938 So. 2d 398, 403 (Ala. 2006) (finding that the decision to expunge a criminal arrest record has policy implications that are "the legislature's prerogative"); State v. Gilkinson, 790 P.2d 1247, 1249–50 (Wash. Ct. App. 1990) (holding that the "disposition of criminal records" is within the legislature's domain and "absent a statutory grant of authority," a court lacks the authority to grant expungement relief).

121. North Dakota, for example, does not provide opportunities for expungement except for juvenile records, N.D. CENT. CODE ANN. § 54-23.4-17(5) (2015), and marijuana possession, *id.* §19-03.1-23(9). Maine has no statutory provision regarding sealing or expunging adult convictions. *See* LOVE, *supra* note 4, at 4 (citing ME. REV. STAT. ANN. tit. 16 § 703(2) (2013) and discussing the dissemination of nonconviction records). However, nonconvictions are generally not available to the public after one year. *Id.* (citing ME. REV. STAT. ANN. tit. 16 § 705(1)(E)).

122. *See, e.g.*, N.J. STAT. ANN. § 2C:52-6 (West 2014) (providing that an individual may petition the court for expungement in the case of dismissed proceedings, acquittal, or discharge); *id.* § 2C:52-2(a)–(b) (providing that with the exception of serious violent and drug offenses, convictions may be expunged after a ten-year waiting period, which may be waived by the court after five years if it is found to be in the public interest).

state statutes allow for automatic expungement of arrest records,[123] in general, statutes direct individuals to petition a court to expunge a record.[124] In determining whether to grant an expungement order, a court is often instructed by statute to balance the same factors utilized by courts under a due process analysis—that is, balancing the harm to the individual caused by the existence of the record against the public interests in preserving the record.[125]

Not all data contained in a criminal record is treated equally under expungement laws. Rather, current expungement law is disposition steered: nonconviction records[126] and summary offenses are more readily expunged than conviction records.[127] Most states limit the availability of expunging conviction data to first-time offenders or probationers.[128] In every state, certain crimes are barred from expungement.[129]

An overview of Pennsylvania's and Minnesota's statutes, as well as the limited federal law pertaining to expungement, aids in demonstrating the current elements of expungement statutes and how they overlap and differ. Grounded in the same balancing principle—weighing the benefit of expungement against the harm to society and burden on the courts—Pennsylvania and Minnesota law provide a helpful basis from which to further develop specific provisions of expungement statutes. Similarly, where limited in reach, the two state statutes and federal law help to inform a more expansive approach.

123. *E.g.*, ALA. CODE § 41-9-625 (2014) (automatic expungement of arrest and released without charge or cleared of offense); MD. CODE ANN. CRIM PROC. § 10-103.1 (West 2013); *id.* § 10-105(a)(1)–(4), (c) (arrests not leading to charges are automatically expunged, while nonconviction data may be expunged after a certain waiting period).

124. *See, e.g.*, PA. R. CRIM. P. 490(A)(1) ("[A]n individual . . . may request expungement by filing a petition with the clerk of the courts of the judicial district in which the charges were disposed.").

125. *E.g.*, N.J. STAT. ANN. § 2C:52-14(b) (mandating that a court deny a petition for expungement when "[t]he need for the availability of the records outweighs the desirability of having a person freed from any disabilities as otherwise provided in this chapter"); OHIO REV. CODE ANN. § 2953.53(B)(2)(d) (LexisNexis 2015) (requiring the court to "[w]eigh the interests of the person in having the official records pertaining to the case sealed against the legitimate needs, if any, of the government to maintain those records").

126. Nonconviction data includes an array of situations, including improper arrests that do not result in filing of charges, acquittals, and convictions reversed on appeal. *See* Mouzon, *supra* note 21, at 36.

127. *See, e.g.*, Commonwealth v. Wolfe, 749 A.2d 507, 508 (Pa. Super. Ct. 2000) (noting the "law provides a distinction between situations where the charges have and have not resulted in a conviction," where expungement of conviction records occurs in much more limited situations than expungement of nonconviction records). Expungement of two distinguished types of records, juvenile and sex offender, are granted more freely and narrowly, respectively, than other criminal records. *See* Mouzon, *supra* note 21, at 38 n.153. This Comment does not touch on these types of records, as they affect a smaller number of individuals.

128. Love, *supra* note 17, at 1723.

129. *E.g.*, N.J. STAT. ANN. § 2C:52-2(b) (listing crimes not eligible for expungement, including criminal homicide, kidnapping, luring or enticing, human trafficking, and sexual assault); FLA. STAT. § 943.0585 (2014) (listing crimes not eligible for expungement, including sexual misconduct, luring or enticing a child, and voyeurism); *see also* Mouzon, *supra* note 21, at 38 n.153 (listing various state statutes that prohibit expungement of certain offenses, regardless of when they were committed).

a. Pennsylvania

i. Court Authority and Analysis

Prior to 1976, Pennsylvania courts lacked consensus as to their authority to expunge criminal records.[130] The courts, therefore, limited expungement to select cases of arrests under the authority of the Controlled Substance, Drug, and Cosmetic Act.[131] In 1976, the Superior Court of Pennsylvania provided some guidance in holding, for the first time, that a petitioner is entitled to a hearing and expungement of his or her arrest record if the evidence presented justifies the expungement.[132] The court first found that it possessed inherent authority to order the expungement of an arrest record and then explained the circumstances under which expungement is proper.[133] Finding the right to an expungement hearing within the purview of due process, the court stated: "[I]t is not hyperbole to suggest that one who is falsely accused is subject to punishment despite his innocence. Punishment of the innocent is the clearest denial of life, liberty and property without due process of law."[134] The court noted that the burden to justify retention of the record fell on the state.[135]

In the case of convictions, Pennsylvania courts have not found an inherent authority to expunge such records.[136] In 1980, however, the Pennsylvania legislature passed the Criminal History Record Information Act (CHRIA).[137] This Act provided the first express legislative authority for courts to expunge eligible "criminal history record information," and the first authority to expunge a conviction record.[138] CHRIA directs courts holding expungement hearings to focus their analysis on the disposition of the underlying charge.[139] Expungement

130. *See* Commonwealth v. Malone, 366 A.2d 584, 587 (Pa. Super. Ct. 1976) (reviewing state appellate court decisions, none "directly on point" and none indicating a "stated legal basis" for the right to expunge, to nevertheless conclude that state "appellate courts recognize the right of an accused to seek expungement of an arrest record").

131. Act of April 14, 1972, Pub. L. 233, No. 64 (codified as amended in scattered sections of 18 and 42 PA. CONS. STAT.).

132. *Malone*, 366 A.2d at 585, 589.

133. *Id.* at 588. The *Malone* court emphasized the collateral consequences associated with an arrest record, including "injury to an individual's reputation," "economic losses," restricted "opportunities for schooling, employment, or professional licenses," and detrimental use by police and judges. *Id.*

134. *Id.; see also* Commonwealth v. Welford, 420 A.2d 1344, 1345 (Pa. Super. Ct. 1980) (noting an "individual's due process interest in being free from the stigma of an arrest record" and finding that petitioner's "substantial interest in clearing his record to facilitate job placement" made expungement an appropriate remedy).

135. *Malone*, 366 A.2d at 589.

136. *See* Commonwealth v. Wolf, 704 A.2d 156, 156–57 (Pa. Super. Ct. 1997) (finding that the common law provides no basis for a trial court to grant an expungement petition for a criminal conviction).

137. 18 PA. CONS. STAT.. §§ 9101–9183 (2014).

138. *See* Commonwealth v. V.G., 9 A.3d 222, 224 (Pa. Super. Ct. 2010) (noting that a defendant is not entitled to expungement of a crime except as outlined in 18 PA. CONS. STAT. § 9122).

139. 18 PA. CONS. STAT. § 9122(a)(1) (directing courts to expunge a criminal record where "no disposition has been received"). Prior to the passing of the statute, courts often considered other

of a conviction is strictly regulated and possible in only very limited situations under the statute.[140] Nonconviction records are much easier to expunge than conviction records. Under the statute, nonconviction data is expungeable where no disposition is indicated after eighteen months, or where the court orders expungement.[141] In the case of an acquittal, courts have found an expungement order should almost always be granted.[142] In fact, when a defendant has been acquitted for all charges, he or she is entitled to expungement of the arrest record as a matter of law.[143] When a defendant has been partially acquitted of charges, courts will expunge the acquitted charges unless the state can show impracticality of expungement.[144]

With both inherent and statutory authority to expunge criminal records, Pennsylvania trial courts exercise their discretion to grant or deny an expungement petition.[145] When presented with a nonconviction record, a court will conduct a balancing test, as set forth in *Commonwealth v. Wexler*.[146] The *Wexler* balancing test consists of a set of nonexhaustive factors, including the known harm associated with maintaining an arrest record, the state's reason for retaining the records, the petitioner's background, and the length of time that has elapsed between the arrest and expungement petition.[147] The burden lies with the state to justify why the arrest should not be expunged; a simple, general

factors such as culpability of the charged offense. *See, e.g.*, *Malone*, 366 A.2d at 588 (finding that "falsely accused" individuals have a right to expungement).

140. CHRIA provides that conviction data may be expunged if:

> (1) An individual who is the subject of the information reaches 70 years of age and has been free of arrest or prosecution for ten years following final release from confinement or supervision; (2) An individual who is the subject of the information has been dead for three years; (3)(i) An individual who is the subject of the information petitions the court for the expungement of a summary offense and has been free of arrest or prosecution for five years following the conviction for that offense. (ii) Expungement under this paragraph shall only be permitted for a conviction of a summary offense.

18 PA. CONS. STAT. § 9122(b); *see also* Commonwealth v. Hanna, 964 A.2d 923, 925 (Pa. Super. Ct. 2009) ("If the defendant is convicted of a crime, he is not entitled to expungement except under the extremely limited circumstances permitted by statute.").

141. 18 PA. CONS. STAT. § 9122(a)–(b)(1).

142. *See Hanna*, 964 A.2d at 925 (holding that "[i]f the defendant is acquitted, he is generally entitled to automatic expungement of the charges for which he was acquitted"); Commonwealth v. Rodland, 871 A.2d 216, 219 (Pa. Super. Ct. 2005) (stating that where the defendant is acquitted of some charges and not others, the court should expunge the acquitted charges unless the state proves that expungement is otherwise "impractical or impossible under the circumstances").

143. *See* Commonwealth v. D.M., 695 A.2d 770, 773 (Pa. 1997) ("In cases of acquittal . . . we hold that a petitioner is automatically entitled to the expungement of his arrest record."). Nevertheless, an individual must still petition the court in the case of "automatic" expungement.

