Harvard Journal of Law & Technology
Volume 38, Number 1 Fall 2024

CHASING A CLEAN SLATE: THE SHIFTING ROLES OF PRIVACY AND TECHNOLOGY IN CRIMINAL RECORD EXPUNGEMENT LAW AND POLICY

Sarah E. Lageson & Alessandro Corda***

ABSTRACT

This Article explores criminal record expungement policy in the United States through the lens of privacy interests. Embarking on a historical policy analysis spanning from the 1950s to the 2020s, it unveils the evolving interplay between privacy rights and the shifting tides of rehabilitative and punitive ideologies and policies in the criminal legal system. The analysis shows that privacy concerns initially emerged as a silent underpinning of rehabilitative policies where privacy was recognized as key to rehabilitation but were subsequently dismissed in the "tough-on-crime" era, where emphasis was placed on public punishment and labeling in the name of public safety. The Article then posits that contemporary strides in criminal record expungement legislation and the embrace of automated record-clearing processes through algorithmic means find their roots in our current moment that emphasizes personal data privacy alongside criminal justice reform.

The Article argues that in the current data-driven landscape, informational privacy — the right of individuals to control and protect their personal data from unauthorized access or disclosure — has emerged as an essential yet often understated element in legal reforms addressing criminal record discrimination. These reforms are unfolding against the backdrop of societal calls for safeguarding individuals against lifelong stigmatization and unwarranted surveillance. Privacy considerations, serving as a surrogate for rehabilitation, also help avoid "soft on crime" criticism, redirecting attention toward providing individuals with an opportunity to rebuild their lives free from perpetual judgment.

However, the Article also introduces a nuanced perspective, cautioning against unbridled optimism in these technological

* Sarah E. Lageson is Associate Professor at Northeastern University School of Law and School of Criminology and Criminal Justice, and an affiliated scholar at the American Bar Foundation.

** Alessandro Corda is Reader at Queen's University Belfast School of Law and an affiliated scholar at the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota Law School.

Both authors contributed equally and are listed in reverse alphabetical order. For helpful comments and suggestions, thanks to Juan Sandoval, Andrew Henley, Bennett Capers, and Jenny Roberts. We also thank the staff of the *Harvard Journal of Law & Technology* for their excellent editorial assistance.

advancements meant to mitigate the collateral consequences of having a criminal record. Specifically, it scrutinizes the potential pitfalls inherent in the algorithmic automation of record clearance processes, as technological realities may also undermine the purported success and fairness of recently enacted criminal record clearance mechanisms. Ultimately, the Article contributes a timely and critical analysis that not only illuminates the historical trajectory of privacy considerations in criminal record expungement law and policy but also injects a note of caution regarding the implications of contemporary technological solutions.

TABLE OF CONTENTS

I. INTRODUCTION 3

II. THE U.S. CRIMINAL LEGAL SYSTEM, CRIMINAL RECORDS, AND PRIVACY 8

III. METHODOLOGICAL APPROACH..12

IV. THREE ERAS OF CRIMINAL RECORD PRIVACY.............................13
A. Era 1: Criminal Record Privacy in the Era of Rehabilitation: 1950s–1970s...16
B. Era 2: Criminal Record Privacy in the Era of Mass Punishment: 1980s–2000s..23
C. Era 3: Criminal Record Privacy in the Data-Driven Era: 2010s–Present..29
1. The Rise of Clean Slate Policies...34

V. PRIVACY AS A PROXY FOR REHABILITATION................................37

VI. THE PITFALLS OF CRIMINAL RECORD TECHNOLOGY 40

VII. CONCLUSION 44

I. INTRODUCTION

As criminal justice reform gains momentum in the United States, the past decade has been characterized by significant efforts at the state level to mitigate the "collateral" consequences of a criminal record. By 2024, more than two-thirds of U.S. states have passed laws introducing or broadening relief mechanisms[1] — namely, certificates of rehabilitation, sealing, expungement, and set-aside — aimed at amending, concealing, or erasing criminal history records.[2] Criminal record clearance

---

1. *50-State Comparison: Expungement, Sealing & Other Record Relief*, COLLATERAL CONSEQUENCES RES. CTR. (July 2024), https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside-2-2/ [https://perma.cc/8QX9-8U9M].

2. *See* Alessandro Corda, *Collateral Consequences and Criminal Justice Reform: Successes and Challenges*, 52 CRIME & JUST. 447, 467 (2023):

> Relief via expungement, sealing, or set-aside is available by statute or court rule for at least some felony convictions in 43 states, for many misdemeanor convictions in 46 states and the District of Columbia, and for most nonconviction records in all 50 states and Washington, DC. Fourteen states offer broad relief for both felony and misdemeanor convictions, 23 offer limited felony and misdemeanor relief, and six allow for relief for misdemeanors and pardoned felonies. Four states and the federal government do not have general sealing, expungement, or set-aside mechanisms.

legislation has been described as the outcome of policy reform efforts rooted in non-ideological and bipartisan considerations.[3] Lobbying efforts to expand criminal record clearance over the past decade have centered on economic arguments to appeal to a broad, bipartisan base. The Center for American Progress argues that "it is vital that such policies are implemented quickly so that justice-involved individuals can access the essential life resources they need to survive and can contribute to the nation's economy recovery."[4] Likewise, the Koch Foundation has blogged and penned op-eds in support of record clearance reform.[5] In this context, a growing number of states, backed by nationwide movements such as the Clean Slate Initiative,[6] are implementing legislation to automate the clearance of certain criminal records.[7] This is achieved by adopting algorithmic methods to assess eligibility and expedite the clearance process for individuals who meet specific criteria.[8]

Sealing hides the record of past criminal convictions from the public but allows access for law enforcement and some other agencies, while expungement erases or removes certain convictions from one's records entirely. Legislative texts and policy documents sometimes confuse these terms. In this Article, unless otherwise specified, we use "expungement" to refer broadly to record clearance mechanisms.

3. *See* Alessandro Corda, *Reshaping Goals and Values in Times of Penal Transition: The Dynamics of Penal Change in the Collateral Consequences Reform Space*, 49 LAW & SOC. INQUIRY 1479, 1486 (2024) (noting the "convergence of ideological, social, and economic considerations that have created momentum for change" and that reform "has gained traction across the political spectrum in a distinctive fashion . . . [bringing] together diverse stakeholders, including policy makers, legal experts, organizations, and directly impacted individuals" (footnote omitted)).

4. Akua Amaning, *Advancing Clean Slate: The Need for Automatic Record Clearance During the Coronavirus Pandemic*, CTR. FOR AM. PROGRESS (June 25, 2020), https://www.americanprogress.org/article/advancing-clean-slate-need-automatic-record-clearance-coronavirus-pandemic/ [https://perma.cc/BE7J-ATEB].

5. *See, e.g.*, Mark V. Holden, *The Evolution of Criminal Justice Reform*, KOCH NEWSROOM DISCOVERY NEWSL. (May 2019), https://discovery.kochind.com/discovery/issues/2019/may/the-evolution-of-criminal-justice-reform [https://perma.cc/UZA4-A3QA]; *Harvard Expands Expungement Project in Kansas and Western Pennsylvania with Support from the Chan Zuckerberg Initiative and the Charles Koch Foundation*, CHARLES KOCH FOUND. (Sept. 23, 2019), https://charleskochfoundation.org/news/harvard-expands-expungement-project-in-kansas-and-western-pennsylvania/ [https://perma.cc/9CE8-MXFJ].

6. *See Clean Slate in States*, THE CLEAN SLATE INITIATIVE, https://www.cleanslateinitiative.org/states [https://perma.cc/A6KZ-6WMM].

7. *See* Kristian Hernández, *More States Consider Automatic Criminal Record Expungement*, THE PEW CHARITABLE TRS. (May 25, 2021), https://stateline.org/2021/05/25/more-states-consider-automatic-criminal-record-expungement/ [https://perma.cc/MTE3-U6KC]; Nikki Pressley, *Providing a Clean Slate: Removing Barriers to Employment*, TEX. PUB. POL'Y FOUND. (Apr. 2022), https://www.texaspolicy.com/wp-content/uploads/2022/04/2022-04-ROC-CleanSlateBarrierstoEmployment-NikkiPressley.pdf [https://perma.cc/XRN2-RETH].

8. *See*, *e.g.*, *The State of CT Leads Implementation of the Clean Slate Law*, ILAB (Oct. 22, 2024), https://www.ilabquality.com/state-of-ct-leads-clean-slate-law/ [https://perma.cc/Y52Y-YJEE] ("The team's role will include ensuring the state's algorithms accurately determine which convictions are eligible for erasure while addressing the issues that caused initial delays."); Alia Toran-Burrell & David Crawford, *Making Automatic Record Clearance a People-Centered, End-to-End Service*, CODE FOR AMERICA (Mar. 9, 2023), https://codefora

This Article examines the developments of criminal record clearance policy in the U.S. through the lens of privacy interests. Criminal record clearance mechanisms, such as expungement and sealing, are traditionally understood as rehabilitative, post-conviction or post-dismissal measures meant to ensure that people, once convicted or acquitted of a crime, no longer have records of their arrest or conviction in the public domain.[9] Accordingly, they may regain access to equal opportunities to secure employment and housing and to live meaningfully.[10] These policies are thus centered around fairness, proportionality, and forgiveness.[11]

However, we argue that a much less discussed driver of the undeniable success of criminal record clearance policy over the past ten years is related to data privacy. With the advent of the so-called era of "big data"[12] and rapid developments in data aggregation, privacy concerns have become even more central to our lives and public discourse. In our data-rich environment, a criminal record constitutes "eternal,"[13]

---

merica.org/news/making-automatic-record-clearance-a-people-centered-end-to-end-service/ [https://perma.cc/7KZL-XX9C] ("Once we had created 'individuals' from the court record data, all that was left was to write an algorithm that looked at these individuals' conviction totals, types, and timelines."). *But see* SEARCH, TECHNICAL AND OPERATIONAL CHALLENGES OF IMPLEMENTING CLEAN SLATE 15 (2023), https://www.search.org/files/pdf/Tech_Op_Challenges_Clean_Slate_ResearchFindings.pdf [https://perma.cc/4ER9-AJWA] ("While humans can often process unstructured information, it is challenging for computer algorithms to accurately interpret and classify free-form text data, which can hinder the process of determining if a person qualifies to have their record sealed under Clean Slate.").

9. *See* JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 113–14 (2015) (noting that the purpose of sealing and expungement policies "is to encourage rehabilitation and to recognize that a previously convicted offender has succeeded in turning his life around").

10. *See*, *e.g.*, Hakim Nathaniel Crampton, *Paying a Debt to Society: Expunging Criminal Records as a Pathway to Increased Employment*, 701 ANNALS AM. ACAD. POL. & SOC. SCI. 206, 207 (2022); Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 8 (2018).

11. *See* THE CLEAN SLATE INITIATIVE, CLEAN SLATE TOOLKIT: UNLOCKING OPPORTUNITY THROUGH AUTOMATED RECORD-CLEARING 5 (2018), https://static1.squarespace.com/static/62cd94419c528e34ea4093ef/t/62d6bb4c65053b64dddba12b/1658239820584/Clean+Slate+Toolkit.pdf [https://perma.cc/WS9D-8TW7] ("Enabling justice-involved individuals to earn a clean slate will make it possible to move on with their lives, provide for their families, and have a fair shot at the second chance they have earned.").

12. *See* Gali Halevi & Henk F. Moed, *The Evolution of Big Data as a Research and Scientific Topic: Overview of the Literature*, 1 RES. TRENDS 1, 3 (2012) ("The term . . . refers to a wide range of large data sets almost impossible to manage and process using traditional data management tools — due to their size, but also their complexity."); *see also* Steve Lohr, *The Origins of 'Big Data': An Etymological Detective Story*, N.Y. TIMES BITS BLOG (Feb. 1, 2013), https://archive.nytimes.com/bits.blogs.nytimes.com/2013/02/01/the-origins-of-big-data-an-etymological-detective-story/ [https://perma.cc/C9XF-GVLT] (tracing the origins of the term to conversations within the high-tech community during the 1990s).

13. JACOBS, *supra* note 9 (describing the eternal criminal record as the permanent retention of a person's criminal history, which often lead to lifelong consequences, stigma, and limited opportunities, even after individuals have served their sentences or a charge has been dismissed).

"digital,"[14] and "disordered"[15] forms of punishment. And while concerns about criminal record-based discrimination have long been centered around collateral consequences,[16] criminal records are increasingly framed as a form of personal data to be managed and a governmental surveillance tool to be tempered.[17]

Our analysis provides historical and contextual support for the argument that in today's data-driven era, concerns for personal privacy are emerging as an important, yet not often discussed, concept in legal reform efforts aimed at concealing criminal record information. This is happening alongside growing arguments for accountability in big data policing and algorithmic fairness within and beyond the criminal legal system.[18]

Following a contextual summary of the relationship between privacy and criminal records within the criminal legal system in Part II and a note on our methodology employed in Part III, our argument in Part IV is developed through a historical policy analysis from the 1950s to the 2020s highlighting how privacy considerations first represented an underpinning of rehabilitative policies (1950s–1970s), which were then squarely dismissed by punitive policymaking during the "tough on crime" period (1980s–2000s). In the current era (2010s–present), we

---

14. SARAH ESTHER LAGESON, DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE 6–9 (2020) (defining digital punishment as the ongoing and public exposure of individuals' criminal records through digital platforms and databases).

15. *See* Alessandro Corda & Sarah E. Lageson, *Disordered Punishment: Workaround Technologies of Criminal Records Disclosure and the Rise of a New Penal Entrepreneurialism*, 60 BRIT. J. CRIMINOLOGY 245, 246 (2020) (describing disordered punishment as the fragmented and inconsistent manner in which criminal records are managed and disclosed, which can result in unpredictable and uneven consequences for individuals).

16. *See*, *e.g.*, Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1799–803 (2012) (highlighting the numerous, unjust, and enduring formally nonpunitive sanctions and restrictions faced today by convicted individuals); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826–44 (2015) (arguing that arrest records are now systematically employed by noncriminal justice actors, such as immigration authorities, landlords, employers, schools, and child welfare agencies, not due to their inherent reliability but because of their easy accessibility).

17. *See* Danielle Keats Citron, *A More Perfect Privacy*, 104 B.U. L. REV. 1073, 1076 (2024) ("The quantity and quality of personal data [including criminal history information] being amassed has exceeded all warning; the distinction between public and private collection efforts has vanished; the privacy that people want, expect, and deserve has been, and continues to be, under assault."); Sarah Lageson, *Criminally Bad Data: Inaccurate Criminal Records, Data Brokers, and Algorithmic Injustice*, 2023 U. ILL. L. REV. 1771, 1787 (2023) (observing that criminal records "[have] now become part of a broader personal data ecosystem"); Sarah Esther Lageson, *Criminal Record Stigma and Surveillance in the Digital Age*, 5 ANN. REV. CRIMINOLOGY 67, 69 ("[C]riminal record data are an increasingly integral part of the everyday surveillance of the public and private sectors.").

