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Chris Skall

Boston College Law School, christopher.skall@bc.edu

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JOURNEY OUT OF NEVERLAND: CORI REFORM, *COMMONWEALTH v. PETER PON*, AND MASSACHUSETTS'S EMERGENCE AS A NATIONAL EXEMPLAR FOR CRIMINAL RECORD SEALING

Abstract: Even after a criminal case is disposed of and a period of incarceration or probation is completed, individuals who have become involved in the criminal justice system often face a myriad of collateral consequences based on their criminal records. In order to promote reintegration and combat recidivism, many states have taken legislative actions to ease the burden associated with having a criminal record. In recent years, these efforts have led several states to reform or enact statutes for criminal record sealing or expungement, a controversial, yet highly efficacious tool to provide greater employment and housing opportunities for ex-offenders. In 2010 and in 2014 respectively, the Massachusetts legislature and judiciary made considerable changes to the way that criminal records are managed, disseminated, and sealed in the Commonwealth's Criminal Offender Record Information ("CORI") system. This Note argues that Massachusetts has established a thorough and balanced approach to criminal record sealing that, with certain modifications, can serve as a model for reform for other states and the federal government.

INTRODUCTION

In August of 2010, Massachusetts Governor Deval Patrick issued a press release in which he stated that "[t]he best way to break the cycle of recidivism is to make it possible for people to get a job."¹ Yet for years, many individuals with criminal records in Massachusetts faced serious roadblocks in their efforts to obtain employment and otherwise reintegrate into society.² John C.

¹ Press Release, Office of Governor Deval Patrick of Mass., Governor Patrick Highlights New Law That Expands Job Opportunities, Protects Public Safety (Aug. 30, 2010), <http://archives.lib.state.ma.us/bitstream/handle/2452/125572/ocn795183245-2010-08-30c.PDF?sequence=1> [<https://perma.cc/5W3D-X2TQ>].

² See Harriette L. Chandler, *CORI Reform Needed Now*, WORCESTER TELEGRAM & GAZETTE (Feb. 4, 2010 6:00 AM), <http://www.telegram.com/article/20100204/news/2040648> [<https://perma.cc/T2ZG-4N3X>] (describing how the existence of criminal records can serve to block ex-offenders from gaining employment and fuel recidivism); Milton J. Valencia, *From Jail to Job: Ex-Inmates Say CORI System, Society Don't Give Them a Chance*, WORCESTER TELEGRAM & GAZETTE (May 17, 2007), <http://www.dismashouse.org/docs/fromjailtojob.rtf> [<https://perma.cc/5P9U-K7YZ>] (describing how former inmates in Massachusetts struggled to find jobs, housing, and their place in society after being released from a period of imprisonment).

Williams, one of many ex-offenders living in Massachusetts, remarked in 2008 that “[i]f you’re not able to take care of yourself, your family, then it’s hard to assimilate back into society. For me, this is personal A lot of people forget about the struggle there is.”³

Incarceration, fines, probation, and other legal restrictions placed on an individual following a criminal conviction do not account for the totality of the punishment that an individual faces following a brush with the criminal justice system.⁴ For many, a one-time lapse of judgment leads to involvement in the criminal justice system that in turn can have a profoundly adverse impact on an ex-offender’s attempts to reintegrate with society or to obtain employment and housing.⁵ Faced with a myriad of roadblocks, the risk of recidivism for ex-offenders remains high.⁶ In light of these realities,

³ See Milton Valencia, *A Clean Slate One Day: He Paid His Debt and Now John C. Williams Is Working to Change the CORI Law That He Says Keeps Others in Crime*, BOS. GLOBE (Apr. 6, 2008), http://www.boston.com/news/local/articles/2008/04/06/a_clean_slate_one_day [<https://perma.cc/Q78L-UEJW>].

⁴ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 102, 141 (rev. ed. 2012) (describing the stigma and collateral consequences that individuals with criminal records experience); Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota—State v. Schultz*, 31 WM. MITCHELL L. REV. 1331, 1335–36 (2005) (commenting on how a criminal record can result in diminished social and economic opportunity); RAM SUBRAMANIAN ET AL., *VERA INST. OF JUSTICE, RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009–2014*, at 2, 43 (2014), <http://www.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v4.pdf> [<https://perma.cc/H2A9-QC2X>] (emphasizing how states and the federal government impose numerous collateral consequences on ex-offenders that negatively impact their lives).