144. *See Rodland*, 871 A.2d at 219 (partially acquitted defendant entitled to partial expungement).

145. *See* Commonwealth v. V.G., 9 A.3d 222, 223–24 (Pa. Super. Ct. 2010) ("The decision to grant or deny a request for expungement of an arrest record lies in the sound discretion of the trial judge, who must balance the competing interests of the petitioner and the Commonwealth." (quoting Commonwealth v. Waughtel, 999 A.2d 623, 624–25 (Pa. Super. Ct. 2010))).

146. 431 A.2d 877 (Pa. 1981).

147. *Wexler*, 431 A.2d at 879.

asserted interest in maintaining accurate records is insufficient.[148] Thus, the government must produce specific facts concerning the state or public interest in maintaining the record.[149] There is less guidance for courts where the disposition falls somewhere in between conviction and acquittal, as in the case of *nolle prosequi* of the charges or completion of an accelerated rehabilitative disposition (ARD) program.[150]

ii. Diversion Programs

Pretrial diversion programs are designed to minimize the detrimental impact of contact with the criminal justice system and the costs to the courts.[151] The Philadelphia District Attorney's Office offers a variety of programs, each with its own eligibility requirements.[152] For example, the Accelerated Misdemeanor Program – Tier 1 accepts certain nonviolent, first-time offenders charged with a misdemeanor, who are required to complete either twelve or eighteen hours of community service and pay $202 in court costs and fines.[153] Upon successful completion, the Commonwealth withdraws prosecution, and the arrest record is eligible for expungement without opposition.

In the case of other programs, expungement is less readily available. Defendants who are first-time offenders charged with relatively minor offenses are eligible for ARD, which is completed under the supervision of the probation department.[154] Once the program is completed, the original criminal charges are dismissed, and a defendant may petition the court for expungement.[155] However, the Commonwealth retains the right to object.[156] If the Commonwealth files an

148. *See id.* at 881.

149. *Id.*; *see* Commonwealth v. Armstrong, 434 A.2d 1205, 1207 (Pa. 1981) (finding that the state "failed to point to any specific harm which would result from expungement or any law enforcement justification for the denial of appellant's petition" and as such failed to establish "any overriding state interest in [the arrest record's] retention").

150. *See* Commonwealth v. Hanna, 964 A.2d 923, 925 (Pa. Super. Ct. 2009) (noting that the cases which present the most difficulty fall somewhere between convictions and acquittals); Commonwealth v. Briley, 420 A.2d 582, 584 (Pa. Super. Ct. 1980) (noting that appellant was accepted into the ARD, complied with the conditions of eighteen-months' probation and $200 fine, and filed a petition for expungement of his arrest record, after which a hearing was held).

151. *See Briley*, 420 A.2d at 586 (noting that in the decision to admit appellant into the ARD program, the state "demonstrated its belief that the nature of appellant's offense and his background and character were such that the interests of society would be best served were he not prosecuted, but diverted out of the criminal justice system as quickly as possible"); *see also* Derek Riker, To Jail or Not to Jail: That is Our Question, Continuing Legal Education Session by the Philadelphia District Attorney's Office 560, *available at* http://benchbar.philadelphiabar.org/course_materials/CHPT10_To_Jail_or_Not_to_Jail.pdf (noting that pretrial diversion programs preserve judicial resources through nontraditional prosecution).

152. *See* Riker, *supra* note 151, at 555–57 (detailing the diversion programs available to offenders in Philadelphia).

153. *Id.* at 558.

154. *Id.* at 560.

155. PA. R. CRIM. P. 320(A) (2014).

156. *Id.* 320(B).

objection, the judge must hold a hearing with both parties.[157] At the hearing, the Commonwealth must present compelling reasons and evidence why the arrest record should not be expunged.[158]

iii. Maintenance of Records

In Pennsylvania, "expunge" is defined quite broadly.[159] Thus, Pennsylvania courts have held that expunged records are essentially destroyed.[160] Nevertheless, the criminal record statute *orders* prosecuting attorneys and the central repository, and *authorizes* courts, to "maintain a list of the names and other criminal history record information" of expunged records.[161] This information may be used only to determine subsequent participation in diversion or probation programs, identify individuals in criminal investigations, and determine the grade of any subsequent offenses.[162] Furthermore, the expunged information must be made available to any court or law enforcement agency upon request.[163] Finally, the statute requires prompt notification to the central state repository, which "shall notify all criminal justice agencies which have received the criminal history record information to be expunged."[164]

b. Minnesota

i. Expungement Authority

Minnesota authorizes expungement of criminal history data[165] through both common law and statute.[166] State courts, relying on their inherent authority, will expunge judicial records (1) when a petitioner's constitutional rights are at stake; or (2) when "expungement will yield a benefit to the petitioner commensurate

157. *Id.* 320(C).

158. *See* Commonwealth v. Armstrong, 434 A.2d 1205, 1206 (Pa. 1981) (holding that a person who successfully completes an ARD is entitled to have his or her arrest record expunged unless the Commonwealth can demonstrate "an overriding societal interest in retaining that record").

159. 18 PA. CONS. STAT. § 9102 (2014) (defining "expunge" as "(1) To remove information so that there is no trace or indication that such information existed; (2) to eliminate all identifiers which may be used to trace the identity of an individual, allowing remaining data to be used for statistical purposes; or (3) maintenance of certain information required . . . when an individual has successfully completed the conditions of any pretrial or posttrial diversion or probation program").

160. *See* Hunt v. Pa. State Police, 983 A.2d 627, 633 (Pa. 2009) ("In general terms, expungement is simply the removal of information so that there is no trace or indication that such information existed.").

161. 18 PA. CONS. STAT. § 9122(c).

162. *Id.*

163. *Id.*

164. *Id.* § 9122(d).

165. In Minnesota, "criminal history data" is defined as "all data maintained in criminal history records compiled by the Bureau of Criminal Apprehension, including, but not limited to fingerprints, photographs, identification data, arrest data, prosecution data, criminal court data, custody and supervision data." MINN. STAT. § 13.87 subd. 1(a) (2015).

166. *See* State v. M.D.T., 831 N.W.2d 276, 279 (Minn. 2013) (explaining that there are two ways expunge criminal records in Minnesota: (1) by statute and (2) inherent judicial authority).

with the disadvantages to the public from the elimination of the record and the burden on the court in issuing, enforcing, and monitoring an expungement order."[167] The Minnesota Supreme Court recently held, however, that a court's authority to expunge does not extend to records held by the executive branch due to conflict with the state's open records act, Minnesota Government Data Practices Act.[168] The court stated that the Act "establishes a presumption that government data are public" for fifteen years.[169] Reading the state expungement statute and the open records act together, the court found that the legislature intended that executive-held conviction records remain public information.[170]

Minnesota's expungement statute heavily emphasizes case dispositions and the dichotomy between nonconviction and conviction records. Sealing[171] is authorized in limited instances of conviction.[172] Nonconviction records have a much greater likelihood of being sealed. The court *must* grant expungement of a charge that was ultimately resolved in the petitioner's favor unless the public interest outweighs the disadvantages to petitioner.[173] Furthermore, in the case of dismissed charges prior to the finding of probable cause or where the prosecutor declines to file charges, all records and identification data are automatically destroyed without petition.[174] Where the disposition was not in the petitioner's favor, a court may grant expungement when it finds "by clear and convincing evidence, that it would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety of: (1) sealing the record; and (2) burdening the court and public authorities to issue, enforce, and monitor an expungement order."[175]

167. State v. K.M.M., 721 N.W.2d 330, 334–35 (Minn. Ct. App. 2006) (quoting State v. Ambaye, 616 N.W.2d 256, 258 (Minn. 2000)).

168. *M.D.T.*, 831 N.W.2d at 282–83 (citing MINN. STAT. § 13.01, subd. 3 (2012)).

169. *Id.* at 828 (citing MINN. STAT. § 13.01, subd. 1(b)).

170. *See id.* (explaining that the legislature identified specific instances in which the court may expunge criminal records held in the executive branch).

171. Minnesota's criminal record expungement statute limits the expungement remedy to the "sealing" of records and to the prohibition of their disclosure, "except under court order or statutory authority." MINN. STAT. § 609A.01 (2014). The process of petitioning to seal a criminal record is clearly enumerated by statute. *Id.* § 609A.03. In filing a petition for a conviction record, an individual must detail "what steps the petitioner has taken since the time of the offense toward personal rehabilitation, including treatment, work, or other personal history that demonstrates rehabilitation." *Id.* § 609A.03 subd. 2(6).

172. *Id.* § 609A.02(1)–(2) (authorizing expungement only for prosecutions for certain first-time drug offenders and minor drug possession violations upon dismissal and discharge of proceedings, and for juveniles prosecuted as adults who have been discharged).

173. *Id.* § 609A.03 subd. 5(b) ("[T]he court *shall* grant the petition to seal the record unless the agency or jurisdiction whose records would be affected establishes by clear and convincing evidence that the interests of the public and public safety outweigh the disadvantages to the petitioner of not sealing the record.") (emphasis added).

174. *See id.* § 299C.11 subd. 1(b) (providing no expungement petition required in the case of dismissed charges before a finding of probable cause, or where the prosecutor declines to file charges and there was no grand jury indictment).

175. *Id.* § 609A.03 subd. 5(a). In these cases, expungement is regarded as "an extraordinary remedy." *Id.*

Thus, Minnesota courts engage in a balancing test under both judicial and statutory authority. In deciding whether the benefit of expungement to the petitioner is equal to or greater than the disadvantages to the public, courts utilize the factors outlined in *State v. H.A.*:[176]

> (a) the extent that a petitioner has demonstrated difficulties in securing employment or housing as a result of the records sought to be expunged; (b) the seriousness and nature of the offense; (c) the potential risk that the petitioner poses and how this affects the public's right to access the records; (d) any additional offenses or rehabilitative efforts since the offense, and (e) other objective evidence of hardship under the circumstances.[177]

Two cases with opposite outcomes offer insight into judicial analysis of expungement petitions in Minnesota. In *State v. Ambaye*,[178] the petitioner, who had been charged with first-degree murder but found not guilty by reason of insanity, contended he lost multiple employment and housing opportunities because of his criminal record.[179] The court held, however, that the lower court had properly found the overriding concerns of an employer[180] and of the public[181] to weigh in favor of refusing expungement.[182] Furthermore, at the time of the case, the petitioner was gainfully employed, negating his claim of professional hardship.[183]

In comparison, the court in *State v. Schultz*[184] found the balance in favor of the petitioner seeking to expunge his felony assault conviction.[185] Because the proceedings were not resolved in the petitioner's favor, the court relied on its inherent authority to hold that the factors in favor of expungement—mistaken advisement by counsel concerning expungement, extensive rehabilitation efforts, a lack of criminal incident since the crime in question, and difficulty in obtaining employment and housing—were commensurate with the disadvantages to the public.[186] In *Ambaye*, a case involving a nonconviction, the court denied expungement, whereas in *Schultz*, a case involving a conviction, expungement was granted. These cases demonstrate the vital role that the balancing test plays in judicial analysis. Although case dispositions inform a court of its authority to expunge, courts will look deeper to decide whether expungement is warranted.