18. *See* ANDREW GUTHRIE FERGUSON, THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT (2017) (discussing how algorithm-driven policing can propagate biases and discrimination in law enforcement); Aleš Završnik, *Algorithmic Justice: Algorithms and Big Data in Criminal Justice Settings*, 18 EUR. J. CRIMINOLOGY 623, 623 (2021) (presenting and discussing the context, potential, and pitfalls of "algorithmic justice" in the criminal legal system).

posit that criminal record clearance is increasingly understood as a neutral acknowledgement of criminal records as "data" requiring privacy safeguards managed through a logic of administrative fairness.[19] At the same time, the aim of protecting individuals' personal privacy can also be framed in modern "second chance" rehabilitative terms, thereby making privacy a proxy for rehabilitation. In turn, this nexus of privacy, forgiveness, and implied rehabilitation through a "second chance" framework helps avoid triggering "soft on crime" criticisms and has eased the path for passing widespread record clearance legislation. Recent trends toward automation in criminal record clearance (so-called "Clean Slate" policies) and related narratives, we argue, make these aspects particularly clear.

As we observe in Part V, privacy today can also be understood as a proxy for rehabilitation. A data privacy perspective in criminal record policy contexts is intimately associated with personal autonomy and economic mobility to the extent that the individual can fulfill themselves only if a sufficient degree of privacy can be enjoyed, including the freedom from being indefinitely stigmatized and discriminated against due to criminal history information. In this manner, criminal record clearance statutes also represent mechanisms aimed at regaining control over how personal criminal record data are disseminated, processed, accessed, and used in contemporary societies where technology plays a key role. We posit that the privacy approach to criminal legal reform may prove more effective than rehabilitation-focused policies and narratives of the past that aimed to reform individuals who are marked by a criminal record and excluded from mainstream society. The described broader social context in which current policy discussions and policymaking are inscribed has made privacy-inspired reforms palatable, particularly as the public reckons with broad critiques of big data surveillance and calls to defund and even dismantle the criminal legal system.

Yet, as we discuss in Part VI, technology also introduces important problems which may undermine the effectiveness of current efforts. While privacy holds central importance in criminal record clearance statutes currently being adopted across U.S. jurisdictions, these laws are facing challenges in keeping up with the rapid advancements in technology. As a result, their efficacy in achieving their policy objectives may be significantly diminished. We conclude, noting that, as the momentum of criminal record clearance reform continues unabated, it is an opportune moment to broaden legislative initiatives to address the limitations identified in this Article and make record clearance mechanisms suitable and ultimately effective in today's data-driven digital age.

---

19. *See infra* Section IV.C.

II. THE U.S. CRIMINAL LEGAL SYSTEM, CRIMINAL RECORDS, AND PRIVACY

As Barbara Hudson noted, "[t]hinking about punishment and the right to privacy is difficult in the first place because of the lack of firm establishment of any well-defined right to privacy."[20] Notoriously, the right to privacy is not explicitly codified in the U.S. Constitution[21] and its definition and operation boundaries are both extremely slippery concepts.[22] The American understanding of privacy is primarily focused on protecting individual liberty from unwarranted government interference.[23] Grounded in constitutional principles, this understanding emphasizes the importance of limiting the government's ability to intrude on personal life, decisions, and spaces.[24] From this angle, the traditional terrain for discussions about privacy in the criminal legal domain is rooted in the Fourth Amendment, regarding what constitutes a reasonable expectation of privacy in the cases of searches of places or seizures

---

20. Barbara Hudson, *Secrets of the Self: Punishment and the Right to Privacy*, *in* PRIVACY AND THE CRIMINAL LAW 137, 138 (Erik Claes, Antony Duff & Serge Gutwirth eds., 2006).

21. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its progeny, the Supreme Court noted that the right to privacy lies in the shadow of the Constitution, the so-called "penumbra of rights," and recognized the existence of a "zone of privacy" that emanates from various constitutional guarantees. *Id.* at 484. In detail, the Supreme Court ruled that state intervention in a married couple's use of birth control devices constituted a violation of the constitutionally protected right to privacy for the couple. *See id.* at 485. On *Griswold*'s legacy, see, e.g., Lana Birbrair, *50 Years of Privacy Since Griswold: Gertner, Suk and Tribe Discuss Landmark Case*, HARV. L. TODAY (Apr. 3, 2015), https://hls.harvard.edu/today/50-years-privacy-since-griswold/ [https://perma.cc/U7WX-B2XP]; Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J.F. 316, 319–22 (2015). On the line of cases establishing constitutional protections for informational privacy, see generally Carmel Shachar & Carleen Zubrzycki, *Informational Privacy After Dobbs*, 75 ALA. L. REV. 1, 10–24 (2023).

22. *See* Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 393 (1978) ("The concept of 'privacy' is elusive and ill defined."); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 482 (2006) (proposing to "shift focus away from the vague term 'privacy' and toward the specific activities that pose privacy problems").

23. *See, e.g.*, David A. Sklansky, *Too Much Information: How Not to Think about Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1113–15 (2014) (arguing for an understanding of privacy grounded in the idea of "refuge" and shaped by its longstanding associations with the concepts of retreat and personal autonomy); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 583–84 (1989) (observing that the Fourth Amendment's prohibition of unreasonable government searches and seizures embodies "the eternal tension between governmental power and individual rights . . . pit[ting] the government's power to detect and redress violations of its laws against an individual's interest in a private life free from government intrusion").

24. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161–62 (2004) (showing that European countries emphasize privacy as a component of human dignity, rooted in protecting personal reputation and identity while, in contrast, the U.S. emphasizes privacy in the context of individual liberty, emphasizing freedom from government intrusion).

of persons or objects,[25] and the Fifth Amendment's clause against self-incrimination, which together create a "sacred" zone of privacy for the individual.[26] In their seminal late nineteenth century article on *The Right to Privacy*, Warren and Brandeis tackled the invasiveness of newspapers and photographs made possible by printing technologies, undertaking a reputational damage perspective.[27] However, privacy rights in the criminal legal context have been historically dismissed with regard to the adverse publicity[28] epitomized by the infamous "perp-walk" — the practice in which a suspect, typically in handcuffs, is publicly escorted by law enforcement from one location to another, often for media coverage[29] — and the spread of mugshots across the internet.[30]

While many law enforcement records are exempt from public disclosure under Exemption 7 of the Freedom of Information Act

25. *See* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 503 (2007); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1265 (1999); *see also* Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CALIF. L. REV. 805, 805 (2016).

26. William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1017–18 (1995) ("The idea that the Fourth and Fifth Amendments guarantee broad privacy protection dates back at least to *Boyd v. United States*, an 1886 Supreme Court decision that laid the foundation for modern search and seizure and self-incrimination doctrine." (footnote omitted)).

27. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) ("Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the housetops." (footnotes omitted)).

28. Sarah Esther Lageson, *The Politics of Public Punishment*, 17 CRIMINOLOGY & PUB. POL'Y 635, 638 (2018) ("In a digitally connected world, public shaming has reached new, global heights. The reach of online shaming, trolling, and bullying has stretched across social and political lines to impact nearly everyone in some way. These incidents are then indexed into search results for a person's name, attaching the criminal accusation for a digital eternity." (citation omitted)).

29. Palma Paciocco, *Pilloried in the Press: Rethinking the Constitutional Status of the American Perp Walk*, 16 NEW CRIM. L. REV. 50, 51 (2013).

30. Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 RUTGERS L. REV. 557, 561 (2018) ("[F]ree speech advocates, media outlets, and victims' rights organizations urge for open access to these records, arguing that the public has the right to know about arrests . . . . [Arrest records] serve[] an important public safety role by encouraging assistance in criminal investigations and deterring future criminality . . . [and are] necessary for a just, democratic society.").

(“FOIA”) of 1966[31] and the Privacy Act of 1974[32] (and the various state equivalents of those statutes[33]), broad disclosure is allowed when it comes to one’s personal criminal record, including arrest, jail, criminal court, and prison records. As it has been noted,

> [P]olice blotter has long been publicly available as a log of law enforcement activity. Local jail inmate rosters of daily bookings and current state prison inmate rosters have also been widely available for public inspection and may include the names and photographs of incarcerated people. There is a common law right to ‘access court records to inspect and to copy,’ which is codified through state constitutions or the legislation governing criminal court operations.[34]

The reach of these records has been greatly expanded by the widespread sale or distribution of criminal record data to the private sector for background checking services.[35]

Although previously neglected for the most part, since at least the 1960s, privacy has been a growing concern in the U.S. criminal legal

---

31. 5 U.S.C. § 552. FOIA Exemption 7 safeguards certain law enforcement records from mandatory disclosure. *Id.* at § 552(b)(7). It comprises several subcategories, including 7(A), which shields records that could interfere with ongoing law enforcement proceedings, and 7(C), which protects the privacy of individuals involved in investigations. Exemption 7, at its core, is intended to balance privacy rights with investigative effectiveness. *Cf.* Benjamin W. Cramer, *Privacy Exceptionalism Unless It’s Unexceptional: How the American Government Misuses the Spirit of Privacy in Two Different Ways to Justify Both Nondisclosure and Surveillance*, 16 OHIO ST. TECH. L.J. 306, 311–19 (2020).

32. 5 U.S.C. § 552(a). The Privacy Act of 1974 regulates the collection, maintenance, and dissemination of personally identifiable information held by federal agencies. Section (j)(2) of the Act permits agencies to exempt certain law enforcement records from disclosure if release could interfere with enforcement proceedings, invade personal privacy, or compromise the safety of individuals. *Id.* at § 552(a)(j)(2). This provision balances transparency with protecting law enforcement information. *Cf.* Cramer, *supra* note 31, at 319–24.

33. *See, e.g.*, Public Information, TEX. GOV’T CODE ANN. § A552.108 (West 2023); CONN. GEN. STAT. § 1-210(a)(3); MINN. STAT. § 13.82, subd. 7; *see also* Bruce D. Goldstein, *Confidentiality and Dissemination of Personal Information: An Examination of State Laws Governing Data Protection*, 41 EMORY L.J. 1185, 1185 (1992) (“All states agree that some records should be confidential. Nonetheless, states collect a huge variety of data, and not only do they disagree on which pieces should be confidential, some states omit whole categories of data from their confidentiality provisions.”).

34. Sarah E. Lageson, Elizabeth Webster & Juan R. Sandoval, *Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet*, 46 LAW & SOC. INQUIRY 635, 637 (2021); *see also id.* (“In the United States, criminal records are considered public material. This accessibility reflects two competing interests of the public’s right to know and the accused or convicted person’s right to privacy. Distinct criminal justice agencies also have individualized purposes for releasing data.”).

35. JACOBS, *supra* note 9, at 70–90.

system and beyond.[36] With the advent of digital databases and information-sharing capabilities, the collection, storage, and dissemination of criminal record data have raised questions about individual privacy rights.[37] At the same time, strong principles favoring public access and narratives emphasizing public safety have also been influential factors in determining policies and approaches deliberately not privacy-friendly.[38] As a result, privacy has often remained in the background as a somewhat elusive right in the criminal legal context, at times recognized as essential to successful rehabilitation endeavors[39] and at other times forfeited as a collateral damage of law enforcement operations[40] and, later on, as part of the criminal sanction.[41]

---

36. *See* Margaret O'Mara, *The End of Privacy Began in the 1960s*, N.Y. TIMES (Dec. 5, 2018), https://www.nytimes.com/2018/12/05/opinion/google-facebook-privacy.html [https://perma.cc/NNS9-GNER] (discussing several pivotal moments in the development of American privacy laws during that decade, particularly in response to the growing concerns about threats to personal privacy posed by technological advancements, and observing that "[i]n being so relentlessly focused on the government's use and abuse of data, Congress paid little attention to what private industry was doing."); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1164 (2002) ("Beginning in the 1960s and 1970s, social commentators began to voice privacy concerns about computerized databases.").

37. *See* Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195, 196–97 (2015) ("From computerized rap sheets and DNA databases to sex offender and other registries, records of a person's contact with the criminal justice system no longer rest in a file folder or card catalog in a local precinct. Instead, they reside indefinitely on law enforcement servers and, in many cases, the publicly searchable Internet." (footnote omitted)).

38. *See, e.g.*, DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 130 (2004) (discussing how "Megan's Laws," enacted during the 1990s to enhance public safety by requiring registration and community notification about convicted sex offenders, routinely encompass the disclosure of information such as offenders' names, "SSNs, photographs, addresses, prior convictions, and places of employment" and how "[a] number of states have placed their sex offender records on the Internet" (footnotes omitted)). The Sex Offender Registration and Notification Act ("SORNA"), a federal law enacted in 2006 as part of the Adam Walsh Child Protection and Safety Act, later established national standards for sex offender registration. States must comply with SORNA's guidelines, fostering consistency in sex offender management across U.S. jurisdictions. *See* Richard G. Wright, *From Wetterling to Walsh: The Growth of Federalization in Sex Offender Policy*, 21 FED. SENT'G REP. 124 (2008). More generally, on legislative attacks on privacy, see A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1468–1501 (2000) (cautioning about the expansion of federal surveillance laws and practices well before the terrorist attacks of 9/11); SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY 8 (2000) (noting that, since the 1980s, the federal government began to pursue an "antiprivacy agenda").

39. *See* Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 54–57 (2016); Sarah Esther Lageson, *Privacy Loss as a Collateral Consequence*, 9 ANN. REV. INTERDISC. JUST. RES. 16, 26–27 (2020).

40. For a guide of state laws regarding access to arrest records, see *Arrest Records*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, https://www.rcfp.org/open-government-sections/5-arrest-records/ [https://perma.cc/7C2Q-M8RC].

41. *See* JACOBS, *supra* note 9, ch. 9.

III. METHODOLOGICAL APPROACH

By employing a historical policy analysis framework,[42] we critically assess the role of privacy in criminal record policy. We examine primary and secondary policy documents, including statutes, policy directives, political speech, and policy analyses. Historical policy analysis is a broadly postpositivist approach to understanding government policy primarily through historical accounts and narratives.[43] Steps to a historical policy analysis involve: (1) identifying relevant actors and how they identified the problem, (2) examining primary and secondary sources of that period, (3) discerning ideologies behind policy decisions, and (4) identifying policy change over time.[44]

A historical policy analysis framework aids in understanding transitions between eras by providing a structured approach to examine policy evolution, identify trends and patterns, and gain valuable insights into the motivations behind policy changes and their broader implications.[45]

Our analysis concentrates on court opinions and government reports that pertain to criminal records and their sealing and expungement. Court opinions provided us with judicial interpretations and legal developments, while government reports and documents offered valuable perspectives from policymakers and authorities involved in shaping record clearance policies. This approach allows us to comprehensively explore the dynamics of criminal record management and the varying attitudes toward privacy. We analyze evidence of how crime has been problematized over time and how criminal record policy was developed in response to changes in policy conditions.[46] Key to

---

42. This method involves examining the context, motivations, rationales, and reasoning that inform policies. This approach facilitates a comprehensive understanding of how policies have been formulated, implemented, and their impact on various segments of society. *See* RICHARD HOEFER, POLICY CREATION AND EVALUATION: UNDERSTANDING WELFARE REFORM IN THE UNITED STATES ch. 2 (2011) (detailing the historical policy analysis framework); *see also* DAVID E. MCNABB, RESEARCH METHODS FOR POLITICAL SCIENCE: QUANTITATIVE AND QUALITATIVE METHODS ch. 17 (2010).