⁵ See Michael D. Mayfield, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1063–64 (describing how individuals with criminal records are subject to prejudice when attempting to reenter society and obtain employment and educational opportunities); Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 2–3 (2008) (arguing that even one arrest or conviction can act as a powerful and persistent limitation on one’s ability to participate in society); Meghan L. Schneider, *From Confinement to Social Confinement: Helping Ex-Offenders Obtain Public Housing with a Certificate of Rehabilitation*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 335, 335–36 (2010) (explaining how certain “invisible punishments” that are not imposed by judges, such as decreased eligibility for housing and employment, adversely impact those with criminal records).

⁶ See Lorelei Laird, *Ex-Offenders Face Tens of Thousands of Legal Restrictions, Bias and Limits on Their Rights*, ABA J. (June 1, 2013, 10:00 AM), http://www.abajournal.com/magazine/article/ex-offenders_face_tens_of_thousands_of_legal_restrictions [<https://perma.cc/7UVZ-6UFH>]; Press Release, Dep’t of Justice, 3 in 4 Former Prisoners in 30 States Arrested Within 5 Years of Release (Apr. 22, 2014), <http://www.bjs.gov/content/pub/press/rprts05p0510pr.cfm> [<https://perma.cc/4VBE-8WUB>] (finding that in a sample of individuals released from prison in 2005, approximately 68% were rearrested within three years and approximately 77% were rearrested within five years); see also Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 258 (2004) (commenting on the web of collateral consequences, including employment obstacles and limitations on public benefits, that limits ex-offenders’ ability to successfully reintegrate with society).

the availability of criminal record sealing represents a potential path to facilitate reintegration and rehabilitation through opportunity and access to economic and social resources.⁷

Although many states have developed pathways through which individuals can seek to transcend their criminal records, very few states actually provide individuals with meaningful paths to opportunity or chances for rehabilitation.⁸ In recent years, there has been a growing call for the adoption of a more comprehensive and efficacious approach in order to encourage rehabilitation and combat recidivism.⁹ In accordance with this trend, numerous state legislatures have proposed, enacted, or revised statutes that allow individuals to seal or expunge criminal records.¹⁰

Beginning in 2010, the Massachusetts legislature and Supreme Judicial Court have made substantial changes to the way that criminal records are sealed, accessed, and distributed in the state.¹¹ These changes include short-

⁷ See Mayfield, *supra* note 5, at 1065 (arguing that limiting access to a criminal record can help to “bridge the gap between society and the rehabilitated offender”); Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 198, 200, 205 (2010) (arguing that increased access to expungement represents a viable tool to decrease recidivism and incarceration).

⁸ Margaret Colgate Love, *The Debt That Can Never Be Paid: A Report Card on the Collateral Consequences of Conviction*, 21 CRIM. JUST. 16, 24 (2006); see *Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the Comm. of the Judiciary*, 111th Cong. 1–3 (2010) [hereinafter *Collateral Consequences of Criminal Convictions*] (statement of Rep. Scott, Member, H. Comm. on the Judiciary); SUBRAMANIAN ET AL., *supra* note 4, at 2, 43.

⁹ See AM. CIVIL LIBERTIES UNION ET AL., STATE REFORMS REDUCING COLLATERAL CONSEQUENCES FOR PEOPLE WITH CRIMINAL RECORDS: 2011–2012 ROUND-UP 1–2 (2012), <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=263700> [<https://perma.cc/E7LF-CL3E>] (stating that there is a growing trend towards recognizing the deleterious impact of criminal records and creating strategies for tackling recidivism); see also Mouzon, *supra* note 5, at 10, 13 (arguing for federal standards for expungement procedures in order to facilitate ex-offender reintegration and provide second chances); Silva, *supra* note 7, at 195–96, 205 (arguing that expungement could represent a viable way to reduce recidivism and rehabilitate ex-offenders).