176. 716 N.W.2d 360 (Minn. Ct. App. 2006).

177. *H.A.*, 716 N.W.2d at 364.

178. 616 N.W.2d 256 (Minn. 2000).

179. *Ambaye*, 616 N.W.2d at 257.

180. The concerns of an employer included "assess[ing] . . . potential risk involved with hiring certain individuals." *Id.* at 261 (internal quotation marks omitted).

181. The concerns of the public included "maintaining respondent's record of violence, particularly because the underlying offense . . . was murder in the first degree." *Id.* (alteration in original) (internal quotation marks omitted).

182. *Id.*

183. *Id.*

184. 676 N.W.2d 337 (Minn. Ct. App. 2004).

185. *Schultz*, 676 N.W.2d at 345.

186. *Id.* at 341.

ii. Expungement's Effect

Minnesota statutory law states that all "arrest data"[187] is "public"[188] at all times.[189] Conviction data is also "public" for fifteen years following the discharge of the sentence imposed for the offense.[190] All other criminal history data held by "agencies, political subdivisions and statewide systems," however, is "classified as private."[191]

In the event of an ordered expungement, the court may require that "the criminal record be sealed, the existence of the record not be revealed, and the record not be opened . . . ."[192] However, the statute clearly states that expunged records cannot be destroyed or returned to the subject of the record.[193] Furthermore, the sealing of a record is subject to limitations: the record "may be opened for purposes of a criminal investigation, prosecution, or sentencing, . . . for purposes of evaluating a prospective employee in a criminal justice agency without a court order, . . . or for purposes of a background study."[194]

iii. Internet Access

The Minnesota Bureau of Criminal Apprehension is statutorily required to provide free inspection of public data through computer access at its central office.[195] However, the agency also has been statutorily required to maintain a website through which public criminal history data may be accessed since July 1, 2004.[196] Several protections are nevertheless incorporated. For example, the website must provide notice to the subject of the data search of his or her right to "contest the accuracy or completeness" of such data.[197]

187. "Arrest data" includes data "which document any actions taken by [law enforcement agencies] to cite, arrest, incarcerate or otherwise substantially deprive an adult individual of liberty." MINN. STAT. § 13.82 subd. 2 (2014).

188. "Public data" is defined as "data accessible to the public in accordance with the provisions of section 13.03." *Id.* § 13.02 subd. 15. Section 13.03 states that "[t]he responsible authority in every government entity shall keep records containing government data in such an arrangement and condition as to make them easily accessible for convenient use." *Id.* § 13.03 subd. 1. Upon request of access to public data, "a person shall be permitted to inspect and copy public government data at reasonable times and places." *Id.* § 13.03 subd. 3.

189. *Id.* § 13.82 subd. 2.

190. *Id.* § 13.87 subd. 1(b).

191. *Id.* "Private data" on individuals is defined as "data made by statute or federal law applicable to the data: (a) not public; and (b) accessible to the individual subject of those data." *Id.* § 13.02 subd. 12.

192. *Id.* § 609A.03 subd. 5(c).

193. *Id.*

194. *Id.* § 609A.03 subd. 7.

195. *Id.* § 13.87 subd. 1(b).

196. *Id.* § 13.87 subd. 3(a).

197. *Id.* § 13.87 subd. 3(c). The statute also requires the website to provide notice to a person accessing data "regarding an applicant for employment, housing, or credit" that he or she must notify the applicant that this type of background check has been conducted. *Id.* § 13.87 subd. 3(f).

Minnesota statute provides an entire section on the "[r]ights of subjects of data."[198] Upon request, an individual must be shown any stored data to which he or she is the subject, as well as be "informed of the content and meaning" of the data or provided copies, if requested.[199] The individual also has the right to contest the accuracy or completeness of public or private data to the responsible authority, and the right to appeal.[200]

3. Federal Judicial Authority

Unlike the state system, federal law expressly authorizes federal courts to issue expungement orders only in extremely isolated circumstances.[201] Furthermore, federal courts have not been found to possess the power to expunge under the United States Constitution due to separation of powers concerns.[202] As a result, federal courts may turn to more general statutes[203] and their inherent powers in equity[204] in order to consider a federal expungement petition. If a federal court chooses to invoke its inherent ancillary authority in an effort to obtain just and fair results, it may indisputably grant an expungement in the case of an invalid conviction or unlawful arrest.[205] However, federal courts have generally reserved their expungement power for the "unusual or extreme case," and will not necessarily grant expungement in the case of an acquittal.[206]

198. *Id.* § 13.04.

199. *Id.* § 13.04 subd. 3.

200. *Id.* § 13.04 subd. 4(a).

201. *See, e.g.*, 18 U.S.C. § 3607(a), (c) (2012) (requiring courts to expunge the record of a person, under twenty-one years old at the time of the offense, if he or she was found guilty of simple possession and had not been previously convicted of a federal or state crime relating to controlled substances).

202. *See* United States v. Lucido, 612 F.3d 871, 877 (6th Cir. 2010) (noting that the "power to expunge an indictment is the power to undermine a web of federal (and state) laws designed to collect and preserve such information for law enforcement purposes").

203. *See* Mouzon, *supra* note 21, at 13 (explaining that federal courts have "stretched and squeezed language" from more general statutes, such as the All Writs Act, 28 U.S.C. § 1651 (2006), and the Privacy Act, 5 U.S.C. § 552a, and from the U.S. Constitution, in order to provide an expungement remedy).

204. *See* Menard v. Saxbe, 498 F.2d 1017, 1023 (D.C. Cir. 1974) ("The judicial remedy of expungement is inherent and is not dependent on express statutory provision . . . ."); *see, e.g.*, United States v. Doe, 935 F. Supp. 478, 480–81 (S.D.N.Y. 1996) (granting expungement of a twenty-year-old conviction, where the defendant did not have any incidents with the law since and had demonstrated the conviction's actual impact on his employment status).

205. *See* United States v. Rowlands, 451 F.3d 173, 177 (3d Cir. 2006) (holding that a court has jurisdiction to grant an expungement when "the predicate for the expunction is a challenge to the validity of either the arrest or conviction") (quoting United States v. Noonan, 906 F.2d 952, 957 (3d Cir. 1990)); United States v. Sumner, 226 F.3d 1005, 1012–14 (9th Cir. 2000) (upholding the court's power to expunge a criminal record in order to correct an unlawful arrest or conviction); Sullivan v. Murphy, 478 F.2d 938, 968 (D.C. Cir. 1973) (finding accordance with the "rulings of other Federal courts ordering the expungement of local arrest records as an appropriate remedy in the wake of police action in violation of constitutional rights").

206. *See* United States v. Linn, 513 F.2d 925, 927–28 (10th Cir. 1975) (noting that "an acquittal, standing alone, is not in itself sufficient to warrant an expunction of an arrest record"); Santiago v. People, 51 V.I. 283, 295 (2009) (per curiam) (noting federal case law "severely limits expungement of

Those federal courts that have found an inherent power to expunge criminal records utilize the familiar balancing test to weigh the negative impact of the criminal record on the petitioner against the public's interest in maintaining the record.[207]

Currently, circuit courts are split as to their inherent authority to grant expungement orders, and the United States Supreme Court has yet to rule on the issue.[208] The Second, Seventh, Tenth, and D.C. Circuits have held that it is within a federal court's power of equity to expunge valid criminal records held by the judiciary.[209] The First, Third, Eighth, and Ninth Circuits have held that federal courts lack this equitable power.[210]

4. Federal Statutes

While no federal expungement statute exists, certain federal statutes contain expungement provisions. The Federal First Offender Act,[211] for example, allows for expungement in the case of an individual under twenty-one years of age, with no prior drug conviction, who is convicted of misdemeanor drug possession but is deferred judgment on the basis of completed probation.[212] The meaning of "expungement" under the Act is broad:

> The expungement order shall direct that there be expunged from all official records . . . all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such

criminal records to extraordinary, exceptional, or extreme circumstances"); *see also* United States v. Lopez, 704 F. Supp. 1055, 1056–57 (S.D. Fla. 1988) ("Mere acquittal standing alone is not deemed an extraordinary circumstance sufficient to warrant expungement of an arrest record.").

207. *See, e.g.*, Diamond v. United States, 649 F.2d 496, 499 (7th Cir. 1981) ("If the dangers of unwarranted adverse consequences to the individual outweigh the public interest in maintenance of records, then expunction is appropriate.") (footnote omitted); United States v. Fields, 955 F. Supp. 284, 285 (S.D.N.Y. 1997) (stating that when deciding whether to grant expungement "the government's interest in maintaining arrest records 'must be balanced against the harm that the maintenance of arrest records can cause citizens'" (quoting United States v. Rosen, 343 F. Supp. 804, 806 (S.D.N.Y. 1972))).

208. *See* United States v. Coloian, 480 F.3d 47, 51–52 (1st Cir. 2007) (noting the split); *see also* Wurie, *supra* note 72, at 42.

209. United States v. Flowers, 389 F.3d 737, 739–40 (7th Cir. 2004); United States v. Pinto, 1 F.3d 1069, 1070 (10th Cir. 1993); Livingston v. U.S. Dep't of Justice, 759 F.2d 74, 78 (D.C. Cir. 1985); United States v. Schnitzer, 567 F.2d 536, 539 (2d Cir. 1977).

210. *Coloian*, 480 F.3d at 52; *Rowlands*, 451 F.3d at 173; United States v. Meyer, 439 F.3d 855, 862 (8th Cir. 2006); United States v. Dunegan, 251 F.3d 477, 478–79 (3d Cir. 2001); *Sumner*, 226 F.3d at 1015.

211. 18 U.S.C. § 3607 (2012).

212. *Id.* § 3607(a), (c).

> arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.[213]

Where expungement is granted, only a nonpublic record is retained by the Department of Justice for use by courts in subsequent proceedings.[214]

There has been legislative initiative to increase federal expungement eligibility. The Fresh Start Act of 2011 was a proposal to amend the federal criminal code to allow expungement of a conviction record in the case of a nonviolent first offense.[215] The Fresh Start Act contained an incentive provision, allowing a five percent increase in grant funding to states that implemented expungement procedures 'substantially similar' to the procedures enacted by the Act, and penalized those states that failed to adopt such procedures with a five percent decrease in the relevant grant funding.[216] Unfortunately the bill died in committee.