43. Anders Hanberger, *Public Policy and Legitimacy: A Historical Policy Analysis of the Interplay of Public Policy and Legitimacy*, 36 POL'Y SCIS. 257, 258 (2003) ("The term 'Historical Policy Analysis' (HPA) is introduced and used for a PA that scrutinizes historical and contemporary material systematically by means of using PA concepts and methods."). Historical policy analysis examines past policies to understand their development, impact, and evolution over time. *See* HOEFER, *supra* note 42.

44. Richard Spano, *Creating the Context for the Analysis of Social Policies: Understanding the Historical Context*, *in* SOCIAL POLICY AND SOCIAL PROGRAMS: A METHOD FOR THE PRACTICAL PUBLIC POLICY ANALYST 31, 44 (Donald E. Chambers ed., 3d ed. 2000).

45. Hanberger, *supra* note 43, at 258–59.

46. In the realm of policymaking, "policy conditions" encompass the broader contextual factors that may influence policy developments and their implementation. *See* Will Jennings, Stephen Farrall, Emily Gray & Colin Hay, *Penal Populism and the Public Thermostat: Crime,*

our inquiry is understanding how criminal records and record clearance mechanisms have been framed and managed via concrete policy measures across different penal policy and crime control eras. We draw explicitly on policy discourse, punishment narratives, and broader trends in criminal justice system operations to identify the role of privacy as a central, though understated, component to criminal record policymaking. We then utilize a contemporary policy analysis lens[47] to critically examine the advent and construction of Clean Slate policies in recent years, paying particular attention to the social and technological context that may inhibit their application or create unintended consequences.

In the analysis that follows, we identify the uses and influence of privacy rights across three eras of criminal record policy in the U.S. As we detail in our historical policy analysis, the area of criminal record law and policy has seen privacy interests ebb alongside the scope and culture of the U.S. criminal legal system over time, though without ever being the apparent focal point of discussion.

IV. THREE ERAS OF CRIMINAL RECORD PRIVACY

Our analysis spans from the so-called rehabilitative era (1950s to 1970s) that cautioned against criminal record disclosures, to the era of mass punishment (1980s to 2000s) during which, in addition to a skyrocketing number of convictions, criminal records became widely public, privatized — i.e., collected and monetized by private companies — and normalized into non-legal institutional settings in line with hyperpunitive policies, and then to the current "data-driven" era (2010s onward) where renewed emphasis has been placed on efforts to conceal criminal record data as a remedy for harms inflicted by the legal system (see Figure 1).

It is important to note that although each era leans toward a dominant dynamic, overlaps and continuities do exist. Nixon's call for "law and order" in the 1960s planted the seeds for the demise of rehabilitation, which gradually shifted the focus towards more punitive measures and away from rehabilitative approaches.[48] The demise was, for the

---

Public Punitiveness and Public Policy, 30 GOVERNANCE 463, 465 (2017) (stressing that "changes in policy conditions are not the same as changes in policy"); *see also* JOEL BLAU & MIMI ABRAMOVITZ, THE DYNAMICS OF SOCIAL WELFARE POLICY chs. 8–12 (4th ed. 2014) (describing a case study on social welfare policies).

47. *See* Michael Mintrom, *The Policy Analysis Movement*, *in* POLICY ANALYSIS IN CANADA ch. 6 (Laurent Dobuzinskis, Michael Howlett & David Laycock eds., 2017) (outlining the general traits of the policy analysis movement during its emergence in the U.S. throughout the second half of the twentieth century).

48. *See generally* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016) (detailing and discussing the 1960s roots of the war on crime).

most part, operationalized beginning in the late 1970s and early 1980s.[49] Yet, contrary to a widespread belief, rehabilitation never completely disappeared from the systems of U.S. corrections even at the peak of "tough on crime" rhetoric and policies.[50] Similarly, recent record clearance reforms benefitted from a gradual shift in attitudes and policy thinking that began to emerge in the mid-2000s as the country was reaching the peak of mass incarceration and starting to reckon with the damages of decades of penal excess.[51] These three eras of criminal record policy indicate how the salience of privacy increases in times of more rehabilitative and reformative efforts and decreases during more punitive periods. They also clearly illustrate how privacy considerations and concerns have grappled with a nuanced balancing act between safeguarding the privacy of criminal history information and addressing other factors, such as public safety, legislatively mandating background screening and occupational licensing restrictions, ensuring First Amendment rights, and promoting governmental transparency.

49. JOE SIM, PUNISHMENT AND PRISONS: POWER AND THE CARCERAL STATE 15 (2009) ("[I]t has become a matter of criminological commonsense to identify the mid-1970s as a moment of profound rupture and epochal change when the state shifted its ideological and material gear and moved onto a new penological terrain in terms of crime and punishment.").

50. *See* Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 361 (2013) ("Rehabilitation has weathered a sustained attack and is now increasingly guiding correctional policy and practice."); Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y. REV. 33, 33 (2011) (revealing that actual punishment and rehabilitation practices remained largely unchanged until the 1990s).

51. *See, e.g.*, Aisha Khan, *The Carceral State: An American Story*, 51 ANN. REV. ANTHROPOLOGY 49, 52 (2022) ("The last 20 years in the United States have seen not only steady government policy commitments to mass incarceration as a key solution to social problems but also an increasing scrutiny and critique of mass incarceration on the part of scholars, journalists, community organizers, and the general public."); Jeremy Travis, *Reflections on the Reentry Movement*, 20 FED. SENT'G REP. 84, 85 (2007) (describing the carceral climate at the time as an "atmosphere of extraordinary policy ferment").

Era	Contextual Factors	Criminal Record Policy	Implications
Rehabilitative Era (1950s–1970s)	Experts guiding penal thinking and setting criminal justice policies Growing concern for informational privacy by the government Emergence of data processing technologies but absence of mechanisms of mass disclosure of criminal history information	Restoration of rights seen as an important component of a successful reintegration into society Expungement and sealing emerging as remedies for the adverse consequences of criminal record disclosure Debate about whether criminal record clearance is in line with or against the spirit of rehabilitation	Reform efforts at the state level to introduce, expand, or rationalize expungement and sealing statutes Policies aimed at removing barriers to employment, housing, and other opportunities Efforts to restrict public access to certain criminal records, striking a balance between privacy and public safety
Punitive Era (1980s–2000s)	Increasing politicization of crime control and criminal justice policies Emphasis on retribution and incapacitation Emerging IT technology disseminating criminal history information within and outside the criminal legal system	Use of criminal history information as tools of incapacitation and risk management Reduction of rights of criminalized subjects, including privacy Isolated voices raising concerns about the disruptive potential of technology for criminal record visibility	Exponential expansion of the criminal legal system resulting in mass conviction and criminal record discrimination through collateral consequences Broad use of criminal records across society, outside the criminal legal system Expungement and sealing reform efforts jettisoned

Data-Driven Era (2010s–present)	Empirical research showing criminal record discrimination and burdensome collateral consequences Growing bipartisan awareness of the injustice of mass criminalization and mass punishment Data and technology increasingly seen as an opportunity to support reforms aimed at ameliorating the criminal legal system	Partial change in the penal climate and new focus on providing second chances for justice-involved individuals Awareness of the ubiquitous availability of and access to criminal history information Wave of criminal record clearance reform, though limited in scope (mostly covering arrest records and conviction records stemming from low-level, nonviolent offenses)	Push toward automation and algorithmic approaches and emergence of Clean Slate initiatives aimed at introducing a new generation of record clearance mechanisms Privacy as a proxy for rehabilitation Problem of "dirty data" and dissemination of criminal history information across multiple platforms, preventing effective record clearance

Figure 1: Main Features of Criminal Record Policy Eras, 1950s–present

A. Era 1: Criminal Record Privacy in the Era of Rehabilitation: 1950s–1970s

Especially from the 1950s through the 1970s, U.S. jurisdictions explicitly and actively endorsed rehabilitation as an integral part of the criminal justice system.[52] Trusted experts were charged with setting criminal justice policies, and trusted professionals implemented them

52. *See, e.g.*, FRANCIS ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE ch. 1 (1981) (analyzing the social and ideological backdrop that fostered the flourishing of the rehabilitative ideal in the twentieth century); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1014–18 (1991) (discussing the rise and consensus around the rehabilitative model until the mid-1970s).

in individual cases.[53] This rehabilitative framework "remained unchallenged as the dominant correctional ideology" into the 1960s.[54]

From this perspective, restoration of rights following completion of a person's sentence was seen as an effective tool to incentivize and certify rehabilitation. For example, in 1968 the Washington Supreme Court explicitly noted that the state's expungement statute was "a legislative expression of public policy in the field of criminal law and rehabilitation. It undertakes, in unambiguous terms, to restore a deserving offender to his preconviction status as a full-fledged citizen."[55] Unfettered criminal record disclosure certainly did not align with the stated goal of said policy because it would deny individuals the chance to move beyond their past offenses without facing perpetual stigma and barriers.

The idea of limiting the disclosure of criminal records first arose during the early decades of the twentieth century in the context of the juvenile justice system. These efforts sought to prevent stigmatization and promote rehabilitation by restricting access to youth delinquency records.[56] Early conceptions of sealing and expungement gained support in the adult system in the 1950s based on the notion that if criminal records were released to the public, their lasting nature could deprive people of fundamental civil, political, and economic rights.[57] Such harms contradicted the aim of rehabilitation and undermined the

---

53. During the rehabilitative era, there was a high level of trust in expertise, with professionals being regarded as authoritative figures in the development and implementation of effective correctional strategies. *See* Lisa Stampnitzky, *Rethinking the "Crisis of Expertise": A Relational Approach*, 52 THEORY & SOC'Y 1097, 1108 (2023); Phelps, *supra* note 50, at 36 ("[B]etween the 1950s and 1970s, the ideal model of correctional administration was founded on the belief that trained experts could administer individualized assessment and treatment that would 'diagnose' and 'treat' the causes of criminality in the way that medical doctors were able to cure other forms of illness.").

54. FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 50 (2d ed. 2012).

55. Matsen v. Kaiser, 443 P.2d 843, 846–47 (Wash. 1968).

56. James B. Jacobs, *Juvenile Criminal Record Confidentiality*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 149, 151 (Franklin E. Zimring & David S. Tanenhaus eds., 2014) (noting that, although "in the first three decades of the twentieth century, efforts to keep juvenile court proceeding and records confidential met significant resistance in some jurisdictions . . . by the late 1920s, proponents of confidentiality had achieved substantial success" (citation omitted)). The Federal Youth Corrections Act of 1950 was one of the first rehabilitative record relief laws, although it was never clear whether the Section 5021 "set aside" provision was supposed to include sealing the record, and circuits did not reach an agreement on this point before the law was repealed in 1984. *See* Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 482–83 n.26 (1981). *See also id.* at 478 ("[T]he legislative history and judicial interpretation of the words obfuscate rather than clarify.").

57. Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 740–42 (1981).

prospect for successful reentry:[58] a person who had successfully completed their criminal punishment has already paid the penalty for a crime and therefore should not suffer the consequences of a conviction for their entire lifetime.[59]

Rehabilitative ideals were central to policy discussions, including the argument that publicly disclosing criminal records would interfere with the ultimate goal of a successful reentry.[60] In this policy climate, criminal record clearance laws gradually gained wider support, and over twenty U.S. jurisdictions (with the notable exception of the federal government) adopted mechanisms for sealing, expunging, or amending criminal records.[61] These policies, however, varied in scope and procedural requirements. Under most statutes, expungement was available only for minor offenses and only after a lengthy waiting period.[62] It is also important to note that the rehabilitation was idealized to such a degree that concerns were voiced that post-sentence record clearance would absolve broader society from its responsibility to forgive and reintegrate. In particular, some commentators, coming from policy and "hands-on" criminal justice backgrounds, warned that efforts to conceal criminal history information violated the tenets of rehabilitation by

58. *Id.* There were early signs of a reform movement favoring record relief beginning in the twentieth century. While these authorities do not use the term "expungement," they did refer to various forms of relief identified by a variety of names. *See* C.S. Potts, *The Suspended Sentence and Adult Probation*, 1 TEX. L. REV. 188, 190 (1923) (saying that, under a 1913 Texas law on suspended sentences, "[i]f defendant is not convicted of another felony during the time assessed as punishment by the jury, he may make application for a new trial and have the case dismissed"); Wilfred Bolster, *Adult Probation, Parole and Suspended Sentence. Report of Committee C of the American Institute of Criminal Law and Criminology*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 438, 443 (1910) ("[W]e strongly recommend that after successful probation the indictment or complaint should be dismissed of record."). That said, in the early 1950s only "a handful of states" had enacted a judicial record relief provision. 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, 1708–09 (2003).

59. Gary Fields & John R. Emshwiller, *Fighting to Forget: Long after Arrests, Records Live On*, WALL ST. J. (Dec. 25, 2014), https://www.wsj.com/articles/fighting-to-forget-long-after-arrests-records-live-on-1419564612 [https://perma.cc/CU3L-YM32]; *see also* JACOBS, *supra* note 9.

60. *See* Corda, *supra* note 39, at 26–29; Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1326 (2017).

61. *See, e.g.*, Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L. Q. 147, 174–78 (1966) (comparing record clearance provision in several state jurisdictions, ranging from restricting access to criminal records without erasing them to their physical erasure); Barry M. Portnoy, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 314–15 (1969) ("Remedies offered by these laws vary from nothing more than a judicial pardon to the entry of a nunc pro tunc dismissal of charges."); Pasco L. Schiavo, *Condemned by the Record*, 55 A.B.A. J. 540, 542 (1969) ("Most of the statutes designate five years after an adult offender has been released as the time for expungement of his record and annulment of the conviction if no other crimes have been committed during the interim.").