¹⁰ See, e.g., 2013 Ill. Legis. Serv. 98–142 (West) (amending Illinois law to allow increased access to criminal record sealing for felony offenses); 2010 Mass. Acts 1095–96 (revising the Massachusetts statute on criminal record sealing to allow individuals to seal conviction records in a shorter timeframe); S.B. 166, 199th Gen. Assemb., Reg. Sess. (Pa. 2015) (proposing an expansion to the state’s statute on expungement); Matthew Higbee, *Foundation Urges PA House Judiciary to Pass Expungement Bill SB 391*, FOUND. FOR CONTINUING JUSTICE (Apr. 16, 2014), <http://www.continuingjustice.org/foundation-urges-pa-house-judiciary-to-pass-expungement-bill-sb-391> [<https://perma.cc/2KQA-S6DM>] (stating that over twenty states have broadened their expungement laws since 2008).

¹¹ See *Commonwealth v. Pon*, 14 N.E.3d 182, 190–94 (Mass. 2014) (describing the significant 2010 legislative alteration of criminal record management and sealing in Massachusetts); 2010 Mass. Acts 1064–101 (redesigning the system for managing, accessing, distributing, and sealing criminal records in Massachusetts); GABRIELLA PRIEST ET AL., THE BOS. FOUND., THE CONTINUING CHALLENGE OF CORI REFORM: IMPLEMENTING THE GROUNDBREAKING 2010 MASSACHUSETTS LAW 5 (2012), <http://www.bostonindicators.org/~media/Files/Global/Articles/Research%20Reports/CORI%20May2012.pdf> [<https://perma.cc/EW8H-NPYP>] (describing the

er waiting times to seal conviction records, increased access to records by employers and agencies, and a new, more permissive standard for sealing non-conviction records.¹² Despite these changes, some observers assert that the Massachusetts legislature should have made additional reforms to the state's criminal record management system.¹³

This Note argues that a slightly modified form of the Massachusetts schema for criminal record sealing should serve as the model for nationwide reform of criminal record sealing and expungement statutes.¹⁴ Although Massachusetts's approach responds to many of the issues facing ex-offenders, certain changes need to be made before Massachusetts can be recognized as a true exemplar for criminal record sealing.¹⁵ Part I of this Note explores the underlying rationales for and against sealing criminal records, and the current approaches to sealing at the state and federal levels.¹⁶ Part II examines the recent legislative and judicial overhaul of Massachusetts's approach to criminal record sealing.¹⁷ Finally, Part III argues for the nationwide adoption of certain aspects of Massachusetts's system, as well as for the revision of certain aspects by the Massachusetts legislature and Supreme Judicial Court.¹⁸

I. THE DIVISIVE ISSUE OF SEALING AND EXPUNGEMENT AT THE STATE AND FEDERAL LEVEL

This Part examines the debate over criminal record sealing and then discusses the different approaches that the federal government and state governments have taken.¹⁹ Section A of this Part analyzes the various societal and

extensive changes to the criminal record sealing approach and record management system in Massachusetts).

¹² See *Pon*, 14 N.E.3d at 193–94 (allowing greater access to sealing for non-conviction records); 2010 Mass. Acts 1072–78 (redesigning the core system for how criminal records are managed, accessed, and disseminated); *id.* at 1095–96 (decreasing required waiting periods for sealing from fifteen to ten years for felony convictions and ten to five years for misdemeanor convictions); Gregory L. Massing, *CORI Reform—Providing Ex-Offenders with Increased Opportunities Without Compromising Employers' Needs*, 55 BOS. B.J. 21, 22–24 (2011) (outlining the multifaceted legislative changes made to the Massachusetts system for criminal record management).

¹³ See PRIEST ET AL., *supra* note 11, at 5, 17 (highlighting how some advocates had hoped that the reform efforts would have been more comprehensive and would have focused more on the obstacles those with criminal records face); Dianne Williamson, *Sometimes Little Problems Never Go Away*, WORCESTER TELEGRAM & GAZETTE (Mar. 4, 2012 6:00 AM), <http://www.telegram.com/article/20120304/column01/103049858> [<https://perma.cc/CRZ5-4PMG>] (describing how Massachusetts State Representative James O'Day felt that there were some important shortcomings in the 2010 reform efforts).