* * *

To varying degrees, federal and state courts have held that the collateral consequences associated with a public nonconviction record may implicate due process rights. Many state legislatures have reinforced this view by passing statutes authorizing expungement of nonconviction records. In the case of conviction records, however, punishment that extends beyond the sentence of the court may violate due process rights as well. The historical progression of expungement law demonstrates courts' willingness to adapt to new understandings of real collateral consequences and the impact that such consequences have not only on individuals, but also on families and communities.[217] In *Padilla*, the Supreme Court found it "'most difficult' to divorce the penalty from the conviction in the deportation context."[218] The Court's language is applicable to the nexus between contact with the criminal justice system and the serious collateral consequences of both conviction and nonconviction records.[219] This Comment urges state legislatures to develop

213. *Id.* § 3607(c).

214. *Id.* § 3607(b). The nonpublic record can be used to determine whether a person qualifies for prejudgment probation or expungement as provided in the same section. *Id.*

215. Fresh Start Act of 2011, H.R. 2449, 112th Cong. (2011).

216. *Id.*

217. For example, until 1981, Pennsylvania courts maintained that nonconviction arrest records could only be expunged if the petitioner proved his or her innocence. *See* Chase v. King, 406 A.2d 1388, 1390 (Pa. Super. Ct. 1979); Commonwealth v. Mueller, 392 A.2d 763, 764 (Pa. Super. Ct. 1978). In 1981, however, the Supreme Court of Pennsylvania held that the state bears the burden of proof at an expungement hearing as to why the expungement should not be granted. Commonwealth v. Wexler, 431 A.2d 877, 880 (Pa. 1981). Actual guilt or innocence of the charged crime is no longer a decisive factor. *Id.*

218. Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (quoting United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982)).

219. Some courts have distinguished between nonpenal restrictions and restrictions, outside of a sentence, that further punishment for the crime. *See, e.g.*, People v. Mgebrov, 82 Cal. Rptr. 3d 778, 781 (Ct. App. 2008) (noting the distinction courts have drawn "between penalties imposed on a felon as further punishment for the crime, as to which vacation . . . generally affords relief, and nonpenal

expungement law that achieves the equitable balance between remedying undue punishment and supporting the public interest by ultimately offering greater opportunities for expungement.[220]

III. DISCUSSION

The balancing act of expungement analysis has been established over forty years of federal and state jurisprudence. Yet the necessary legal framework for expungement reform is currently lacking. Expungement is generally inaccessible due to strict statutes, limited inherent judicial authority, and record holders' lack of knowledge regarding access to and eligibility for expungement. An absence of federal common law or statutes authorizing expungement renders the federal judiciary a difficult forum for expungement reform.[221] State legislatures, many of which have already passed some form of an expungement statute, are in the best position to provide greater uniformity and clarity to the application and effect of expungement.[222] By passing comprehensive expungement reform, legislatures can rework expungement as a remedy for "extraordinary circumstances"[223] into a standard remedy for "common" circumstances involving "extraordinary" punishment.

A. Elements of Comprehensive Expungement Reform

Legislatures should define expungement and its legal effects so as to relieve issues surrounding separation of powers,[224] rights of access and dissemination,[225]

restrictions adopted for protection of public safety and welfare" (quoting People v. Vasquez, 108 Cal. Rptr. 2d 610, 613 (2001) (internal quotation marks omitted))).

220. *See* Loder v. Mun. Court for San Diego Judicial Dist., 553 P.2d 624, 636 (Ca. 1976) (stating that the legislature should be allowed "the difficult task of striking the proper balance between [the] competing concerns" of public access and privacy rights); State v. M.D.T., 831 N.W.2d 276, 283 (Minn. 2013) ("[O]ur Legislature has struck that balance with respect to M.D.T.'s criminal records held in the executive branch. It is not necessary to the performance of a judicial function to strike the balance differently.").

221. See *supra* Parts II.D.3 and II.D.4 for a discussion of federal authority to expunge criminal records. See Wurie, *supra* note 72, for a proposal of a federal, equitable expungement process through the FBI.

222. *See* ARK. CODE ANN. § 16-90-1402 (2014) (noting that "[i]t is the intent of the Generally Assembly to provide in clear terms in what instances, and, if applicable, how a person may attempt to have his or her criminal history information sealed"); Mobile Press Register, Inc. v. Lackey, 938 So. 2d 398, 403(Ala. 2006) ("Whether citizens should be entitled to have their criminal arrest records expunged is a substantive matter involving policy considerations within the purview of the legislature, not this Court."); *see c.f.*, Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota*—State v. Schultz, 31 WM. MITCHELL L. REV. 1331, 1344 (2005) (noting that each Minnesota trial court handled expungement differently prior to the enactment of the expungement law).

223. See *supra* note 175 for the classification of expungement in Minnesota law as an "extraordinary remedy" in the case of a conviction record; see *supra* note 206 for federal case law indicating expungement is reserved for "extraordinary circumstances."

224. *See infra* Part III.A.1 for a discussion on resolving separation of powers issues surrounding effective expungement.

and enforcement of court orders.[226] Further, legislatures should instruct judicial analysis, in form and content, to create more room for record holders to demonstrate their efforts toward rehabilitation.[227] Expungement statutes should also be drafted in tandem with other statutes and rules, such as open records laws and rules pertaining to pretrial diversion programs, to ensure an effective and holistic remedy for collateral consequences.[228] Finally, legislatures drafting new statutes should incorporate certain elements of current expungement statutes, including direction to both judicial and executive entities to privatize expunged data;[229] greater opportunity for expungement after reasonable waiting periods;[230] and increased access to public records to satisfy employer, landlord, and law enforcement needs.[231]

1. Court Authority

Many courts have claimed inherent authority to expunge nonconviction records.[232] The court in *Commonwealth v. Malone*[233] reasoned:

> Punishment of the innocent is the clearest denial of life, liberty and property without due process of law. To remedy such a situation, an individual must be afforded a hearing to present his claim that he is entitled to an expungement—that is, because an innocent individual has a right to be free from unwarranted punishment, a court has the authority to remedy the denial of that right by ordering expungement of the arrest record.[234]

But does not an individual who has "paid his debt to society" or proved to be "rehabilitated" also have a right to be "free from unwarranted punishment"?[235] If not, we are renouncing any societal theories based on forgiveness, mistakes, or proportional punishment. Within the framework of just punishment and

225. *See infra* Part III.A.5 for a discussion on balancing rights of access and dissemination with expungement remedies.

226. *See infra* Part III.A.6 for a discussion of the maintenance of accurate criminal records and the enforcement of expungement orders.

227. *See infra* Part III.A.3 for a discussion of court expungement analysis.

228. *See infra* Part III.A.7 for a discussion of complementary laws; *see infra* notes 339–42 for a proposal to integrate pretrial diversion programs into expungement statutes.

229. See *infra* notes 250–52 and accompanying text for a discussion of the need for clear declarations of legislative intent in regard to expungement statutes.

230. See *infra* notes 291–93 for the argument that legislatures should adopt "waiting periods" into the statutory schemes.

231. See *infra* Part III.A.5 for a discussion of criminal record access.

232. See *supra* Part II.D.1 for a discussion of inherent state court authority to expunge and Part II.D.3 for a discussion of the limited inherent federal court authority to expunge.

233. 366 A.2d 584 (Pa. Super. Ct. 1976).

234. *Malone*, 366 A.2d at 588.

235. *See* Radice, *supra* note 41, at 722 (describing how discrimination-based recidivism undercuts the time and expenses put into prisoners' incarceration); Andrew Hacker, Comment, *The Use of Expunged Records to Impeach Credibility in Arizona*, 42 ARIZ. ST. L.J. 467, 470 (2010) (explaining that expungement recognizes that "a theory of law which withholds . . . forgiveness after punishment is ended is as indefensible in logic as it is on moral grounds").

rehabilitation, expungement statutes should expand on the due process reasoning of *Malone* to broaden expungement eligibility.

Given various courts' concern with overstepping judicial bounds in ordering expungement of records held by the other branches of government,[236] legislatures must address the issue of separation of powers. If court records are sealed through expungement, but records held by executive agencies remain available to the public, expungement as a whole loses effectiveness. Criminal records document events that transpired in the courts, with which courts have a continuing interest. In theory, then, "[p]ractical considerations . . . should be of sufficient weight to override any theoretical separation of powers objections."[237] However, as courts have more authority over their own records than those held by another branch—such as a prosecutor—a distinction could be made between modifying the court's judgment and "modifying a private litigant's files."[238]

To overcome this obstacle, legislatures must provide more than "practical considerations." In *Sealed Appellant v. Sealed Appellee*,[239] the Fifth Circuit denied the petitioner's requested expungement of executive records where there was no "showing of an agency's or official's affirmative misuse of the subject information."[240] Expungement is a remedy and not a right, and thus may only be granted where there is injury to a legally protected interest.[241] The court found that expungement of executive records would be appropriate where state officers violated the defendant's civil rights, but that here, the alleged injury of interference with the defendant's career was too "amorphous."[242] The court noted that previous court orders to expunge executive branch records had been issued in accordance with statute and to remedy statutory rights.[243] Because there was no allegation of specific misuse of information, the Fifth Circuit did not have jurisdiction to grant expungement relief against the executive.[244] The court looked for a "logical relationship between the injury and the requested remedy" but did not find one.[245]

The key appears to be identifying the nexus between an injury and the expungement remedy. To alleviate separation of powers concerns, there should be a statute directing expungement of both court and executive records with the explicit purpose of remedying an injury. While the Fifth Circuit held that a party seeking expungement of executive records must assert a violation of affirmative rights by executive actors possessing the records, a petition for expungement should not have to go to such lengths. If the government were to systematically

236. See *supra* notes 202–04 for examples of separation of powers concerns by the judiciary.

237. United States v. Janik, 10 F.3d 470, 473 (7th Cir. 1993) (Cudahy, J., dissenting).

238. Sealed Appellant v. Sealed Appelle, 130 F.3d 695, 698 n.6 (5th Cir. 1997).

239. 130 F.3d 695 (5th Cir. 1997).

240. *Sealed Appellant*, 130 F.3d at 702.

241. *Id.* at 699–700.

242. *Id.*

243. *Id.* (citing the Controlled Substances Act, 18 U.S.C. § 3607(c) (1994), and the Youth Corrections Act, 18 U.S.C. § 5005).

244. *Id.* at 702.