62. *See, e.g.*, Bryant H. Byrnes, *Expungement in California: Legislative Neglect and Judicial Abuse of the Statutory Mitigation of Felony Convictions Comment*, 12 U.S.F. L. REV. 155, 173–77 (1977); Linda S. Buethe, *Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma Comment*, 58 NEB. L. REV. 1087, 1110–12 (1978).

requiring people with convictions to "lie" about their criminal past rather than requiring society to make an effort to forgive and policymakers to fully restore civil and economic rights of ex-offenders.[63] In this regard, forms of restoration of rights not involving any concealment of one's criminal history were deemed more appropriate.[64]

During this period, the intersection between privacy and rehabilitation became more apparent. Privacy concerns emerged especially during the 1960s in light of factors such as "[t]he growing reach of the administrative state, coupled with the increasing sophistication of the commercial sector and the emergence of new data-processing technologies," such as the development of computerized databases.[65] In the wake of the Watergate scandal, the federal Privacy Act of 1974 established the Privacy Protection Study Commission to examine *individual privacy* rights and record-keeping policies.[66] The Commission's report, *Personal Privacy in an Information Society*, published in 1977, acknowledged that

> [I]n American society today records mediate relationships between individuals and organizations and thus affect an individual more easily, more broadly, and often more unfairly than was possible in the past. This is true in spite of almost a decade of effort to frame the objectives of a national policy to protect personal privacy in an information-dependent society. It will remain true unless steps are taken soon to strike a

63. Bernard Kogon & Donald L. Loughery, Jr., *Sealing and Expungement of Criminal Records — The Big Lie*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 378, 378 (1970) ("Despite the good intentions of its proponents, [the practice of sealing or expunging criminal records] does not provide the relief intended and actually does harm, frequently, by the hoax it plays upon ex-offenders and the general public."); Franklin & Johnsen, *supra* note 57, at 749.

64. This debate between forgetting and forgiving is today at center stage in broader privacy discussions about the so-called right to be forgotten. *See* Amy Gajda, *Privacy, Press, and the Right to Be Forgotten in the United States*, 93 WASH. L. REV. 201 (2018) (arguing that, while the U.S. boasts the First Amendment safeguarding press freedom, the Right to Be Forgotten principles have long existed in U.S. common and statutory law, despite constitutional protections for truthful information publication. Courts, then and now, frequently prioritize privacy over press interests, challenging the perception of absolute freedom under the First Amendment); Corda & Lageson, *supra* note 15, at 256–58 (discussing the European developments in the relationship between the Right to Be Forgotten and criminal record management).

65. Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 494 (2013). *See also* ALAN F. WESTIN & MICHAEL A. BAKER, DATABANKS IN A FREE SOCIETY: COMPUTERS, RECORD-KEEPING AND PRIVACY 3–5 (1972) (summarizing debates over computer databases and privacy in the 1960s).

66. PRIVACY PROTECTION STUDY COMMISSION, THE PRIVACY ACT OF 1974: AN ASSESSMENT. APPENDIX 4 TO THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION (1977).

> proper balance between the individual's personal privacy interests and society's information needs.[67]

A 1979 report examining criminal record privacy published by the SEARCH Group and funded by the U.S. Bureau of Justice Statistics explicitly linked privacy of criminal records and rehabilitation, noting that "dissemination of this information unquestionably stigmatizes and harms the subject" and that

> [O]nce a period of time has passed, the extent of the public's interest in the conviction decreases and the subject's and society's interest in "forgetting" the conviction increases. To the extent that society has a realistic interest in rehabilitating criminal offenders, the confidential treatment of their criminal records is thought to release them from a "record prison" and contribute to their ability to re-enter the job market and otherwise acquire full citizenship status.[68]

Amidst these policy debates over the role of expunging and sealing of conviction records, courts also focused their attention on the tension between criminal histories, public records, and personal privacy, particularly concerning records of arrests not leading to a conviction, whose inclusion in the public record has been historically contested. For example, the 1967 case *United States v. Kalish*,[69] while conceding that "[w]hen arrested, an accused does not have a constitutional right of privacy that outweighs the necessity of protecting society and the accumulation of this data, no matter how mistaken the arrest may have been," also stated that when an individual is acquitted or discharged without conviction,

> [N]o public good is accomplished by retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity [are] invaded as long as the Justice Department retains "criminal" identification records, "criminal" arrest, fingerprints and a rogue's gallery photographs . . . . The preservation of these records constitutes an unwarranted attack upon his

67. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 3 (1977).

68. GARY R. COOPER & ROBERT R. BELAIR, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., PRIVACY AND SECURITY OF CRIMINAL HISTORY INFORMATION: PRIVACY AND THE MEDIA 23 (1979).

69. 271 F. Supp. 968 (D.P.R. 1967).

> character and reputation and violates his right of privacy; it violates his dignity as a human being.[70]

Other cases, such as *Eddy v. Moore*[71] and *Menard v. Mitchell*,[72] confirmed this approach supporting the expungement of, or limitations on the disclosure of, arrest records when the arrest did not subsequently lead to a conviction.[73] Privacy was thus linked to individual autonomy against undue state control and invasiveness. Such a concern emerging from the case law was not accidental since, as previously noted, during the 1960s, the right to privacy in America became a symbol at a time when society increasingly "feared oppression and repression . . . through powerful technological tools" employed by the state bureaucracy.[74] As mainframe computers became more accessible and integral to data processing by both government agencies and private companies, the use of these large-scale machines heightened fears about the collection and misuse of sensitive data.[75] Likewise, the development of automated systems for managing and tracking personal information led to increased concerns about data privacy and the potential for abuse.[76] Furthermore, other emerging technologies and practices heightened privacy concerns and fears of increased surveillance.[77] The introduction of large-scale automated data processing systems allowed for the centralization and extensive storage of personal information, amplifying worries about misuse.[78] The use of Social Security numbers for tracking various aspects of individuals' lives raised concerns about data

---

70. *Id.* at 970.

71. 487 P.2d 211, 217 (Wash. Ct. App. 1971).

72. 328 F. Supp. 718, 726–28 (D.D.C. 1971).

73. On early expungement mechanisms, *cf.* Brian M. Murray, *Retributive Expungement*, 169 U. PA. L. REV. 665, 683 (2021) ("Arrestees (who did not need to prove rehabilitation, but certainly good character) and extremely low-level offenders (once rehabilitation was proven) began to petition courts in the name of privacy."). Yet, privacy restoration and rehabilitation have also co-existed no matter the seriousness of the offense of conviction. *See, e.g.*, Peter D. Pettler & Dale Hilmen, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CAL. W. L. REV. 121, 124 (1967) (observing that the primary goal of expungement statutes is "the lessening or abolition of penalties which public opinion, as opposed to the law, imposes upon one convicted of an offense against society" and how "[u]pon fulfillment of one's debt to society . . . it is only natural and just that he is deemed fit to return to his former role in society and assume a position of equality with its members").

74. DONALD A. MARCHAND, THE POLITICS OF PRIVACY, COMPUTERS, AND CRIMINAL JUSTICE RECORDS: CONTROLLING THE SOCIAL COSTS OF TECHNOLOGICAL CHANGE 122 (1980).

75. *See* ARTHUR R. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS 64–66 (1971).

76. *Id.*

77. Alan F. Westin, *Social and Political Dimensions of Privacy*, 59 J. SOC. ISSUES 431, 435–36 (2003).

78. *Id.*

aggregation and privacy invasion.[79] Advances in surveillance technologies and improved wiretapping methods increased the capacity for monitoring individuals' activities.[80] Additionally, the expansion of credit reporting systems that collected detailed financial data fueled anxieties about the security and privacy of personal information, sparking significant debates about privacy rights and government overreach.[81] Legislative action was prompted by the described fears of potential misuse of computerized information systems which were then in their infancy although developing very fast.[82] These concerns grew amidst the rise of social mistrust and fragmentation and a declining interest in collective actions and community engagement, resulting in individual rights gaining center stage.[83]

Despite the surge of privacy laws passed in the 1970s,[84] the link between privacy and rehabilitation in criminal justice policy discussions was cut short by increasingly punitive attitudes and agendas.[85] While privacy had come to be seen as a value to protect, preserve, and hold dear,[86] this reasoning only applied to those not marked as "criminals." Then-Associate Justice of the Supreme Court William Rehnquist echoed concerns that allowing privacy protections to go too far, including regarding the management of criminal history information, might hinder the effectiveness of law enforcement.[87] Despite growing

---

79. Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1402 (2001) ("Social Security numbers — which originally were not designed to be used as identifiers beyond the social security system — became immensely useful for computer databases.").

80. David Lyon, *Surveillance Technology and Surveillance Society*, *in* MODERNITY AND TECHNOLOGY 162, 167 (2002) (stressing that the tendency of modern societies to become surveillance societies "became increasingly marked as surveillance practices and processes intensified from the 1960s onward, enabled by large-scale computerization").

81. JOSH LAUER, CREDITWORTHY: A HISTORY OF CONSUMER SURVEILLANCE AND FINANCIAL IDENTITY IN AMERICA 14 (2017) ("During the mid-1960s the credit reporting industry began to convert its millions of paper files into electronic data, a process that was hastened by the simultaneous adoption of computers among the industry's major subscribers — mass retailers, finance companies, credit card companies, and banks.").

82. Westin, *supra* note 77, at 437.

83. *See* Irene Taviss Thomson, *The Transformation of the Social Bond: Images of Individualism in the 1920s Versus the 1970s*, 67 SOC. FORCES 851, 860 (1989) ("Individualism now also entails freedom from one's own past. For in their zeal for self-development, individuals have come to value growth and the possibility of change above all else.").

84. Murphy, *supra* note 65, at 493–508.

85. *See* PETER K. ENNS, INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD ch. 3 (2016) (arguing that throughout the 1960s, 70s, 80s, and 90s, politicians, in response to a growing demand for harsher measures from the public, enacted more punitive policies, and further contending that media portrayal of escalating crime rates played a role in intensifying the public's support for punitive measures).

86. MARCHAND, *supra* note 74, at 88.

87. William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, 23 U. KAN. L. REV. 1, 8 (1974) (noting that "the privacy interest is multidimensional, depending on the use to which the record is put. An arrest is not a 'private' event. An encounter between law enforcement authorities and a citizen is ordinarily a

concerns about privacy, an increasingly punitive population not only seemingly rejected the rehabilitative ethos which had been prevalent since the 1950s, but also failed to establish a significant connection between the gathering, holding, and sharing "offenders'" data and its own privacy interests.[88]

B. Era 2: Criminal Record Privacy in the Era of Mass Punishment: 1980s–2000s

Criminal record clearance and restoration of privacy as a rehabilitative measure was overshadowed and eventually repudiated during the "tough on crime" era, which went into full swing during the 1980s, peaked in the mid-1990s, and then gradually plateaued.[89] The efforts during the previous era to introduce meaningful and comprehensive forms of criminal record relief began to slow in light of new policies that reflected the view that "[p]ermanent changes in a criminal offender's legal status served to emphasize his 'other-ness.'"[90] Put differently, the gradual rejection of expungement policies by increasingly punitive lawmakers was driven by the aim of marking individuals involved in the criminal justice system as fundamentally different from mainstream law-abiding society. This approach sought to maintain a clear and lasting distinction between "offenders" and "non-offenders." Expungement and sealing of criminal records became a hard sell. Criminal records were soon recognized as a valuable source of information and a central tool for a more effective governance of the inherently risky group constituted as criminal subjects in society.[91] As America rapidly descended into an era of more determinate and harsher

---

matter of public record, and by the very definition of the term it involves an intrusion into a person's bodily integrity").

88. David Weinstein, *Confidentiality of Criminal Records — Privacy v. The Public Interest*, 22 VILL. L. REV. 1205, 1212 (1977) (noting that "[t]he immediate problem of controlling criminal behavior preclude[d] serious consideration of remote and uncertain consequences" of the misuse of personal information created as part of the criminal process).

89. *See, e.g.*, Loic Wacquant, *The Great Penal Leap Backward: Incarceration in America from Nixon to Clinton*, *in* THE NEW PUNITIVENESS: TRENDS, THEORIES, PERSPECTIVES 3 (2005); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 24–25 (2007); HINTON, *supra* note 48.

90. Love, *supra* note 58, at 1716.

91. *See, e.g.*, Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 455 (1992) (famously noting that "[t]he new penology is neither about punishing nor about rehabilitating individuals. It is about identifying and managing unruly groups"); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 6–20, 197–99 (2001) (exploring the transformation of criminal justice, linking societal shifts toward more punitive policies, surveillance, and the erosion of individual rights and freedoms to broader cultural changes).

sentences[92] leading to mass conviction[93] and mass punishment,[94] individual privacy-based arguments became recessive to the public's right to know and the state's response to crime. With punishment policies becoming ever more expressive and the government struggling to control rising crime rates, politicians, pundits, and the public looked for places to lay the blame. Often, the blameworthy "criminal" became cast as irredeemable, and criminal records served to codify such a label.[95]

The continued disclosure of criminal records was justified and expanded in two important ways. First, records began to transform from an administrative tool used to manage an ever-increasing population of people under police, court, or correctional control to an instrument used by extralegal actors to measure risk, typically through the institutionalization of background checking.[96] Criminal background checks became more widely available due to technological advancements and the digitization of records. The rise of the internet and automated databases made it easier and cheaper to access criminal records across jurisdictions, allowing private companies to offer background checks as a service.[97] This increased affordability, coupled with a growing demand for security and punitive measures, fueled the widespread use of these checks by employers and institutions.[98] Second, criminal punishment

---

92. *See* NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 71–85 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014); MICHAEL TONRY, SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975–2025 41–95 (2016).

93. Chin, *supra* note 16, at 1804 ("There are approximately 1.1 million new state felony convictions in a typical year, and some multiple of that in misdemeanor convictions.").

94. Kevin R. Reitz & Cecelia M. Klingele, *Model Penal Code: Sentencing — Workable Limits on Mass Punishment*, CRIME & JUST. 255, 261 (2019) ("[T]he nation has reached a condition of 'mass punishment' that goes beyond incarceration and touches a far greater share of the US population than the 2 million in prison and jail. For instance, across America there were 3.7 million adults under sentences of probation supervision on any given day in 2016.").

95. GARLAND, *supra* note 91, at 182 (summarizing the new society-offender relationship in the following terms: "'Our' security depends upon 'their' control"); *see also* David Garland, *On the Concept of Moral Panic*, 4 CRIME MEDIA CULTURE 9 (2008); DARIO MELOSSI, CONTROLLING CRIME, CONTROLLING SOCIETY: THINKING ABOUT CRIME IN EUROPE AND AMERICA 199–228 (2008).

96. *See* Lageson, *supra* note 17, at 68 ("The advent of increasingly data-driven criminal justice system operations exponentially accelerated historical trends in criminal record keeping and furthered the growing institutionalization of criminal background checking, private-sector data collection efforts, and advances in surveillance and prediction."); Corda, *supra* note 39, at 32 (2016) (speaking of "mass dissemination of criminal history information"). *See also* Charles Brackett, The Rise and Rise of the Criminal Record: Power, Order, and Safety in the United States, 1848–1960 156–248 (May 2020) (Ph.D. dissertation, University of Massachusetts, Boston) (ProQuest) (tracing and examining the rise of criminal record-keeping and its increased utilization during the period spanning from the conclusion of the American Civil War to the 1960s).

97. Corda, *supra* note 39, at 6, 39–41.

98. James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 388 (2006) ("Information technology has increased the capacity and reduced the cost of collecting, storing, and searching criminal records . . . . Private-sector

became more public and expressive than in previous decades, aided by television and experiments with criminal punishments. In a fashion deemed "gonzo justice," judges began to order people convicted of crimes to place signs in their front yards proclaiming that they are a thief or to take out an advertisement in a local paper to announce their recent conviction for child molestation.[99] The function of these expressive punishments was to use extraordinary measures to "demonstrate social control and moral compliance, often through rule enforcement and punishment designed to stigmatize publicly."[100] Punishment and social control also became increasingly commodified through television shows like *Cops* and *To Catch a Predator*.[101] The proliferation of televisions in American households and the twenty-four-hour news cycle, which often sensationalized crime, helped stoke public fears and support for harsher penalties and surveillance.[102] Together, these technological developments and media influences reinforced the era's "tough on crime" mentality and expanded the reach of punitive policies.[103]

Sex offender registries transformed from databases used for internal police tracking purposes to community notification systems, which shared identifying information with the public at large.[104] In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act as part of a controversial federal crime bill, requiring states to implement sex offense registries.[105] In 1996, the so-called Megan's Law amended the 1994 Act to

---

entrepreneurs have stepped forward to meet the growing demand for background checks, and, for business reasons, have purposefully sought to increase that demand.").

99. David L. Altheide, *Gonzo Justice*, 15 SYMB. INTERACT. 69, 70–71 (1992).

100. *Id.* at 71.

101. *See* Steven A. Kohm, *Naming, Shaming and Criminal Justice: Mass-Mediated Humiliation as Entertainment and Punishment*, 5 CRIME MEDIA CULTURE 188 (2009) (arguing that, for an extended period, shame has served as a questionable instrument in the realm of criminal justice, wielded by state authorities in various forms throughout history. Yet, in the latter part of the 20th century, the amplification of humiliation has taken center stage, propelled by mass media in the dual guise of crime control and entertainment).

102. *See* David L. Altheide, *The News Media, the Problem Frame, and the Production of Fear*, 38 SOCIO. Q. 647 (1997) (examining how news media amplify messages that emphasize fear and danger).

103. By the late 1990s, ninety-eight percent of U.S. homes had at least one television set. The twenty-four-hour news cycle's constant focus on crime fueled public anxiety and fear, shaping social issues and pushing for punitive solutions. This coverage not only amplified crime as a key concern but also influenced policymakers, with the media framing problems and offering solutions contributing to harsher policies. *See* Natasha A. Frost & Nickie D. Phillips, *Talking Heads: Crime Reporting on Cable News*, 28 JUST. Q. 87, 88–109 (2011).

104. Wayne A. Logan & J.J. Prescott, *Preface* to SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EVALUATION ix, ix (Wayne A. Logan & J.J. Prescott eds., 2021).

105. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. XVII, § 170101 (1994) (codified as 42 U.S.C. § 14071). Subtitle A of Title XVII of the so-called Clinton Crime Bill was popularly known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act.

require each state to provide notification and information to communities about convicted sex offenders living in the area for public safety purposes.[106] In his remarks in signing Megan's Law in May 1996, President Bill Clinton stated the following: "Today we are taking the next step. From now on, every State in the country will be required by law to *tell a community* when a dangerous sexual predator enters its midst."[107]

Furthermore, with expansion of expungement statutes for adults out of the question, voices were even raised against statutory provisions allowing for, or mandating, the expungement of juvenile criminal records once the juvenile reaches a certain age to allow him to start anew with a clean slate.[108] Opponents of expungement statutes for juvenile offenders argued that such measures could undermine accountability, potentially allowing serious crimes to be erased and hindering public safety.[109] They believed that expungement might not effectively deter future criminal behavior, compromise justice by diminishing the consequences of unlawful actions, and could lead to challenges in background checks for employment and other purposes.[110]

Under this new mainstream public safety rationale, during the 1980s and 1990s "legislation was created allowing greater dissemination of juvenile information for criminal justice purposes to parties outside the juvenile court proceedings."[111] For instance, counties, law enforcement, and local judicial districts nationwide initiated interagency collaborations with the aim of sharing information to proactively identify students who may have a higher likelihood of engaging in criminal activities within school campuses.[112] In a 1997 report on the 1974 Family Educational Rights and Privacy Act ("FERPA") — a federal law enacted to protect the privacy of student education records —

---

106. Pub. L. No. 104-145, § 2 (1996).

107. William J. Clinton, *Remarks on Signing Megan's Law and an Exchange with Reporters*, THE AMERICAN PRESIDENCY PROJECT (May 17, 1996) (emphasis added), https://www.presidency.ucsb.edu/documents/remarks-signing-megans-law-and-exchange-with-reporters [https://perma.cc/2CEX-TSJZ].

108. Allyson Dunn, *Juvenile Court Records: Confidentiality vs. The Public's Right to Know*, 23 AM. CRIM. L. REV. 379, 384–85 (1986).

109. *Id.*

110. T. Markus Funk, *A Mere Youthful Indiscretion — Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 938 (1995) ("Justifications advanced in favor of expungement were not only highly speculative . . . [they] have been disproved by volumes of research conducted on the issue of recidivism and rehabilitation . . . a more serious analysis leads to the conclusion that a long overdue reconsideration of the nation's expungement statutes is in order.").

111. Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, 384 (2017).

112. *See, e.g.*, Richard A. Schwartz, *Balancing Student Safety and Students' Rights*, *in* SAFE SCHOOLS, SAFE COMMUNITIES 20 (Naomi E. Gittins ed., 2000) (noting that safe schools "involve more than a hard-nosed assistant principal with a pad of detention slips and a paddle," but may also include, among other measures, "information sharing, referrals to law enforcement and juvenile agencies, alternative schools, early identification and intervention strategies, [and] gang identification").

the Department of Justice's Office of Juvenile Justice and Delinquency Prevention openly praised collaborative agreements to share confidential juvenile record information between schools, social services, licensed private community organizations, and law enforcement agencies.[113] Such programs have, among others, the purposes of "establish[ing] specific juvenile justice policies that enhance the effectiveness of system procedures for handling habitual juvenile offenders" and "promot[ing] public safety by identifying, tracking, arresting, and prosecuting the most violent habitual juvenile offenders."[114] Overall, during the "tough on crime" era, the dominant assumption was that "there is no such thing as an 'ex-offender' — only offenders who have been caught before and will strike again. 'Criminal' individuals have few privacy rights that could ever trump the public's uninterrupted right to know."[115]

Amidst this overarching zeal for criminal record disclosure, however, several voices called for a more tempered approach, especially in light of growing awareness and concerns about the potential threats posed by technology. Since the late 1980s, technology made criminal history information more and more accessible to employers and other private individuals.[116] The number of working-aged individuals with criminal records in the population significantly increased during this period, especially in African American and Hispanic communities.[117] In the 1989 case *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*,[118] the Supreme Court protected state compiled rap sheets from public disclosure, drawing privacy boundaries around this particular form of criminal records through the concept of "practical obscurity" — the idea that, although the individual components of the rap sheet included public information held by police and courts, the sheer difficulty of accessing and compiling this information creates a privacy protection.[119] The Court noted that the "compilation of otherwise hard-to-obtain [criminal history] information" about an individual into a "computerized summary located in a single

113. U.S. DEP'T OF JUST., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS 15–16 (1997).

114. *Id.*

115. GARLAND, *supra* note 91, at 180–81.

116. JACOBS, *supra* note 9, at 5 ("Criminal background checking has become a routine feature of American life.").

117. Sarah K. S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1807 (2017) ("For African Americans, people with felony convictions tripled, from 7.6% of adults in 1980 to approximately 23% in 2010."); Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 967–68 (2013) (discussing the disproportionate number of African American and Latino men and women with a criminal record).

118. 489 U.S. 749 (1989).

119. *Id*. at 780.

clearinghouse of information" significantly "alters the privacy interest implicated by disclosure of that information."[120] The *Reporters Committee* case gives us a glimpse of an early connection between informational privacy — the interest of individuals in exercising control over the collection, use, and disclosure of one's personal information — and criminal record-based "overflow" of punishment, albeit through an analysis of the "intersection of two core values in democratic society: the right to privacy and the right to know."[121]

The Justices took care to distinguish the public's right to know about governmental operations (in the spirit of FOIA laws) from the reporter's aim to know about an individual's criminal history, writing: "FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed."[122] Further, the Court pointed toward a growing public awareness of data aggregation and surveillance in assigning a "substantial" privacy interest in a rap sheet: "[T]he substantial character of that interest is affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten . . . ."[123]

A 2001 report by the Bureau of Justice Statistics noted that by the late 1990s, "the American public registered the strongest concerns ever recorded about threats to their personal privacy from both government and business" as it had become apparent that "changes in technology, as well as in the public's attitude about access to information and privacy, made it appropriate and important to take a new look at [Criminal History Record Information] law and policy."[124] The report also acknowledged the broader context of technological change that "fuels the appetite for information and creates new players in the criminal justice information arena" amidst a criminal justice climate focused on a "data-driven, problem-solving approach" that simultaneously "creates privacy risks through a wider circulation of criminal justice information."[125] These threads have culminated in the current moment of criminal record clearance reform we discuss next.

---

120. *Id.* at 764.

121. Patrick C. File, *A History of Practical Obscurity: Clarifying and Contemplating the Twentieth Century Roots of a Digital Age Concept of Privacy*, 6 U. BALT. J. MEDIA L. & ETHICS 4, 6 (2017).

122. *Reporters Comm.*, 489 U.S. at 774 (emphasis in original).

123. *Id.* at 771.

124. BUREAU OF JUSTICE STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY, AND CRIMINAL JUSTICE INFORMATION 1–2 (2001), https://bjs.ojp.gov/content/pub/pdf/rntfptcj.pdf [https://perma.cc/DZ3J-K265].

125. *Id.* at 3.

C. Era 3: Criminal Record Privacy in the Data-Driven Era: 2010s–Present

By the early 2000s, the U.S. began to reckon with the social problems wrought by mass criminalization and incarceration[126] and the exceptional size and harshness of its penal state compared to other developed Western countries.[127] As of 2010, nineteen million people were estimated to have a felony conviction[128] and by 2014, nearly one third of the U.S. adult population had some type of criminal record.[129] Social science research began to empirically measure the discriminatory effects of criminal records, particularly on employment outcomes,[130] and a robust literature on "collateral consequences"[131] emerged as analysts began to compile the impressive number of statutory burdens and restrictions placed on people with a conviction record.[132]

---

126. *See, e.g.*, MICHAEL JACOBSON, DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION 106–30 (2005) (arguing that mass incarceration neither reduces crime nor ensures public safety); Bruce Western, Mary Pattillo & David Weiman, *Introduction* to IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION, 1–18 (2004) (discussing how, since the late 1970s, the expansion of the U.S. penal system has profoundly changed the government's role in impoverished and minority communities).

127. *See* Michael Tonry, *Explanations of American Punishment Policies: A National History*, 11 PUNISHMENT & SOC'Y 377 (2009) (attributing the comparatively exceptionally punitive policies and practices witnessed in the U.S. from the late 1970s onwards to four main factors: "paranoid" politics, Manichean moralism linked to fundamentalist religious views, the obsolescence of the American Constitution, and the historical backdrop of race relations); *see also* Alessandro Corda & Rhys Hester, *Leaving the Shining City on a Hill: A Plea for Rediscovering Comparative Criminal Justice Policy in the United States*, 31 INT'L CRIM. JUST. REV. 203, 204 (2021) ("Especially over the past decade, a growing consensus that America's criminal justice policies and practices are too expensive, ineffective, excessively punitive, and often inhumane has laid the ground for a new phase of soul-searching.").

128. Sarah K. S. Shannon et al., *supra* note 117, at 1806.

129. *Half In Ten: Americans with Criminal Records*, THE SENTENCING PROJECT (2014), https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf [https://perma.cc/4H74-XLLX].

130. *See* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 58–85 (2008) (documenting the tremendous difficulties faced by criminal justice involved individuals on the job market); Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland & Hilary K. Whitham, *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment* 52 CRIMINOLOGY 627 (2014) (finding a non-negligible effect of low-level *arrest* information on callback rates).

131. *See, e.g.*, Nora V. Demleitner, *Collateral Damage: No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027 (2002); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006); Chin, *supra* note 16; Alessandro Corda, *The Collateral Consequence Conundrum: Comparative Genealogy, Current Trends, and Future Scenarios*, 77 STUD. L. POL. & SOC'Y 69 (2018); Alessandro Corda & Johannes Kaspar, *Collateral Consequences of Criminal Conviction in the United States and Germany*, *in* CORE CONCEPTS IN CRIMINAL LAW AND CRIMINAL JUSTICE (Kai Ambos et al. eds., 2022).

132. *See Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION (2024), https://niccc.nationalreentryresourcecenter.org/consequences [https://perma.cc/PUG7-U7TH].

Amidst the growing consensus that criminal records were posing serious social problems, three other trends in this era coalesced to help drive the recent push for record clearance policies.

First, major data leaks convinced many Americans that their data was less secure than ever. In 2013, Edward Snowden famously released information about the NSA's global surveillance programs, spurring broad public debate over the previously unknown scope of warrantless surveillance.[133] In 2017, massive credit bureau Equifax announced a major data breach which impacted the personal information of approximately 147 million Americans.[134] In 2018, the Cambridge Analytica scandal came to light, where personal data from millions of Facebook users was collected without their consent and used for political advertising.[135] As these revelations came to light, public opinion studies in 2019 showed that most surveyed Americans had the sense of "always being tracked," believing their personal data was less secure than ever before and that widespread data collection posed more risks than benefit.[136] The same study showed that eighty-four percent of U.S. adults felt they have very little or no control over the data that the government collects about them.[137] A 2021 poll found that eighty-three percent of American voters believe Congress should pass national data privacy legislation, shared across both Democrats (eighty-six percent) and Republicans (eighty-one percent).[138] By 2024, nineteen states passed comprehensive data privacy laws.[139]

---

133. *See* David Lyon, *Surveillance, Snowden, and Big Data: Capacities, Consequences, Critique*, 1 BIG DATA & SOC'Y 1, 3 (2014):

> The gathering of national intelligence in the U.S. is a mammoth undertaking, worth over US$70 billion per year [] and involving extensive links with universities, internet companies, social media, and outside contractors — such as Booz Allen Hamilton that employed Edward Snowden and from which Snowden illegally conducted his removal of sensitive data.

134. *Equifax Data Breach Settlement*, JND, https://www.equifaxbreachsettlement.com/ [https://perma.cc/4TA8-7AZN].

135. *See* Matthew Rosenberg, Nicholas Confessore & Carole Cadwalladr, *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html [https://perma.cc/HXD8-W2Y9].

136. Brooke Auxier, Lee Raine, Monica Anderson, Andrew Perrin, Madhu Kumar & Erica Turner, *Americans and Privacy: Concerned, Confused and Feeling Lack of Control over Their Personal Information*, PEW RSCH. CTR. (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/ [https://perma.cc/BUR5-A2Q8].

137. *Id.*

138. Sam Sabin, *States Are Moving on Privacy Bills. Over 4 in 5 Voters Want Congress to Prioritize Protection of Online Data*, MORNING CONSULT (Apr. 27, 2021), https://pro.morningconsult.com/instant-intel/state-privacy-congress-priority-poll [https://perma.cc/JN5A-DZSL].