245. *Id.* at 700.

recognize the harm caused by collateral consequences,[246] there is a much stronger argument for specific injury. Thus, legislatures should draft expungement statutes that articulate the policy behind expungement, the injuries that often result from criminal records, and the relief that expungement would provide. By doing so, legislatures would provide the specificity found missing in *Sealed Appellant*.

Following *Padilla*, there is also the potential for government recognition of the punitive nature of collateral consequences.[247] This redefinition from nonpunitive to punitive would allow collateral consequence to assume the constitutional rights that attach to punishment. Under the Fifth Circuit's reasoning, if the maintenance of a criminal record violates those constitutional rights, the judiciary would have jurisdiction to order expungement of both its own and the executive's records. Furthermore, the government bears the responsibility of maintaining accurate records.[248] It could be argued that once a court orders the expungement of a criminal record—a court record—the executive record is no longer accurate.[249] Thus, a court could find that it has jurisdiction to order the expungement of an executive record based on its inaccuracy.

2. Legislative Intent and the Effect of Expungement

Legislatures should present their declaration of intent in terms of rehabilitation and acknowledge that communities are better served when barriers to employment for individuals with criminal records are removed.[250] This will clearly set the framework in which judges conduct a balancing analysis of the benefits and harms of expunging criminal records. The New Jersey legislature provides a good example: "The Legislature finds and declares that it is in the public interest to assist the rehabilitation of convicted offenders by removing impediments and restrictions upon their ability to obtain employment or to participate in vocational or educational rehabilitation programs based solely upon the existence of a criminal record."[251] Yet employer and law enforcement interests in record retention need not be lost. In all cases, the

246. See *supra* Part II.A and accompanying notes for a discussion of the harm caused by collateral consequences. See *supra* notes 35–43 for a discussion of *Padilla*.

247. See *supra* notes 35–43 for a discussion of *Padilla*.

248. The Seventh Circuit in *United States v. Janik* held that federal courts do not have jurisdiction to order the executive branch to expunge its records. 10 F.3d 470, 473 (7th Cir. 1993). The court so held because it found no constitutional basis for such relief, reasoning that "the Constitution does not prohibit the government from maintaining what are admittedly accurate records of Janik's indictment and conviction." *Id.* at 471.

249. This contention has been disputed by several courts and critics of expungement, who have found expungement to "hide the truth" of the underlying acts. See *supra* notes 65–67 for examples of cases that have expressed such criticism.

250. *See, e.g.*, N.M. STAT. ANN. § 28-2-2 (2014) ("The legislature finds that the public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible.").

251. N.J. STAT. ANN. § 2A:168A-1 (West 2014).

remedy must be proportionate to the nature of the recorded incident and its underlying circumstances.

Every state expungement statute must delineate the legal effect of an expunged record.[252] For the sake of clarity and accuracy, legislatures could abandon using the umbrella term "expungement," thereby removing ambiguity in its meaning and actual legal effect.[253] Most statutes state that an expungement order removes any record of the underlying conduct as if it never occurred.[254] At the same time, statutes maintain that expunged records can be disclosed to criminal justice agencies, courts, and prosecuting attorneys.[255] These contradictory provisions are simply unhelpful both to administrators and record holders. Instead, if certain arrest records are destroyed automatically upon dismissed charges,[256] then such records are indeed "expunged."[257] The term "sealing," however, is more applicable for all other records that are not destroyed and are maintained for law enforcement purposes.[258] While current expungement statutes tend to use either "expungement" or "sealing," legislatures should consider consistently using different terms to refer to different processes and legal effects.

Furthermore, when a record is expunged but maintained for law enforcement purposes, legislatures should define this process as the

252. See *supra* notes 48–53 for a discussion of the varying meanings and effects of expungement. *Cf.*, MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 10 (2005) ("[T]he limited and/or uncertain legal effect of expungement in some jurisdictions . . . raise[s] questions about the usefulness of expungement as a restoration device.").

253. See *supra* notes 159–64 and accompanying text for a description of Pennsylvania's statutory definition of expungement acting at odds with its actual legal effect. *Cf.* State v. M.B.M., 518 N.W.2d 880, 883 (Minn. Ct. App. 1994) (explaining that the legislature mandated the "return of records" as opposed to sealing or destroying and that it could have limited the form of expungement if it wanted); City of Pepper Pike v. Doe, 421 N.E.2d 1303, 1306 (Ohio 1981) (highlighting the lack of precision in the term expungement); Love, *supra* note 17, at 1725 (explaining how the variation of states' approaches in the effect of an expunged record is "often not spelled out in the law," creating confusion for those attempting to follow the order).

254. *See, e.g.*, ARK. CODE ANN. § 16-90-1417(b)(1) (2014) ("Upon the entry of the uniform order, the person's underlying conduct shall be deemed as a matter of law never to have occurred, and the person may state that the underlying conduct did not occur and that a record of the person that was sealed does not exist."); N.J. STAT. ANN. § 2C:52-27 ("[I]if an order of expungement is granted, the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred.").

255. *See, e.g.*, ARK. CODE ANN. § 16-90-1416(a) (explaining that a sealed record may be released upon request by a criminal justice agency, a court, a prosecuting attorney, or the Arkansas Crime Information Center); NEV. REV. STAT. § 179.301 (2014) (stating that the inspection of sealed records is available to law enforcement and certain agencies); N.J. STAT. ANN. § 2C:52-21 (providing that an expunged record is still available to judges, prosecutors, probation department, and Attorney General when requested for bail hearings, presentence reports, and sentencing).

256. See *infra* notes 287–90 and accompanying text for a proposal for automatic expungement in some circumstances.

257. See *supra* note 50 and accompanying text for the common definition of "expunge" as the destruction of records.

258. See *supra* note 53 and accompanying text for a definition of "sealing." See *supra* note 171 and accompanying text for Minnesota's use of "sealing" rather than expungement.

transformation of a public record[259] into a nonpublic, or private, record.[260] Although state expungement laws do not establish the parameters of constitutional rights, such as the right to privacy,[261] they nevertheless can divorce expunged records from public records to regulate disclosure and remove the records from the public domain.[262] By classifying expunged records as private, legislatures prohibit public dissemination and create an expectation of privacy, while retaining law enforcement access.[263]

In the Federal First Offender Act, Congress provides an example of clear directive to expunge specific information while maintaining nonpublic records: "The expungement order shall direct that there be expunged from all official records, except the nonpublic records [retained by the central repository for use by courts in subsequent proceedings], all references to [the individual's] arrest for the offense, the institution of criminal proceedings against him, and the results thereof."[264] Similarly, South Carolina exempts expunged records from disclosure by removing their public classification:

> Information retained by a local or state detention or correctional facility as permitted under this section after an expungement order has been issued is not a public document and is exempt from disclosure. Such information only may be disclosed by judicial order, pursuant to a subpoena filed in a civil action, or as needed during litigation proceedings.[265]

An expungement order should also restore an individual to his or her former legal status. Legislatures should explicitly state that upon receiving an expungement order of his or her criminal record, an individual is to receive full restoration of rights,[266] and shall "be released from all penalties and disabilities

259. Broadly, "public records" include court records and specific criminal justice records. *See* State *ex rel.* Cincinnati Enquirer v. Winkler, 805 N.E.2d 1094, 1096 (Ohio 2004) (noting that "court records fall within the broad definition of a public record in [the state's open record law]: 'Public record' means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units").

260. See *supra* notes 211–14 and accompanying text for a discussion of the federal law, 18 U.S.C. § 3607, which requires that only a nonpublic record of the expunged record be retained by the Department of Justice for use by courts. See *infra* notes 306–09 and accompanying text for a discussion of Colorado law taking a similar approach.

261. See *supra* Part II.C.1 for a discussion of the public right to access criminal records and the lack of expectation of privacy in an expunged record.

262. *See, e.g.*, S.C. CODE ANN. § 17-1-40 (2014) (requiring that criminal records be destroyed after a criminal charge has been discharged).

263. *But see* Nunez v. Pachman, 578 F.3d 228, 231–32 (3d Cir. 2009) (noting that even if a state expungement statute completely removes a criminal record from the public domain, a privacy claim fails "under the *federal* constitution, which protects against public disclosure only 'highly personal matters' representing 'the most intimate aspects of human affairs'" (footnote omitted) (quoting Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir. 1996))).

264. 18 U.S.C. § 3607(c) (2012).

265. S.C. CODE ANN. § 17-1-40.

266. *See, e.g.*, OHIO REV. CODE ANN. § 2953.33(A) (LexisNexis 2015) (providing that an order to expunge or seal the "record of a person's conviction restores the person who is the subject of the

resulting from the offense of which he or she has been convicted."[267] This includes the petitioner's ability to deny the existence of the record in "any application for employment, license, or other right or privilege, any appearance as a witness, or any other inquiry."[268]

3. Eligibility and Court Analysis

Expungement law should be disposition based: nonconviction data[269] should be more readily expunged than conviction data.[270] Disposition-based expungement eligibility avoids burdening the petitioner with establishing nonculpability and avoids reliance on the court's belief of prior guilt or innocence.[271] Focusing solely on record disposition, however, ignores recognition of rehabilitation and other relevant factors.[272] In Pennsylvania, for example, where one must be dead or elderly to get a conviction expunged,[273] conviction record holders have no opportunity to demonstrate their rehabilitative efforts to the court. Similarly, expungement of conviction data in Minnesota is "an extraordinary remedy" and granted in few situations.[274]

Expungement of a conviction record is no doubt a substantial remedy. Nevertheless, statutes should require courts to engage in a balancing of interests test[275] in the case of convictions as well as nonconvictions.[276] By requiring this judicial analysis, legislatures will acknowledge that the collateral consequences

order to all rights and privileges not otherwise restored by termination of the sentence or community control sanction or by final release on parole or post-release control").

267. People v. Mgebrov, 82 Cal. Rptr. 3d 778, 781 (Ct. App. 2008) (quoting People v. Vasquez, 25 P.3d 1090, 1092 (Cal. 2001)).

268. OHIO REV. CODE ANN. § 2953.33(A); *see also* ALASKA STAT. § 12.62.180(d) (2014) (providing that a person who has a sealed criminal record can deny the existence of that record); MINN. STAT. § 609A.03 subd. 6 (2014) (explaining that the effect of an order shall be to restore the person to the status they had before the underlying conduct occurred).

269. See *supra* note 122 and accompanying text for description of nonconviction data.

270. See *supra* notes 139–44 and 170–75 and accompanying text for a description of Pennsylvania and Minnesota's disposition-steered approaches to expungement.