139. *See* C. Kibby, *US State Privacy Legislation Tracker*, INT'L ASS'N OF PRIV. PROS. (Nov. 4, 2024), https://iapp.org/media/pdf/resource_center/State_Comp_Privacy_Law_Chart.pdf [https://perma.cc/DTA7-Q5BT].

Second, discussions of privacy soon translated into debates over policing and the criminal legal system following the murder of George Floyd in May of 2020. Debates over the use of biased A.I. and facial recognition software increasingly used by police departments took on new urgency as the broader public became more aware of longstanding police violence against Black and Brown communities.[140] At the same time, the *New York Times* reported on the use of facial recognition app Clearview AI by over six hundred law enforcement agencies across the U.S.[141] Soon after, reports began to emerge of people wrongfully accused by an algorithm.[142] In the years following, public opinion on police technologies has varied by race and age (with older white respondents tending to believe the technology can aid in policing), but concerns persist: in a 2022 Pew poll, sixty-six percent of respondents believed that police would use facial recognition technology to monitor Black and Hispanic neighborhoods much more often than other neighborhoods.[143] Other studies showed growing distrust of the criminal legal system in terms of privacy even before 2020; for instance, one nationally representative study showed a strong majority opposed the publication of arrest records on the internet,[144] and many newspapers, including the Associated Press, stopped publishing mugshots for minor arrests.[145] There are also links between automated record clearance and efforts to decrease broad police surveillance, as police often rely on old criminal records to justify current suspicion.[146] Criminal record data are increasingly seen as the building blocks of data-driven criminal legal system operations and are mechanisms that enable further

140. *See* Hope Reese, *What Happens When Police Use AI to Predict and Prevent Crime?*, JSTOR DAILY (Feb. 23, 2022), https://daily.jstor.org/what-happens-when-police-use-ai-to-predict-and-prevent-crime/ [https://perma.cc/A772-XW9N].

141. Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES (Jan. 18, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html [https://perma.cc/Q7R3-Y2B2].

142. Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html [https://perma.cc/4HFA-N49G].

143. Lee Rainie, Cary Funk, Monica Anderson & Alec Tyson, *2. Public More Likely to See Facial Recognition Use by Police as Good, Rather than Bad for Society*, PEW RSCH. CTR. (Mar. 17, 2022), https://www.pewresearch.org/internet/2022/03/17/public-more-likely-to-see-facial-recognition-use-by-police-as-good-rather-than-bad-for-society/ [https://perma.cc/CMM9-4DR4].

144. Sarah E. Lageson, Megan Denver & Justin T. Pickett, *Privatizing Criminal Stigma: Experience, Intergroup Contact, and Public Views about Publicizing Arrest Records*, 21 PUNISHMENT & SOC'Y 315, 315 (2019) (finding that 88 percent of the general public oppose the publication of arrest records by private companies).

145. David Bauder, *AP Says It Will No Longer Name Suspects in Minor Crimes*, AP NEWS (June 15, 2021), https://apnews.com/article/crime-technology-df0a7cd66590d9cb29ed1526ec03b58f) [https://perma.cc/CGP3-MZ33].

146. SARAH BRAYNE, PREDICT AND SURVEIL: DATA, DISCRETION, AND THE FUTURE OF POLICING chs. 3, 4 (2020).

investigation, marking, and punishment.[147] For instance, arrest data can be used to direct police attention or to enter suspects in a gang or other type of investigatory database.[148] These data are also used in immigration court decisions, where arrests can be considered by non-criminal justice actors,[149] resulting in widespread "big data blacklisting" based on suspicion alone.[150] Clearing criminal records may operate as a protective shield against these intrusions and may also "help both advance privacy and the presumption of innocence in this big data age, as well as stem the racial disparities in police practices and criminal justice outcomes that might otherwise be perpetuated."[151]

Finally, amidst these broader debates around privacy and surveillance, a different thread of criminal legal reform also spurred criminal record clearance: the legalization of recreational cannabis. Prior to 2021, only two states authorized the automatic clearing of cannabis-related criminal records — California and New Jersey — but by 2022, this automatic remedy was expanded to Connecticut, Colorado, Missouri, New Mexico, New York, Rhode Island, and Virginia.[152] Beyond these states that embrace automatic sealing of cannabis records, as of 2024 twenty-seven states in total offer cannabis-based expungement remedies, most by court petition.[153]

These policy changes are often framed as providing a state-triggered remedy for the longstanding harms of criminal enforcement while also invoking the benefits of concealing a criminal record. For instance, the New York Attorney General issued a pamphlet on cannabis expungement that stated: "[L]aws have changed recently, making

---

147. LAGESON, *supra* note 14, at 30 (noting that "[d]ata-driven criminal justice . . . exerts a powerful gaze over people who are already under a tremendous amount of governmental surveillance").

148. *Cf.* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 819, 823, 845 (2015).

149. *Id.* at 826–33.

150. Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1738 (2015) ("'[B]ig data blacklisting' describes the harm incurred by those categorized by the government as administratively 'guilty until proven innocent' by virtue of digitally generated suspicion, such as through government-led big data systems that flag suspicious digital data and database screening results.").

151. Jenn Rolnick Borchetta, *Curbing Collateral Punishment in the Big Data Age: How Lawyers and Advocates Can Use Criminal Record Sealing Statutes to Protect Privacy and the Presumption of Innocence*, 98 B.U. L. REV. 915, 918 (2018).

152. *See* Margaret Love, Jana Hrdinová & Dexter Ridgway, *Marijuana Legalization and Record Clearing in 2022* 2 (Ohio State Legal Stud. Rsch., Paper No. 747, 2022), https://www.ssrn.com/abstract=4307003 [https://perma.cc/AJ4N-G5UE]; *see also* Tanner Wakefield, Stella Bialous & Dorie E. Apollonio, *Clearing Cannabis Criminal Records: A Survey of Criminal Record Expungement Availability and Accessibility Among U.S. States and Washington D.C. that Decriminalized or Legalized Cannabis*, 114 INT'L J. DRUG POL'Y 1 (2023).

153. *50-State Comparison: Marijuana Legalization, Decriminalization, Expungement, and Clemency*, COLLATERAL CONSEQUENCES RES. CTR. (June 2024), https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-marijuana-legalization-expungement-2/ [https://perma.cc/2Y6W-MXX9].

recreational marijuana legal and clearing many people's records of marijuana convictions. These changes promise fairer treatment. Records of marijuana convictions will no longer block people's access to higher education, public housing, or good jobs."[154] Some legal analysts advocated for advanced data privacy measures to be taken alongside cannabis expungement so that no access remained regarding the original records or records of the expungement itself.[155]

The scope of automatic expungement for cannabis can be enormous, given the decades of cumulative criminal record creation through cannabis prohibitions enforcement. Technology has offered a solution. California offers a helpful case for understanding how cannabis legalization led to technology-facilitated expungement: while the 2016 Proposition 64 allowed people to petition for expungement, only three percent of eligible people were able to navigate the administrative process for record clearance.[156] In response, a 2018 law (AB 1793) delivered automatic relief, requiring California DAs to seal all records by July 2020.[157] Faced with the daunting task of locating and sealing such a large volume of data, several counties contracted with technology non-profit Code for America, which developed an open-source application called "Clear My Record" to facilitate the process.[158] Describing the process as "record clearance at scale," Code for America was able to clear records for 70,000 people in the five counties where it operated its pilot app.[159] The partnership has continued across the state.[160] The California experience helped clarify the language around Clean Slate policies more generally, which were increasingly reframed as a "data" issue for which states must contend.[161] And once recast as a data issue,

---

154. *Marijuana Legalization and Record Expungement: Know Your Rights*, OFF. OF THE N.Y. STATE ATT'Y GEN., https://ag.ny.gov/sites/default/files/publications/cannabis-expungement-english.pdf [https://perma.cc/HS5L-D2TN].

155. Julie E. Steiner, *Erasing Evidence of Historic Injustice: The Cannabis Criminal Records Expungement Paradox*, 101 B.U. L. REV. 1203, 1227 (2021) ("To protect personal privacy and the sanctity of expungement, the individual's name and other personal information should be expunged.").

156. Alia Toran-Burrell & David Crawford, *Record Clearance at Scale: How Clear My Record Helped Reduce or Dismiss 144,000 Convictions in California*, CODE FOR AMERICA (Sept. 23, 2020), https://codeforamerica.org/news/record-clearance-at-scale-how-clear-my-record-helped-reduce-or-dismiss-144-000-convictions-in-california/ [https://perma.cc/R64L-XLVS] (noting that "the burden was on individual people to navigate a complex, expensive legal process to receive it").

157. Cal. Assembly B. 1793, ch. 993 (2018).

158. CLEAR MY RECORD, https://www.clearmyrecord.org/ [https://perma.cc/C2W2-QYLE].

159. Toran-Burrell & Crawford, *supra* note 156.

160. *Id.*

161. *Id.* (emphasis removed) ("AB 1793 required every DA in California to adopt an automatic approach to marijuana record clearance, so we scaled up the technology by releasing a no-cost, open-source application that efficiently identifies eligible convictions from bulk record data — up to 10,000 eligible convictions per minute, in fact.").

expungement policy began to clearly invoke informational privacy as a remedy to collateral consequences.

1. The Rise of Clean Slate Policies

Alongside cannabis reform and broader debates about privacy and fairness in the criminal legal system, efforts to undo the mark of a criminal record picked up in earnest,[162] and new record clearance policies started to offer new second chances. Statutory record clearance schemes now exist on the books in the vast majority of U.S. states,[163] but these are generally administered through a petition-based system involving judicial review and other procedural hurdles.[164] Yet, a stark "second chance gap" has been noted in traditional, court petition-based expungement because a very small minority of eligible people actually apply for and receive relief.[165] A national study estimates that less than ten percent of people eligible for relief receive it,[166] while a study of Michigan expungement found that only 6.5 percent of eligible people obtained expungement within five years of becoming eligible for relief.[167] These studies have encouraged advocacy for automated record clearance remedies, often dubbed "Clean Slate" provisions: the automatic, algorithmic expungement or sealing of certain qualifying arrest

162. Corda, *supra* note 3, at 1485–86, 1490–93; *see also* MARGARET LOVE & NICK SIBILLA, ADVANCING SECOND CHANCES: CLEAN SLATE AND OTHER RECORD REFORMS IN 2023, at 1 (Jan. 2024), https://ccresourcecenter.org/wp-content/uploads/2024/01/Annual-Report-2023.1.5.24.rev2_.pdf [https://perma.cc/SA44-UCW8] ("This modern law reform movement . . . reflects a public recognition that the 'internal exile' of such a significant portion of society [with a criminal record] is not only unsafe and unfair, but it is also profoundly inefficient.").

163. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 1; MARGARET LOVE & DAVID SCHLUSSEL, FROM REENTRY TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2021, at 2 (Jan. 2022), https://ccresourcecenter.org/wp-content/uploads/2022/01/2022_CCRC_Annual-Report.pdf [https://perma.cc/4FT5-23V7].

164. Brian M. Murray, *Insider Expungement*, 2023 UTAH L. REV. 337, 345 (2023) (noting that "the traditional process of petition-based expungement is, in most instances, arduous and, frankly, an ordeal for most petitioners . . . . The procedural complexity of expungement comes in various forms: filing hurdles, fees, waiting periods, statutory presumptions, standards of review, judicial rules, and evidentiary norms and rules for hearings").

165. Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 524 (2020).

166. *Id.* at 564. Following this study, the Paper Prisons Initiative was launched to review the situation and determine the percentage of individuals eligible for record relief who actually received it in every state. Uptake rates for conviction records range between twenty-two percent in Iowa and one percent in New York and Missouri. *See What is the "Second Chance Gap"?*, PAPER PRISONS INITIATIVE, https://paperprisons.org/SecondChanceGap.html [perma.cc/2K7K-CFN5].

167. J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2466 (2020).

or conviction record.[168] These reforms are presented by their proponents as "a new era for record clearance policies in America" — one "in which eligible records would be cleared automatically as a routine function of government."[169]

Though not always explicitly framed around privacy rights, the logic of record clearance is to conceal, make private, or erase data about an arrest or criminal conviction, at least for public sources of data. Indeed, Section 1 of the Pennsylvania Clean Slate law (Act 56 of 2018) explicitly states that government agencies "may not disseminate to an individual, a noncriminal justice agency or an Internet website any information relating to a conviction, arrest, indictment or other information leading to a conviction, arrest, indictment or other information."[170] Community Legal Services of Philadelphia, a champion of the state's Clean Slate legislation, reminds residents on its website that "the vast majority of employers, landlords, schools, and the general public will NOT have access to sealed records."[171]

In states like Pennsylvania, automation also ensures that the privacy afforded via record sealing is no longer reserved only to those with the resources to access expungement. Scholars have long described privacy as a resource rooted in inequality,[172] and the "second chance gap" in expungement illustrates this inequality in action.[173] Automation ensures democratic access to a newly created privacy right through Clean Slate initiatives and further treats criminal records as a source of personal data to be managed at a broad scale. In this sense, automated record clearance is rooted in a theory of *administrative fairness* by shifting data management tasks away from the person with the record and

168. *See, e.g.*, Jamie Dimon, *If You Paid Your Debt to Society, You Should Be Allowed to Work*, N.Y. TIMES (Aug. 4, 2021), https://www.nytimes.com/2021/08/04/opinion/clean-slate-incarceration-work.html [perma.cc/BPR6-SQ5P] ("These initiatives enjoy significant support across the aisle — a rare opportunity for consensus, bipartisanship and momentum."); Alice Gainer, *New York Becomes 12th State with "Clean Slate" Legislation*, CBS NEWS (Nov. 16, 2023), https://www.cbsnews.com/newyork/news/new-york-clean-slate-legislation/ [perma.cc/BBH9-6ACQ] ("Labor and advocacy groups say this was a long time coming and will help fill the state's worker shortage.").

169. *Automatic Record Clearance: Working with Communities and Government to Fundamentally Transform the Process of Clearing Records*, CODE FOR AM., https://www.codeforamerica.org/programs/criminal-justice/automatic-record-clearance/ [https://perma.cc/64AC-9YPC].

170. 18 PACSA § 9122.1.

171. *Frequently Asked Questions About Clean Slate*, CMTY LEGAL SERVS. OF PHILA. (June 26, 2018), https://clsphila.org/employment/frequently-asked-questions-about-clean-slate/ [perma.cc/N2WF-Y42A].

172. Michele Gilman & Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 N.Y.U. REV. L. & SOC. CHANGE 253, 295 (2018) ("Information inequality describes the problem when the holder of data has more information than the data subject, resulting in the data holder controlling or otherwise duping the data subject.").

173. Chien, *supra* note 165, at 526 (defining the "second chance gap" as the difference between expungement eligibility and actual "delivery of second chances").

toward the systems that created and maintained criminal records in the first place.[174] Expungement, as seen through an informational privacy lens, affirmatively deletes previously public information in an effort to ensure privacy equity within a starkly inequal criminal legal system.

Expungement also raises theoretical questions about the connection between "forgetting" and "forgiving" as part of promoting fairness and rewarding rehabilitation in the criminal legal system. The Clean Slate campaign's lobbying efforts, for instance, are rooted in an assumption of rehabilitation. In contrast to traditional markers of rehabilitation as "performed" by defendants and parolees through participation in programs or performing administrative compliance,[175] automated record clearance assumes a criminal record subject to be reformed by simply meeting the criteria for relief (such as time since last offense and type or severity of a conviction record). In this sense, recognition of rehabilitation is automatically assumed based on remaining crime free or avoiding any serious criminal convictions. As Professor Sonja Starr put it, "[u]nder the Clean Slate approach, computer algorithms use state criminal history databases to identify those who meet the legal requirements for expungement, and (while actual implementation procedures vary by state) there would be no petitions and no judicial discretion."[176] Therefore, proponents of Clean Slate policies advocate for "objective" automated approaches that treat criminal records as mass data sets, rather than individualized, person-based records.

The policies are spreading across the U.S. at a rapid pace: after Pennsylvania became the first state to adopt Clean Slate in 2018, it was soon followed by Utah, New Jersey, Michigan, Connecticut, Delaware, Virginia, Oklahoma, Colorado, California, Minnesota, and New York.[177] Currently, no uniform model is used. Clean Slate laws exhibit variations across states, encompassing diverse criteria for automatic

---

174. We use the concept of "administrative fairness" to describe the shift of administrative work from civilians to the state for a criminal record expungement. This concept stands in contrast to what Herd and Moynihan refer to as "administrative burdens," which they describe as the learning costs, psychological costs, and compliance costs that affect whether people can access governmental services or benefits. Administrative burdens mean that a governmental benefit "often only reach[es] a fraction of their target population, automatically weakening their effectiveness by shutting out those who fail to negotiate the required procedure." PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 2 (2018). While petition-based expungements may involve administrative burdens, automated expungements require little to no work on behalf of the person who will receive the expungement, creating what we deem as "administrative fairness."

175. *See* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING ch. 6 (2018).

176. Sonja B. Starr, *Expungement Reform in Arizona: The Empirical Case for a Clean Slate Reforming Arizona Criminal Justice*, 52 ARIZ. ST. L.J. 1059, 1067 (2020).

177. *Clean Slate States and CSI Criteria for Clean Slate Legislation*, CLEAN SLATE INITIATIVE (2024), https://www.cleanslateinitiative.org/states [https://perma.cc/VTX2-QSK2]; *see also Round-up of 2023 Record-clearing Laws*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 4, 2024), https://ccresourcecenter.org/2024/01/04/round-up-of-2023-record-clearing-laws/ [https://perma.cc/L75H-Y5BJ].

sealing or clearance of records. Some states limit eligibility to misdemeanors and non-conviction records, whereas others also permit the expungement of specific felony convictions.[178]

V. PRIVACY AS A PROXY FOR REHABILITATION

Historically, the American ethos is permeated by the belief in second chances — from immigrants who came to start over, to born-again Christians, to workers eyeing the promise of upward mobility.[179] Privacy can be viewed as a quintessentially American value because it "allows us to experiment, make mistakes, and start afresh if we mess up. It allows us to reinvent ourselves, or at least maintains the valuable illusion that reinvention is possible."[180] While "tough-on-crime-and-criminals" rhetoric has, for a long time, overshadowed any relevance of privacy interests in U.S. criminal record policy, things, as discussed, are gradually changing.[181] Privacy has long been recognized as an important feature in society, and it has become even more salient to policymaking in the recent discussion about criminal record clearance reform. As criminal record clearance reform continues its expansion across the United States, these policy successes point toward a broader reckoning that, within the enormous cache of collateral consequences associated with a criminal record, the loss of privacy has become a central defining characteristic of American punishment that must be undone.

The growing number of record clearance reforms may also be related to rebounds in political support for second chances in a climate characterized by "the emergence of more nuanced and even less punitive attitudes."[182] Empirical studies on the support for record clearance

---

178. For each state's laws and practices regarding expungement, sealing and other record relief, see *Restoration of Rights Project*, COLLATERAL CONSEQUENCES RES. CTR., https://ccresourcecenter.org/restoration-2/ [https://perma.cc/JYR8-7YKR].

179. Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 99 (2019) ("The great promise of the American dream is that with hard work, determination, and some good luck, people can reinvent themselves . . .").

180. Eric Posner, *We All Have the Right to Be Forgotten*, SLATE (May 14, 2014), https://slate.com/news-and-politics/2014/05/the-european-right-to-be-forgotten-is-just-what-the-internet-needs.html [https://perma.cc/4CRL-L58S].

181. *See* Alessandro Corda, *Toward a Narrowing of American Criminal Record Exceptionalism*, 30 FED. SENT'G. REP. 241, 245–47 (2018) (discussing "forgiving" and "forgetting" approaches to criminal record clearance reform across the U.S.).

182. Michael M. O'Hear & Darren Wheelock, *Public Attitudes Toward Punishment, Rehabilitation, and Reform: Lessons from the Marquette Law School Poll*, 29 FED. SENT'G. REP. 47, 47 (2016); *see also* Katherine Beckett, Anna Reosti & Emily Knaphus, *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 238, 238–39 (2016) (arguing that, despite notable instances of evolving rhetoric and policy adjustments in criminal justice reform efforts across the U.S., these changes do not constitute a full paradigm shift; instead, they reflect a more nuanced, intricate, and at times contradictory modification in how punishment is conceptualized, discussed, and ultimately put into practice).

measures conducted in recent years found a strong correlation between respondents' belief in "redeemability" and support for record clearance, with overall support for the reforms varying by seriousness of the crime and time since offense.[183] However, post-sentence discrimination and the regulation of criminal history information increasingly frame and invoke crucial data privacy questions in today's data-rich environment. While record clearance policies are designed to provide a concrete opportunity for rehabilitation by concealing, sealing, or even, at times, destroying the original record of a criminal legal event, criminal record data are increasingly intertwined with other forms of personal data and integrated into Google Search results and digital biographies.[184] As a result, new questions arise about the loss of privacy as a related consequence of criminal punishment in contemporary societies in which technology plays a key role. Expungement provisions, therefore, also clearly express an informational privacy rationale pertaining to the "interest of individuals in exercising control over access to information about themselves."[185]

In this context, criminal record clearance statutes function as mechanisms to partially regain control over the dissemination, processing, and utilization of personal criminal record data. This data privacy perspective is closely tied to the fundamental concept of personal autonomy, emphasizing that individuals can only fulfill themselves when a sufficient level of privacy is maintained. This includes freedom from enduring indefinite stigmatization and discrimination based on one's past conduct.[186] From this angle, privacy seemingly represents a *proxy* for rehabilitation: when privacy rights are upheld and restored in the context of record clearance, this implies that the individual's past mistakes should not continuously define them, enabling them to reintegrate

183. *See, e.g.*, Alexander L. Burton, Francis T. Cullen, Justin T. Picket, Velmer S. Burton, Jr. & Angela J. Thielo, *Beyond the Eternal Criminal Record: Public Support for Expungement*, 20 CRIMINOLOGY & PUB. POL'Y 123, 137–38 (2021) (finding widespread public endorsement for expungement — particularly for individuals convicted of property and substance-related offenses — contingent upon their demonstration of crime-free behavior for 7–10 years, stable employment, and successful completion of a rehabilitation program). Concerns among the public extend to unrestricted access to criminal records, emphasizing the importance of accuracy in available information. *Id.*

184. LAGESON, *supra* note 14, at 146–49, 156–57.

185. Jeroen van den Hoven, Martijn Blaauw, Wolter Pieters & Martijn Warnier, *Privacy and Information Technology*, *in* THE STAN. ENCYC. OF PHIL. (Edward N. Zalta ed., 2020), https://plato.stanford.edu/entries/it-privacy/ [https://perma.cc/L86D-96X8].

186. Paul Roberts, *Privacy, Autonomy and Criminal Justice Rights: Philosophical Preliminaries*, *in* PERSONAL AUTONOMY, THE PRIVATE SPHERE AND THE CRIMINAL LAW: A COMPARATIVE STUDY 49, 62 (Peter Alldridge & Chrisje Brants eds., 2001) (describing privacy as the ability "to experiment with new activities and experiences on a trial basis and without fear of ridicule or censure, and to pursue one's chosen projects and commitments without being exposed to avoidable risks of victimisation or unreasonable demands to account for oneself before the galleries of public opinion").

into society with a fair chance at a fresh start.[187] By safeguarding criminal record privacy, society acknowledges the potential for personal growth, change, and reformation, which are key components of the rehabilitation process. The ability to limit the dissemination of sensitive criminal history information allows for a more equitable chance at employment, housing, and social acceptance.

Emphasizing privacy shifts the focus from punishment to offering individuals a chance to rebuild their lives without perpetual judgment. This emphasis fosters a more empathetic and nuanced approach to criminal justice. Crucially, privacy enjoys a broader appeal than rehabilitation due to its universal recognition and alignment with fundamental values. As observed, privacy, as a concept, is deeply ingrained in societal norms, resonating with both those with and without a criminal history.[188] Furthermore, its appeal extends beyond specific contexts, striking a chord with individuals who inherently value personal autonomy and freedom.[189] Law-abiding citizens understand the importance of protecting one's privacy not only for those with a criminal record but also as a general safeguard against potential misuse of personal information. In contrast, rehabilitation may be more contentious, subject to differing perspectives on justice and societal reintegration. Privacy, as a shared value, becomes a unifying force appealing to a wide range of people who recognize its significance in maintaining a sense of security, control, and fairness in both personal and societal contexts. Through the privacy lens, the narrative of "us" (law-abiding citizens) versus "them" (people with a criminal history) to support and justify discrimination based on a criminal record weakens, and informational privacy emerges as a viable and palatable policy rationale in our data-rich environment.

Privacy, we maintain, is gaining new relevance amidst renewed criminal justice reform debates. In a cultural climate placing strong emphasis on personal autonomy and individual rights, and where "tough-

---

187. The "right to oblivion" of one's judicial past and the restoration of criminal record privacy therefore become an essential element in order to nurture the potential for fresh starts. *See* W. Gregory Voss & Celine Castets-Renard, *Proposal for an International Taxonomy on the Various Forms of the Right to Be Forgotten: A Study on the Convergence of Norms*, 14 COLO. TECH. L.J. 281, 288–313 (2016) (discussing the right to judicial rehabilitation and the right to deletion or erasure established by data protection legislation).

188. *See, e.g.*, Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RSCH. CTR. (May 20, 2015), https://www.pewresearch.org/internet/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/ [https://perma.cc/E3D7-SCVC] ("93% of adults say that being in control of *who* can get information about them is important." (emphasis in original)); Elsa Y. Chen & Ericka B. Adams, *"I've Risen Up From the Ashes That I Created": Record Clearance and Gendered Narratives of Self-Reinvention and Reintegration*, 14 FEMINIST CRIMINOLOGY 143, 164–65 (2019) (discussing how record clearance mechanisms help and motivate individuals with a criminal record to rebuild their identities and move forward, creating a path to reintegration and renewed privacy and autonomy).

189. *See* MARINA OSHANA, PERSONAL AUTONOMY IN SOCIETY 138 (2006).

on-crime" and public safety rhetoric have seemingly lost part of their totemic status and influence, the quest for an effective protection of the right to privacy is seen as a fundamental precondition for the affirmation of the self. From this perspective, privacy emerges as a viable "surrogate" for, and aid to, traditional notions of rehabilitation and reintegration in the discussion about crime, punishment, and the management of people with a criminal record.

Digital technologies applied to criminal record data, however, put this opportunity in jeopardy. This is especially true today where it is extremely difficult for a person to be forgotten and forgiven by "escap[ing] their digitized past."[190]

VI. THE PITFALLS OF CRIMINAL RECORD TECHNOLOGY

Automated record clearance relief has been offered as a prime example of how technology can create better access and more effective outcomes through an algorithmically automated implementation. On the other hand, digital technologies contributed to the dissemination, aggregation, and use of criminal records across institutional and commercial domains, hence driving criminal record discrimination. The embrace of algorithmic approaches in criminal record sealing stands in stark contrast to growing skepticism over using algorithmic approaches in most facets of the justice system, such as in sentencing, bail setting, probation terms, and police investigations.[191] But, as noted, the technologies of record clearance represent both an opportunity and an obstacle.

First, the narrow scope of automated expungement laws in a racialized criminal justice system may mean that the marginalized communities that most need access to expungement are least likely to be eligible for the remedy.[192] Second, automated expungement policies have little effect on private providers of criminal record data.[193] Third, even as federal agencies like the Consumer Financial Protection Bureau ("CFPB") work to ensure private vendors comply with Clean Slate,

---

190. Matt Bishop, Emily Rine Butler, Kevin Butler, Carrie Gates & Steven Greenspan, *Forgive and Forget: Return to Obscurity*, PROCEEDINGS OF THE 2013 NEW SECURITY PARADIGMS WORKSHOP 1, 7 (2013) (noting that, in the past, individuals could expect to be forgiven for social transgressions, which were eventually forgotten or no longer discussed; however, in today's digital world, even minor offenses that would have been easily forgiven are permanently accessible online, with new acquaintances, employers, and colleagues effortlessly finding this information with a simple search, making it difficult to move on from past mistakes); *see also* Eldar Haber, *Digital Expungement*, 77 MD. L. REV. 337 (2018) (stressing the need to restrict access to legally expunged criminal record information available online).

191. *See* BRAYNE, *supra* note 146; Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303 (2018); Završnik, *supra* note 18.

192. *See infra* text accompanying note 217.

193. *See supra* Parts IV, V.

"dirty data" problems continue to limit full automation of the policies.[194]

Technology thus casts a shadow on the ultimate efficacy of record clearance mechanisms, including automated ones — record clearance policy only addresses the state's version of a criminal record, not the internet or data broker's cache of criminal record data. Record clearance policies rest on the idea that there only exists one single criminal record, when in reality dozens of pieces of digital information relay an arrest or conviction across multiple public and private sources. Automated expungement mechanisms primarily focus on removing criminal records from state-controlled databases.[195] However, for data hosted on servers outside the state's control, such as social media posts, automated expungement would face significant challenges.[196] The algorithm could issue requests for removal, but it would ultimately rely on the platform's compliance with that request, which could vary depending on the platform's policies, jurisdiction, and adherence to privacy laws.[197] Although data privacy rights and technological solutions are helping to drive policymaking, there are still considerable limits to criminal record clearance reforms in today's digital age.[198]

Overall, paired with how eligibility requirements in current record clearance policy are narrowly defined, technology may serve to exacerbate privacy inequalities.