271. *See* Rambo v. Comm'r of Police, 447 A.2d 279, 281 (Pa. Super. Ct. 1982) (stating the court was not permitted to cling to a personal belief in the appellant's guilt). In *Commonwealth v. G.C.*, the court noted the rejection of *Commonwealth v. Mueller* and its progeny by *Commonwealth v. Wexler*. 581 A.2d 221, 224–25 (Pa. Super. Ct. 1990) (holding that when the Commonwealth makes a prima facie case of guilt the accused has the burden to affirmatively demonstrate nonculpability at an expungement hearing.

272. See *supra* notes 176–86 and accompanying text for a discussion of the Minnesota courts looking beyond mere disposition and considering the circumstances surrounding petitioners' criminal records and their requests for expungement.

273. 18 PA. CONS. STAT. § 9122(b) (2014). The exception is for summary offenses, which may be petitioned for expungement if an individual has been free of arrest for five years following the conviction. *Id.* § 9122(b)(3).

274. MINN. STAT. § 609A.03 subd. 5(a) (2014).

275. See *supra* notes 145 and 173 and accompanying text for an explanation of the common law balancing of interests tests used by Pennsylvania and Minnesota state courts.

276. See *infra* notes 279–81 and accompanying text for a proposal of expungement eligibility of conviction records.

of certain conviction records often bestow undue punishment on individuals. The balancing test at once incorporates each petitioner's rehabilitative efforts and lends to a proportionate remedy that takes into account the public interest of maintaining the criminal record.

A statutorily required balancing test should enumerate the following nonexclusive factors: (1) the strength of the state's case against the petitioner; (2) the reasons for retention provided by the state; (3) the extent that a petitioner has demonstrated difficulties in securing employment or housing as a result of the records sought to be expunged; (4) the seriousness and nature of the offense; (5) the potential risk that the petitioner poses and how this affects the public's right to access the records; (6) the petitioner's age, criminal record, and employment history; (7) the length of time that has elapsed between the arrest and the petition to expunge; (8) any additional offenses or rehabilitative efforts since the offense; (9) the specific adverse consequences the petitioner may endure should expungement be denied; and (10) other objective evidence of hardship under the circumstances.[277] These factors provide the court with a comprehensive picture of the circumstances surrounding the record. To ensure that courts have sufficient information to conduct this analysis, expungement statutes should enumerate the required contents of an expungement petition.[278] For example, in the case of a conviction, a petitioner should explain why expungement is sought, what steps he or she has taken toward personal rehabilitation, and the details of the offense for which expungement is sought.[279] With this information, a court can make an informed determination whether the petitioner is deserving of expungement or if an expungement order is likely to be abused.

Legislatures can also shape proportionate remedies by specifying the standards of review and the burden shifting that courts should use in their analysis. For example, when a court conducts a balancing test regarding a nonconviction record, the presumption should be in the petitioner's favor: the court *must* grant the expungement unless the state can show the public interest to *outweigh* the disadvantages to the petitioner.[280] On the other hand, in the case of a conviction record, legislatures should direct that courts *may* grant expungement if the benefit to the petitioner is *at least equal* to the disadvantages to the public and the court.[281] In *State v. XYZ Corp.*,[282] the Supreme Court of

277. *See* State v. H.A., 716 N.W.2d 360, 364 (Minn. Ct. App. 2006) (listing the factors to be considered by the district court when determining whether a petitioner's benefits from expungement are commensurate with the disadvantages to the public and the court, providing grounds for expungement); Commonwealth v. Wexler, 431 A.2d 877, 879 (Pa. 1981) (providing a nonexclusive and nonexhaustive list of factors to be considered in the balancing determination).

278. *See, e.g.,* MINN. STAT. § 609A.03 subd. 2.

279. *See id.*

280. See *supra* notes 173–75 and accompanying text for the court analysis mandated by Minnesota statute.

281. See *supra* note 175 and accompanying text for an example of a legislature granting courts discretion.

282. 575 A.2d 423 (N.J. 1990).

New Jersey explained that normally "an objector must establish grounds for denial of expungement by a preponderance of the evidence."[283] However, in the case of nonconviction, "the facts established should *clearly convince* the court that the need for the availability of the records outweighs the desirable effects of expungement."[284] Similarly, the Arkansas expungement statute states that courts "*shall* seal [a] misdemeanor or violation conviction" unless the court "is presented with and finds that there is clear and convincing evidence that [the] conviction should not be sealed."[285] In the case of a felony conviction, however, a court *may* grant an expungement petition if it "finds by clear and convincing evidence that doing so would further the interests of justice."[286] By instructing courts which standards of proof to use in their analysis, and when to shift the burden of proof, legislatures can ensure more uniform application of expungement relief that reflects the distinction between nonconviction and conviction records.

4. Proposals for Expungement Expansion

Following Minnesota's lead, statutes should mandate automatic expungement—where no petition is necessary—in cases that do not get far past the initial stages of arrest.[287] This approach incorporates existing judicial recognition of the constitutional rights potentially implicated by a nonconviction record.[288] Automatic expungement saves judicial and individual resources, and mitigates the problem of unawareness of the expungement remedy.[289] Furthermore, the more time that elapses between the creation of the arrest record and the expungement, the more time exists for an individual to enter the record-recidivism cycle. Thus, provisions concerning automatic expungement

283. *XYZ Corp.*, 575 A.2d at 426.

284. *Id.* (internal quotations omitted).

285. ARK. CODE ANN. § 16-90-1415(a) (2014) (emphasis added).

286. *Id.* § 16-90-1415(b).

287. For example, if charges are not filed or charges are dismissed prior to a determination of probable cause, expungement should be automatic. *See, e.g.*, ALA. CODE § 41-9-625 (2014) (providing for automatic expungement of arrest and released without charge/cleared off offense); MD. CODE ANN. CRIM. PRO. § 10-105(a)(1)-(4), c(1-2) (West 2014) (dictating that arrests not leading to charges are automatically expunged). See *supra* note 174 and accompanying text for Minnesota's automatic expungement provision

288. See *supra* Part II.D.1 for a discussion of inherent court authority to expunge. *See also* Love, *supra* note 14, at 6 (asserting that "existence of an arrest record alone can be fatal to an individual's chances for a job, apartment, or loan"); Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMMLAW CONSPECTUS 123, 130 (2010) (highlighting that the adverse effects suffered by those with arrest records can be similar to those suffered by individuals with criminal records).

289. See *infra* Part III.A.7 for a discussion of efforts to spread awareness of expungement and to provide expungement services to the indigent. The Kansas statute has an important provision concerning notice, requiring that individuals, throughout the criminal process, be informed of the possibility of petitioning for expungement, especially upon release from confinement or probation. KAN. STAT. ANN. § 21-6614(j) (2014).

should also direct the removal of conviction data after a certain period of time, during which there has been no additional convictions.[290]

To further expand opportunity for individuals to show their rehabilitative efforts, legislatures may adopt "waiting periods" into the statutory scheme.[291] The waiting period should correspond with the severity and nature of the crime.[292] A statute should also include extra incentives for good behavior by providing the court with the discretion to shorten waiting periods.[293] However, in order to balance public safety concerns with the benefit of rehabilitative accomplishments, statutes may categorically bar the convictions of certain types of offenses from expungement eligibility.[294] Exclusion of certain offenses reflects a legislature's policy concerns and opinions regarding the level of harm caused by such crimes, and whether certain types of offenders are deserving, or capable, of rehabilitation.

5. Access

a. Restricting Access to Criminal History Information

Without a constitutional right to privacy in the dissemination of their criminal history information, coupled with the state's obligation to provide access to public information, individuals face an uphill battle against the ever-increasing proliferation of information.[295] To make matters worse, the disjoint in communication between agencies holding records, as well as the lack of uniform

290. *See, e.g.*, N.J. STAT. ANN. § 2C:52-2 (West 2014).

291. *See* Mouzon, *supra* note 21, at 39–40 (proposing federal expungement legislation that requires "proof of rehabilitation through a demonstration of years of law-abiding life. The period of productive life required should depend upon the nature and severity of the crime.").

292. *See, e.g.*, N.J. STAT. ANN. § 2C:52-2 (explaining that an individual must wait ten years to seek expungement following a conviction of an indictable offense, five years for conviction of a disorderly person offense, and only two years for violating a municipal ordinance).

293. *See, e.g.*, N.J. STAT. ANN. § 2C:52-2(a)(1)–(2) (stating that a court can waive the ten-year waiting period after five years if it is in the public interest). The public interest determination includes the consideration of various factors, including, "in the context of an early pathway petitioner's 'conduct and character,' whether he or she has engaged in activities that have limited the risk of re-offending, or has avoided activities that enhanced that risk. . . . A petitioner's performance while incarcerated or while on probation may also be relevant." *In re* LoBasso, 33 A.3d 540, 550 (N.J. Super. Ct. App. Div. 2012).

294. *See, e.g.*, FLA. STAT. § 943.059 (2014) (explaining that records of sex crimes, crimes against children, communications fraud, burglary, and drug trafficking cannot be expunged); N.H. REV. STAT. ANN. § 651:5(V) (2015) (excluding from expungement eligibility convictions of violent crimes, obstruction of justice, or any offense to which there was an extended-term sentence); OHIO REV. CODE ANN. § 2953.36 (LexisNexis 2015) (excluding from expungement eligibility convictions with attached mandatory prison terms, convictions of a felony of the first or second degree, or violence misdemeanors of the first degree).

295. See *supra* Part II.C.1 for a discussion of rights of access to public records; *see also* Calvert & Bruno, *supra* note 288, at 136 (highlighting the importance of technology in assimilation of former inmates and the negative impact that it has on the goals of expungement); Love, *supra* note 17, at 1726 (noting "the expungement concept ignores the technological realities of the information age").

regulation, cause dissemination loopholes.[296] Even if a record is expunged, if it is still available to the public, the expungement will have little beneficial effect.

One proposed solution is to place restrictions on access and dissemination, such as by prohibiting bulk purchase of data.[297] However, critics have noted the inevitable dangers of this approach. Large data harvesters will be able to find other ways to gather the now increasingly valuable criminal history information,[298] while pushing smaller harvesters to resort to publishing out-of-date and expunged records.[299] Another approach some states have taken is to impose penalties on state officials for unauthorized dissemination.[300]

A more effective strategy may be to reconcile presumptions of openness with privacy expectations in expunged records. The Minnesota Supreme Court removed judicial authority to expunge executive-held criminal records due to the presumption of openness in both the open records statute and expungement statute.[301] However, if legislatures draft complementary open records and expungement statutes, courts can direct both judicial and executive agencies to restrict access to expunged records. For example, the Ohio open records law created an exception to public record access for "[r]ecords the release of which is prohibited by state or federal law."[302] Because Ohio's expungement statute makes it a crime to release sealed or expunged records,[303] they fall within this exception.