Because governmental and private sector surveillance, as well as contact with the criminal legal system, are simultaneously concentrated in low-income, Black, and Brown communities, it is likely that record clearance remedies are only reaching those who are the least likely to be entangled in the justice system in the first place and more likely to address and overcome legal and extralegal versions of their criminal records. Here, an automated approach may reduce the inequalities already present in state record clearance schemes. At the same time, however, the limited scope of expungement laws may increase racial disparities by focusing only on "low-level" crimes that are disproportionately concentrated in white communities.

---

194. Chien, *supra* note 165, at 526, 529.

195. Lageson, *supra* note 14, at 82–83.

196. Criminal records linger on the internet long after the operation of record relief mechanisms. *Id.* at 84.

197. *What Is "Expungement?"*, AM. BAR ASS'N (Nov. 20, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-_expungement-/ [https://perma.cc/5KCY-HSUL] ("Expungement orders do not remove records from the press, Google, or social media . . . . So, while a person's reasons for seeking expungement of a record . . . might, ultimately, include desires for privacy, it is important to realize that there are limitations."). *But see* Brian M. Murray, *Newspaper Expungement*, 116 NW. U. L. REV. 68, 72 (2021) ("Newspapers (almost all of which maintain an online presence now) have begun to create informal expungement processes for their own archived records.").

198. Personal behavior has become more "monitorable" and "searchable." LAWRENCE LESSING, CODE: VERSION 2.0 203 (2006).

Furthermore, it is critical for contemporary criminal record policy discussion to acknowledge advances in data collection and aggregation that limit the effects of expungement. In our computerized era, a concerning industry has emerged: private vendors gathering bulk criminal data from state repositories and selling it online, intensifying stigma and sentencing consequences.[199] Criminal justice system involvement — any recorded interaction or engagement an individual has with the criminal legal system — leads to enduring online stigma, even after expungement.[200] Disillusionment with record clearance in the digital age may thus be one of the reasons driving the extremely low uptake rates in states that offer only petition-based expungement, particularly if private data repositories fail to regularly refresh their data or delete newly expunged records.[201]

One of the aims of Clean Slate initiatives is for states to "take control" over their data. An automated record-sealing process, however, is only capable of impacting a database maintained by the government and has no effects on other sources available on the internet. Absent more robust privacy protections concerning criminal history records, even automated record clearance policies can be quite an ineffective remedy for criminal record subjects. For criminal record clearance policies to fully work, states must also ensure that private background checking companies do not report records that have been sealed or expunged under the law. The federal Fair Credit Reporting Act ("FCRA"),[202] while broadly shielding from liability for defamation and invasion of privacy, requires commercial background screening companies to follow "reasonable procedures" to assure "maximum possible accuracy" of the information reported.[203] However, this standard in practice creates significant room for commercial screening actors to successfully contend they have not violated the statute even when cleared criminal records are reported.[204] There have been recent advances in this arena. In January 2024, the CFPB released an advisory

199. *See* Corda, *supra* note 39, at 38–40; JACOBS, *supra* note 9, ch. 7.

200. Lageson, *supra* note 17, at 84 (conceptualizing "digital privacy harms" as a collateral consequence of a criminal record).

201. Haber, *supra* note 190, at 355–59; Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 341–46 (2015). Generally, data brokers are not subject to FCRA, though this may soon change. Consumer Reporting Agencies are subject to the FCRA and must delete expunged records. *See CFPB Addresses Inaccurate Background Check Reports and Sloppy Credit File Sharing Practices*, CONSUMER FIN. PROT. BUREAU (Jan. 11, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-addresses-inaccurate-background-check-reports-and-sloppy-credit-file-sharing-practices/ [https://perma.cc/G5HW-JFTW].

202. 15 U.S.C. § 1681.

203. 15 U.S.C. § 1681(e) (specifying "compliance procedures").

204. *Cf.* Sharon M. Dietrich, *Ants Under the Refrigerator? Removing Expunged Cases from Commercial Background Checks*, 30 CRIM. JUST. 26, 28 (2016) (noting that many background checking companies have "no procedure whatsoever to learn of expunged cases," and that this blatant failure "appears on its face to contravene the FCRA's accuracy provisions").

opinion stressing that private companies covered by the FCRA must maintain reasonable procedures to avoid producing background reports that contain expunged or sealed criminal record information.[205] Failing to do so constitutes a violation of the FCRA.[206] Data brokers, long considered to be outside the coverage of FCRA, may also be subject to its accuracy requirements that now include expungement compliance.[207]

That said, technology alone also cannot remedy the incomplete and incorrect data that undermine an automated approach. The implementation of expungement has exposed "dirty data" problems that preclude true automation.[208] For instance, approximately thirty percent of nationwide rap sheets maintained by the FBI in the criminal history record repository known as the Interstate Identification Index (III or "Triple I") are missing final case disposition information,[209] which would render those records unusable in automated approaches. This too may be stratified by race and compound racial inequalities. Recent work found that lower quality criminal record data are concentrated in states where African Americans make up larger shares of felony record populations — a reflection of the punitive era's "cheap and mean" approach to criminal punishment (and its attendant criminal record data systems).[210]

On the ground, the application and effectiveness of automated expungement has yet to be measured at a broad scale. As Chien cautions, "though second chances automation presents the potential for algorithms to reduce, rather than exacerbate, existing disparities . . . much depends on how it is implemented."[211] Researchers in organizational theory and science and technology studies have long warned that technological policy interventions "depend on the same good-old-fashioned factors that have helped and hindered reform for centuries: context, incentives, and details of implementation."[212] With these caveats in mind, we conclude by discussing how policymakers might continue to leverage privacy considerations in criminal justice policymaking.

---

205. CFPB Advisory Opinion on Fair Credit Reporting, 12 C.F.R. § 1022 (Jan. 23, 2024).
206. *Id.*
207. *Prepared Remarks of CFPB Director Rohit Chopra at the White House on Data Protection and National Security*, CONSUMER FIN. PROT. BUREAU (Apr. 2, 2024). https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-white-house-on-data-protection-and-national-security/ [https://perma.cc/4QKF-WSUA].
208. Chien, *supra* note 165, at 581–83.
209. U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2018 3 (Nov. 2020).
210. David McElhattan, *Punitive Ambiguity: State-Level Criminal Record Data Quality in the Era of Widespread Background Screening*, 24 PUNISHMENT & SOC'Y 367, 373 (2021).
211. Chien, *supra* note 165, at 527.
212. Stevenson, *supra* note 191, at 306.

VII. CONCLUSION

Privacy and technology have become closely linked, and beyond criminal records, privacy is regularly invoked in debates about the use of personal data and surveillance technologies by criminal justice authorities.[213] This Article has raised important questions about the historical role and understanding of privacy in criminal justice contexts, the automated administrative state,[214] and the promises and perils of technology in regulating privacy rights in the criminal records context. We presented a historical policy analysis that highlights the role of privacy interests in the construction of criminal record policy across three eras: the rehabilitative era, the punitive era, and the current data-driven era. In doing so, we have shown how privacy rights have been framed and operationalized within criminal record policy and are reflective of broader cultural and political conceptions of crime and punishment. We also paid special attention to how privacy has begun to take on an informational privacy rationale in the data-driven era. Ultimately, while new technologies offer a solution through automated record clearance policy, they can also simultaneously exacerbate criminal record discrimination.

Our analysis highlighted how privacy has long existed as an important, though long understated, feature in criminal record policy and is now emerging more than ever as a focal aspect of new conversations about criminal legal reform. Following the rehabilitative era, and during the punitive era, penal trends and technological developments were characterized by a consistent trajectory toward surveillance and disciplinary techniques which tended to disregard the right to privacy of individuals with a criminal history. In the current era, however, privacy represents a central concept behind the current wave of criminal record clearance reforms. Privacy helps reshape policy narratives by appealing to a broader audience more willing to support the protection of individual rights and personal sensitive data in the digital age. Privacy is also leveraged through Clean Slate policies as a method of correcting the historical harms of the criminal legal system in a time of intense public scrutiny.[215] Regaining informational privacy over criminal history

213. *See* Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539, 1542 (2014) (arguing that "because privacy makes an individual less vulnerable to oppressive state social control, the deprivation of privacy can be an important aspect of one's subordination").

214. *See* Ryan Calo & Danielle K. Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797 (2021) (discussing the challenges posed by automated systems in the administrative state, highlighting concerns about transparency, accountability, and legitimacy).

215. In this context, Clean Slate policies, as an advanced technological solution, respond directly to concerns about the increased government surveillance potential that arose with the

information through record clearance allows people to "avoid being at the mercy of the judgment of others" and crucially protects "people who do have something to hide but who do not or no longer deserve punishment."[216]

At the same time, while we contend that privacy rights represent a significant factor behind criminal record reforms in our data-driven age, significant challenges persist. While automation-based record clearance reforms, in particular, decisively capture how technological development has effectively transformed traditional privacy problems into *data privacy* problems following the digital revolution, these reforms do not currently seem capable of providing a full solution to longstanding inequalities in the criminal record policy environment. The use of algorithmic technology for clearing purposes leaves untouched the problem of the narrow scope of current legislative reforms as to what types of criminal records are eligible to be cleared. As record clearance reform shows no signs of slowing down, the time is ripe to thoughtfully expand legislative efforts to overcome the limitations we have identified in this Article.

First, record clearance eligibility must be expanded to include a broader set of criminal offenses. Strict eligibility requirements deliver relief only to people with very low-level criminal histories, cutting out people who have more extensive records potentially due to racially biased criminal legal system processes impacting downstream record clearance eligibility that is structured by, and contributes to, racial inequalities.[217] This will be particularly true for offenses historically linked to biased policing or prosecution. Eligibility might also be expanded by implementing shorter waiting periods and removing other barriers, such as a requirement that a person has no outstanding legal financial obligations. Legislatures might also think about more

creation of computerized criminal record databases. *See, e.g.*, Diana R. Gordon, *The Electronic Panopticon: A Case Study of the Development of the National Crime Records System*, 15 POL. & SOC'Y 483 (1987) (discussing the development of computerized criminal record systems and the resulting increase in government surveillance capabilities).

216. Mark Tunick, *Privacy and Punishment*, 39 SOC. THEORY & PRACT. 643, 650 (2013).

217. On racial inequalities in criminal record policy, see Alyssa C. Mooney, Alissa Skog & Amy E. Lerman, *Racial Equity in Eligibility for a Clean Slate under Automatic Criminal Record Relief Laws*, 56 LAW & SOC'Y. REV. 398, 398 (2022) ("[O]ne in five people with [criminal] convictions [in California] met criteria for full conviction relief under the state's automatic [record clearance statute]. Yet the [percentage] of Black Americans eligible for relief was lower than White Americans, reproducing racial disparities in criminal records."). On the issue of racial inequalities within the criminal legal system, see, e.g., Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191 (2018) (finding that "racial disparities in plea-bargaining outcomes are greater in cases involving misdemeanors and low-level felonies relative to cases involving more severe offenses"); Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 811 (2018) (stressing how "bail and pretrial detention have meaningful consequences for racial disparities in incarceration").

sweeping reform, such as New Jersey's new law that allows eligible applicants to have their entire criminal record sealed after a period of ten years crime free.[218] Rather than over-focusing on policymaking at the *offense* level, this approach primarily emphasizes creating a truly clean slate at the level of an individual *person* — something that more fully reflects the idea of starting anew with a clean slate. Such robust approaches leverage a privacy interest against an old criminal history, helping to ameliorate the concerns of racial and economic inequalities stemming from partial record clearance.

Finally, criminal record clearance reform must crucially turn its attention to the various ways through which criminal record information is shared and disseminated across various state and private databases. More comprehensive legal tech policies should be devised and implemented to fight technological reality and fully embrace a privacy rights framework. Today, police, courts, and correctional facilities routinely release (and even sell) criminal history information to websites, online background screening companies, and social media, which contradicts and undermines record clearance rules — including those governed by algorithmic automation. Technology applied to record clearance does not address the problem of incomplete and "dirty data" as well as the dissemination of criminal record data well beyond government-held databases.

New measures are being adopted as a result. For example, according to the Clean Slate laws passed in California,[219] courts are now prohibited from disseminating criminal record information on individuals that have been granted criminal record relief. It is therefore now unlawful for data brokers[220] to obtain information about previous arrests and

218. N.J. Rev. Stat. § 2C:52-5.3 (2024) (under the state's new Clean Slate expungement scheme, a person can expunge an unlimited number of qualifying offenses with the exception of a relatively short list of very serious crimes: "unless the person has a conviction for a crime which is not subject to expungement pursuant to subsection b. or c. of N.J.S.2C:52-2.").

219. Cal. Assembly B. 1076 (2019). The law, signed by Governor Gavin Newsom in October 2019, became effective on Jan 1, 2021. California's Clean Slate Act automatically relieved some arrest records and low-level convictions. Before this law, people had to file a petition in the Superior Court and go through a hearing to obtain relief. Subsequently, S.B. 731 (Cal. 2022) made important changes to the 2019 Clean Slate Act and came into effect in July 2024. Automatic relief has been expanded and is now available for all felony non-conviction records and most non-serious, non-violent, non-registerable sexual felony conviction records for those who have completed their sentences and remained crime-free for four years. *See* CCRC Staff, *California Poised to Expand Record Clearing to Cover Most Felonies*, COLLATERAL CONSEQUENCES RES. CTR. (Sept. 26, 2022), https://ccresourcecenter.org/2022/09/26/california-poised-to-enact-significant-expansion-of-record-clearing-to-cover-most-felonies/ [https://perma.cc/UZ2G-N8PZ].

220. For a list of brokers, see Data Brokers, *Registered Data Brokers in the United States: 2021*, PRIVACYRIGHTS.ORG (Feb. 22, 2022), https://privacyrights.org/resources/registered-data-brokers-united-states-2021 [https://perma.cc/ZB3L-3UXA]; *see also* Lageson, *supra* note 17, at 1779–80 ("[D]ata brokers (and the screening companies that buy and use their data products) often report factually incorrect criminal record information or mistakenly report expunged or sealed records.").

convictions of a defendant who was granted criminal record relief from court records.[221] An inquiry at the courthouse by a data broker will now return a "no record found."

Effective reform must holistically regulate the segmented and disparate approaches taken by criminal justice agencies in managing and disseminating criminal history information. Record clearance reform should therefore be consistently accompanied by data privacy protections that effectively address and govern the entire continuum of operations of the criminal legal system in our data-driven age.

221. *See* Cal. Penal Code § 851.92(B)(5) ("Arrest records, police investigative reports, and court records that are sealed under this section shall not be disclosed to any person or entity except the person whose arrest was sealed or a criminal justice agency."); Cal. Penal Code § 851.93(c) ("[F]or any record retained by the court . . . the court shall not disclose information concerning an arrest that is granted relief pursuant to this section to any person or entity, in any format, except to the person whose arrest was granted relief or a criminal justice agency."); Cal. Penal Code § 1203.425(a)(3)(A) ("[F]or any record retained by the court . . . the court shall not disclose information concerning a conviction granted relief . . . to any person or entity, in any format, except to the person whose conviction was granted relief or a criminal justice agency.").