Another approach is to initially limit access to criminal records (not just expunged records) by creating a separate category within "public records" for "criminal justice records," thereby excluding criminal records from the scope of open records laws. Often the interchange between public records and court

296. *See* Hacker, *supra* note 235, at 472 (asserting that the multiple locations in which a record may be kept make it difficult to expunge or seal the record from all of those places); Hancock, *supra* note 44, at 529 (describing the difference in available criminal history information provided to private individuals and companies by state repositories and the Administrative Office of Pennsylvania Courts).

297. *See* Richard Peltz, Joi L. Leonard & Amanda J. Andrews, *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms*, 59 ARK. L. REV. 555, 626 (2006) (discussing reasons for limiting bulk access, including the cost of separating accessible information from restricted information that overly burdens court staff, and the existence of inaccurate judicial records available through third parties that undermines confidence in the judiciary).

298. One example of an alternative method of information gathering available to large data harvesters is the use of runners. See *supra* note 81 and accompanying text for a description of private data companies' methods for obtaining information.

299. Michael H. Jagunic, *The Unified "Sealed" Theory: Updating Ohio's Record-Sealing Statute for the New Twenty-First Century*, 59 CLEV. ST. L. REV. 161, 181 (2011).

300. *E.g.*, N.J. STAT. ANN. § 2C:52-30 (West 2014) (setting a maximum penalty of $200.00 for revealing an expunged record).

301. See *supra* notes 168–70 and accompanying text for a discussion of *State v. M.D.T.*, 831 N.W.2d 276 (Minn. 2013).

302. OHIO REV. CODE ANN. § 149.43(A)(1)(v) (LexisNexis 2015); *see* State *ex rel.* Cincinnati Enquirer v. Winkler, 805 N.E.2d 1094, 1096 (Ohio 2004) (noting that "once the court records were sealed under [the state's expungement statute], they ceased to be public records").

303. OHIO REV. CODE ANN. § 2953.35(A).

records in state statutes causes confusion regarding questions of access as to where criminal justice records fall.[304] As a result, some states make clear whether its open records law applies to judicial records.[305] The Colorado legislature, for example, passed the Colorado Criminal Justice Records Act[306] (CCJRA) following the enactment of the Colorado Open Records Act[307] (CORA) in order to separate "criminal justice records" from the general category of "public records" under CORA.[308] The purpose of the CCJRA is made plain in the statute: "[t]he maintenance, access and dissemination, completeness, accuracy, and *sealing* of criminal justice records are matters of statewide concern."[309] In stark contrast, the Virgin Islands Public Records Statute explicitly makes arrest records public and "open to the inspection of any citizen."[310] The Supreme Court of the Virgin Islands reasoned that the "public policy which mandates maintaining arrest records simultaneously disfavors sealing and expunging public records."[311]

By creating a separate category for criminal records, the Colorado legislature has more control over record dissemination.[312] Custodians of criminal history data maintain discretion to allow inspection of the information.[313] However, in executing this discretion, a custodian must consider and balance relevant public and private interests.[314] Thus, the CCJRA, in restricting access to criminal history information, represents public policy that recognizes the "privacy interests and dangers of adverse consequences involved in [an] inspection request."[315]

304. *See* Peltz et al., *supra* note 297, at 602 (noting that statutory use of the term "public records" rather than "court records" regarding access to records causes confusion over the applicability of the statutes to judicial records) (internal quotation marks omitted).

305. *See, e.g.*, Commonwealth v. Fenstermaker, 530 A.2d 414, 420 (Pa. 1987) (holding that Pennsylvania's "Right to Know Act" pertains only to state agencies, not the judiciary).

306. COLO. REV. STAT. §§ 24-72-301–309 (2014).

307. *Id.* § 24-72-202.

308. *Id.* § 24–72–202(6)(b)(I) ("Public records [do] not include . . . [c]riminal justice records that are subject to the provisions of part 3."); *see also* Harris v. Denver Post Corp., 123 P.3d 1166, 1170–71 (Colo. 2005) ("Although similar in many respects, key definitions of CORA and the CCJRA differ in a fundamental way. Criminal justice records are restricted to those 'made, maintained, or kept by any criminal justice agency.' Public records are those made, maintained, or kept by the State or one of several listed entities, but does not include criminal justice records.") (citation omitted).

309. COLO. REV. STAT. § 24-72-301(1) (emphasis added); *see also Harris*, 123 P.3d at 1171 (emphasizing that the legislature "enumerated not just 'access and dissemination' but 'sealing' of criminal justice records as 'matters of statewide concern'").

310. *See* Santiago v. People, 51 V.I. 283, 298 (2009) (citing V.I. CODE ANN. tit. 3, § 881(g)(9) and V.I. CODE ANN. tit. 4, § 241)).

311. *Id.*

312. *See Harris*, 123 P.3d at 1171 (noting legislature's intent in passing the CCJRA to draw a distinction between records of "official actions" and all other records of criminal justice agencies for the purpose of determining public access).

313. COLO. REV. STAT. § 24-72-304(1)–305(1).

314. *See Harris*, 123 P.3d at 1174 ("In granting such discretion, the legislature intended the custodian to consider and balance the public and private interests relevant to the inspection request.").

315. Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't, 196 P.3d 892, 899 (Colo. 2008);

b. A Compromise: Increased Access, Increased Protections

Despite efforts to limit access to criminal history information through statutory classifications, there is currently a massive amount of information already in the public sphere.[316] The mass availability of government records has led to the prevalence of employer- and landlord-conducted criminal background checks, and ultimately discrimination.[317] To control access to privately disseminated, and often inaccurate, criminal history information, a compromise between expanded access to official government information and increased expungement opportunities may be the best answer.

Legislatures can draft legislation to incentivize employers and landlords to access more accurate and up-to-date information through official state systems rather than private companies.[318] Incentives may include instant online access to state-held information for a nominal fee, and legal protection from negligent hiring claims and from certain employment discrimination claims based on erroneous information.[319] At the same time, legislatures should provide procedural protections for record holders whose information will become more widely available. For example, users must self-certify that they have a legitimate reason for seeking the record information and that they obtained the subject's permission.[320]

Further protections may include restricting the *type* of information available, such as old convictions that are eligible for expungement under a statute's waiting period.[321] Legislatures could also decrease waiting-period times, as well as reward rehabilitation and reentry efforts by including time on probation and parole as counting toward the waiting period.[322]

see also Harris, 123 P.3d at 1174–75; Wick Commc'ns Co. v. Montrose County Bd. of County Comm'rs., 81 P.3d 360, 364 (Colo. 2003) (noting the legislature's preference for broad disclosure of public records under CORA).

316. See Part II.C.2 for a discussion of the modern dissemination of information, specifically criminal history information.

317. *See* Wallace Wade, *Who's Lying Now?: How the Public Dissemination of Incomplete, Thus Half-Truthful, Criminal Record Information Regarding a Statutorily Rehabilitated Petty Offender Is an Unjust Penalty and Why Laws Regarding Expungement of and Restrictions on Dissemination of Criminal Records Information in California Must Be Reformed*, 38 W. ST. U. L. REV. 1, 6 (2010) ("[I]t has been estimated that more than 80% of employers in the United States perform a criminal background check on prospective employees.").

318. *See* H.B. 4701, 2008 Leg. 185th Sess. (Ma. 2008) (proposing the creation of an electronic database of criminal offender record information which provides different levels of access to a wide variety of users).

319. *Id.* This approach was taken by Massachusetts' Governor Deval Patrick in 2010 with a reform bill that instituted a new criminal record web-based service allowing for greater official access to records and greater protections for record holders. *See* Massing, *supra* note 18, at 22 (stating that the governor's bill would expand availability of official criminal offender record information).

320. *See id.* (stating that users are able to instantly obtain criminal offender record information online by self-certifying that they have a legitimate purpose for requesting the information and permission to do so).

321. See *supra* notes 291–94 and accompanying text for description of "waiting periods." *See also* Massing, *supra* note 18, at 22.

322. *See* Massing, *supra* note 18, at 22.

c. Special Law Enforcement Access for Bail and Sentencing

The exception allowing expunged records to be accessed by law enforcement represents a near consensus among legislatures: the public interest in law enforcement's ability to conduct its duties outweighs an individual's interest in shielding his or her criminal record from all state agencies. Arrest information alone may be highly relevant in bail and sentencing considerations. For example, cases are often dismissed when witnesses fail to testify, mainly as a result of witness intimidation.[323] An individual may have twenty-five arrests, most from crimes of which he was guilty, but his charges are continually dropped for lack of witness testimony.[324] Furthermore, a judge may better assess bail risk with access to criminal history that reveals whether an individual complied with previous bail conditions.[325]

Nevertheless, broad judicial discretion in bail and sentencing determinations allows for misuse of criminal records and may implicate due process rights.[326] Furthermore, while law enforcement may think of expungement as "hiding" desired information, expungement also serves to ensure that data held by various repositories remains up to date and accurate.[327] Not only does accurate data support agency integrity, but it also protects defendants' rights in bail and sentencing hearings.[328] With this is mind, drafters of expungement statutes should not "tie the hands of law-enforcement agencies,"[329] but rather assist them in the appropriate use of criminal records. For example, criminal record statutes and rules of criminal procedure could both contain provisions applicable to sentencing judges, ensuring that they assign

323. *See* United States v. LaFontaine, 210 F.3d 125, 134 (2d Cir. 2000) (noting that the obstruction of justice in the form of witness intimidation has been a traditional ground for pretrial detention by the courts); Joan Comparet-Cassani, *Balancing the Anonymity of Threatened Witnesses Versus a Defendant's Right of Confrontation: The Waiver Doctrine After* Alvarado, 39 SAN DIEGO L. REV. 1165, 1194–95 (2002) (discussing the problem of witness intimidation, which often precludes crucial evidence and testimony that prevents the prosecution of crimes).

324. *Id.*

325. *See* People v. Mohammed, 653 N.Y.S.2d 492, 499 (App. Div. 1996) (noting that a factor in determining bail is the "defendant's record or history in returning to court for his required court appearances").

326. *See* United States v. Salerno, 481 U.S. 739, 748 (1987) (upholding the constitutionality of the 1984 Bail Reform Act due to the regulatory, rather than punitive, nature of pretrial detention); Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 930, 934 (2013) (noting that the procedural safeguards found adequate in *Salerno* to protect defendants in preventive detention proceedings are not required in many state bail proceedings and thus "[t]he bail determination process in many state courts creates a grave risk of an erroneous and arbitrary deprivation of liberty").

327. *See* State v. XYZ, Corp., 575 A.2d 423, 426 (N.J. 1990) (noting that "a central purpose of the expungement statute was to broaden[] the reliable base of information that will be maintained for law enforcement" (alterations in original) (quoting State v. A.N.J., 487 A.2d 324, 328 (N.J. 1985))).

328. *See* United States v. Strayer, 846 F.2d 1262, 1267 (10th Cir. 1988) (due process requires sentences to be based on accurate information); State v. Spears, 596 N.W.2d 375, 380 (Wisc. 1999) ("It is well-settled that a criminal defendant has a due process right to be sentenced only upon materially accurate information.") (citation omitted).

329. *Id.*

different weights to arrests and convictions, or instructing that they only take arrests into account when a clear pattern of witness intimidation is demonstrated. Although expunged records are available for review,[330] the statutes should instruct judges to consider an expunged record to have less weight than a nonexpunged record.

6. Maintenance and Enforcement

Until all state repositories, law enforcement, prosecutors, courts, and corrections agencies are comprehensively linked, maintaining complete and accurate record keeping will continue to be extremely difficult.[331] Following Pennsylvania's example, legislatures must place an affirmative duty on all agencies to regularly ensure record accuracy and completeness, especially before dissemination.[332] After a court issues an expungement order, all relevant state and local agencies must be bound to follow its directives.[333]

Enforcement of an individual's expungement order should not be solely delegated to that individual. Specific statutory provisions regarding individual rights, including the right to contest data accuracy, are of course crucial.[334] However, statutes must also create a remedy in damages for noncompliance by state agencies.[335] If expunged records are classified as private data, then unauthorized release should be punishable as a misdemeanor.[336]

330. See *supra* notes 101–103 and accompanying text for a discussion of judicial discretion in sentencing.

331. See *supra* Part II.C.2 for a discussion of disjointed record keeping of criminal records. *See also* Eagle v. Morgan, 88 F.3d 620, 623 (8th Cir. 1996) (involving police disclosure of a criminal record, the court noted that "because the responsible authorities had failed to file notification of the expungement of Eagle's record, the report obtained by the officers did not indicate that the listed felony offense had been stricken").

332. 18 PA. CONS. STAT. § 9111 (2014). This section of the Pennsylvania statute states: "It shall be the duty of every criminal justice agency within the Commonwealth to maintain complete and accurate criminal history record information and to report such information at such times and in such manner as required by the provisions of this chapter or other applicable statutes." *Id.* Upon discovery of inaccurate data, it is the responsibility of the agency to promptly correct the record and notify recipients of the record, including the central repository, of the required correction. *Id.* § 9114; *see also id.* § 9121(b)(2) (agencies must "extract from the record all notations of arrests . . . where: (i) three years have elapsed from the date of the arrest; (ii) no conviction has occurred; and (iii) no proceedings are pending seeking a conviction").

333. See *supra* note 164 for Pennsylvania's post-expungement notification process.

334. See *supra* notes 198–200 for the "rights of subjects of data" provided by Minnesota statute. *See also* 18 PA. CONS. STAT. § 9183 (providing that an individual may petition the court for enforcement of an expungement order).

335. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-4051 (2015) (once a judge requires an order to be delivered to all law enforcement agencies and courts, barring release of the relevant records, "[a]ny person who has notice of such order and fails to comply with the court order . . . shall be liable to the person for damages from such failure").

336. *See, e.g.*, OHIO REV. CODE ANN. § 2953.35 (LexisNexis 2015) (making unauthorized release of "any information or other data concerning any arrest, complaint, indictment, trial, hearing, adjudication, conviction, or correctional supervision the records with respect to which the officer or employee had knowledge of were sealed . . . or were expunged . . . is guilty of divulging confidential information, a misdemeanor of the fourth degree").

Legislatures must keep in mind that drafting increased statutory protection for record holders may simultaneously affect the statutorily instructed balancing analysis. For example, the Supreme Court of Pennsylvania noted that statutory provisions that "reduce the adverse effect of retaining an arrest record" must be weighed in addition to the *Wexler* factors.[337] The court cited title 18, section 9121(b)(2) of the Pennsylvania Consolidated Statutes as one example, as this provision "forbids criminal history record-keeping agencies from disseminating to an individual or noncriminal justice agency any record of an arrest which did not result in a conviction if it is more than three years old."[338]

7. Complementary Programs and Organizations

The growing use of deferred adjudication and sentencing reflects policymaker and law enforcement recognition that public safety may be better served "by keeping certain kinds of offenders out of the justice system entirely."[339] Diversion programs encourage rehabilitation by providing a clean slate to individuals who demonstrate good character and behavior.[340] If an individual successfully completes a diversion program, the charges may be dismissed (avoiding the creation of the criminal record to begin with), the record of conviction set aside, or the record expunged.[341] Although prosecutors usually control participation in deferred adjudication,[342] courts and defending counsel,

337. Commonwealth v. D.M., 695 A.2d 770, 773 n.2 (Pa. 1997).

338. *Id.* The court provides other examples:

> Title 18 Pa.C.S. § 9124(b)(1) forbids licensing and certification boards from even considering arrests not resulting in convictions, regardless of their age, when acting on an application for a license, certificate, or permit. Title 18 Pa.C.S. § 9125 forbids any employer from denying employment on the basis of an arrest not resulting in conviction. Title 18 Pa.C.S. §§ 9181 and 9183 provide sanctions for violation of the statute, including administrative discipline, injunctive relief, actual damages, attorney's fees, costs of litigation, and punitive damages.

Id.

339. Love, *supra* note 252, at 6; *see* Commonwealth v. Armstrong, 434 A.2d 1205, 1207–08 (Pa. 1981) ("[T]he Criminal Procedural Rules Committee noted that the [ARD] program was designed to dispose promptly of relatively minor cases involving social or behavioral problems 'which can best be solved by programs and treatments rather than by punishment.'" citing PA. R. CRIM. P. 185 comment)); OHIO REV. CODE ANN. § 2951.041(B) (individuals charged with nonserious offenses, with no previous felony convictions for violence, may participate in state diversion program if the court finds that such intervention would reduce the likelihood of future criminal activity; no adjudication of guilty upon successful completion).

340. *See* Commmonwealth v. Welford, 420 A.2d 1344, 1345 (Pa. Super. Ct. 1980) ("[B]y recommending an accused for ARD, the Commonwealth agrees that he will be free from criminal responsibility if he successfully completes the ARD program.").

341. Love, *supra* note 252, at 10; *see Armstrong*, 434 A.2d at 1208 ("Indeed, the fundamental appeal of ARD for first time offenders is the avoidance of a criminal record."). In New York, for example, diversion options include both a pre-plea option, N.Y. CRIM. PROC. LAW § 216.00, .05 (McKinney 2015), or a deferred sentence/post-guilty plea option for qualifying individuals who complete a drug treatment program, after which charges are dismissed and the record sealed. *See* People v. Jenkins, 898 N.E.2d 553 (N.Y. 2008).

342. *See* Love, *supra* note 252, at 10 ("Eligibility for deferred adjudication tends to be controlled by prosecutors.").

advising defendants of their options, would benefit from statutory guidance regarding the expungement opportunities attached to each type of rehabilitative program.

Hiring a lawyer to petition a court for expungement is often unaffordable for record holders.[343] Fortunately, there are organizations that provide expungement services to the indigent. One organization, Philadelphia Lawyers for Social Equity, created the Criminal Record Expungement Project (C-REP). The project "works to lower the barriers to employment, public benefits, and public housing encountered by those who have criminal history record information through direct representation, community education, and legislative advocacy."[344] On behalf of low-income clients, C-REP has filed over four thousand expungement petitions in the Court of Common Pleas of Philadelphia County since November 2010.[345] The majority of C-REP's clients indicated that they sought expungement to remove the most significant barrier to employment: their criminal record.[346] C-REP's efforts have proved almost entirely successful; since November 2010, ninety-five percent of its expungement petitions have been granted.[347]

IV. CONCLUSION

Courts and legislatures have developed expungement law under the same precept of proportionality underlying the criminal justice system. The legal framework surrounding expungement demands balancing the benefits of obtaining a clean slate with the purported harms to society. Yet a lingering critique of expungement as an effort to "hide the truth" works to bolster the public interest claim in opposition of expungement. Many courts have emphasized that history cannot be changed; the fact of the arrest or conviction is a fact that may not be altered by an expungement order. Some critics similarly find the effort to hide the truth through expungement to pose moral and practical dilemmas.

343. *See, e.g.*, KAN. STAT. ANN. § 21-6614(g)(2) (2014) ("[A] petition for expungement shall be accompanied by a docket fee in the amount of $100."); *see* Hancock, *supra* note 44, at 528 (noting that "[e]xpungement costs between $450 and $2,000 in Philadelphia, including $15.00 per petition for expungement and $12.50 per petition for redaction" and that "[a]n individual must file a separate petition for each arrest and the individual must pay an additional filing fee for each petition filed").

344. Hancock, *supra* note 44, at 516. Similar organizations include the Ohio Ex-Offender Reentry Coalition, http://www.reentrycoalition.ohio.gov (last visited Mar. 6, 2015), and the Minnesota Legal Services Coalition, which created the "Criminal Expungement Start-to-Finish" program, an "interactive online resource to help pro bono attorneys pursue criminal expungement on behalf of indigent clients." *Minnesota Legal Servies Coalition Announces New "Start-to-Finish" Expungement Tool for Pro Bono Attorneys*, PROJUSTICEMN (Mar. 11, 2010), http://www.projusticemn.org/news/article.301722.

345. E-mail from Ryan Hancock, Cofounder and Bd. Chair, Phila. Lawyers for Soc. Equity, to author (March 29, 2014) (on file with author).

346. *See* Hancock, *supra* note 44, at 519 (providing statistics on C-REP members seeking to expunge their records for purposes of obtaining employment).

347. E-mail from Ryan Hancock, *supra* note 345.

Nevertheless, the debilitating effects of a criminal record are painfully real. Expungement law is not an effort to rewrite history, but "reflect[s] the fact that past convictions followed by a lengthy period of law-abiding conduct simply are not relevant in predicting future criminal activity or assessing credibility."[348] It is only through extending opportunity for civic engagement that the current stigma of criminal records may begin to dissolve, breaking the cycle of criminal records, collateral consequences, and recidivism.

If collateral consequences were deemed punitive, and, therefore, taken into consideration in charging, plea bargaining, and sentencing, the need for expungement would be less. A fair sentencing process requires proportionality between the offense and the punishment, and uniformity of imposed sentences among similar offenders. Thus, because collateral consequences are not factored into the "total package" of the sentence, and until *Padilla* generates a wider scope in its applicability, expungement is a necessary tool to limit those consequences and ensure fairness in punishment.

348. Massing, *supra* note 18, at 23.