¹⁴ See *infra* notes 158–194 and accompanying text.

¹⁵ See *infra* notes 195–221 and accompanying text.

¹⁶ See *infra* notes 23–78 and accompanying text.

¹⁷ See *infra* notes 79–153 and accompanying text.

¹⁸ See *infra* notes 154–221 and accompanying text.

¹⁹ See *infra* notes 23–78 and accompanying text.

penological arguments that weigh against and in favor of criminal record sealing.²⁰ Section B of this Part examines the narrow routes to expungement and sealing at the federal level through judicial and statutory remedies.²¹ Finally, section C of this Part provides an overview of the differing terminology, eligibility requirements, and waiting periods that states incorporate into criminal record sealing and expungement statutes.²²

A. The Competing Rationales Underlying Criminal Record Sealing

States have enacted criminal record sealing and expungement remedies in a disparate and non-uniform fashion.²³ Underlying these statutory responses are divergent views on the propriety of criminal record sealing and its proper scope.²⁴

Most states have statutory provisions authorizing courts to seal or expunge records in certain situations.²⁵ Expungement is the process of destroying, erasing, or holistically preventing access to a criminal record such that neither the public nor governmental actors can access it.²⁶ Sealing is a process

²⁰ See *infra* notes 23–49 and accompanying text.

²¹ See *infra* notes 50–60 and accompanying text.

²² See *infra* notes 61–78 and accompanying text.

²³ Compare ALASKA STAT. § 12.62.180(b) (2014) (allowing the possibility of criminal record sealing only when petitioner shows beyond a reasonable doubt that his or her record was the result of a mistaken identification or false accusation), with OHIO REV. CODE ANN. §§ 2953.31(A)–.32(A)(1) (West Supp. 2015) (allowing an individual to petition to have a record of a conviction sealed if the individual has not more than one felony conviction and one misdemeanor conviction or not more than two misdemeanor convictions).

²⁴ Compare HELEN GAEBLER, WILLIAM WAYNE JUSTICE CTR. FOR PUB. INTEREST LAW, CRIMINAL RECORDS IN THE DIGITAL AGE: A REVIEW OF CURRENT PRACTICES AND RECOMMENDATIONS FOR REFORM IN TEXAS 16–17 (2013), <http://www.utexas.edu/law/centers/publicinterest/research/criminalrecords.pdf> [<https://perma.cc/E26W-5MZV>] (arguing that increased access to sealing or expungement increases economic and social opportunity and can thus decrease recidivism and increase public safety), with Zainab Wurie, Note, *Tainted: The Need for Equity Based Federal Expungement*, 6 S. REGION BLACK L. STUDENTS ASS'N L.J. 31, 34 (2012) (pointing out that some detractors of record sealing feel that public knowledge of individuals' arrest and conviction records is necessary to ensure public safety), and *Pon*, 14 N.E.3d at 191 (recognizing that sealing may be undermined by the presence of third-party commercial background check providers).

²⁵ See, e.g., NEB. REV. STAT. ANN. § 29-3523(4) (Lexis through 2015 1st Reg. Sess.) (allowing for expungement of arrest record if the prosecution decides to dismiss a case or if the record is the product of an error by a law enforcement agency); N.H. REV. STAT. ANN. § 651:5 (Supp. 2015) (providing individuals with ability to petition to “annul” non-conviction records immediately and to “annul” conviction records after applicable waiting periods); 12 R.I. GEN. LAWS § 12-1.3-2(a) (Supp. 2015) (permitting first-time offenders to petition to have a misdemeanor or felony expunged); Mouzon, *supra* note 5, at 31–33 (commenting that most states have some form of expungement or sealing statute).

²⁶ See Nicola J. Pagonis, *Criminal Records: Sealing and Expungement*, in MASSACHUSETTS CONTINUING LEGAL EDUCATION, CRIME AND CONSEQUENCE: THE COLLATERAL EFFECTS OF CRIMINAL CONDUCT § 18.2.1 (2013) (explaining that expungement refers to the total destruction of a record); Dash DeJarnatt, Note, *Changing the Way Adult Convictions Are Vacated in Washing-*

where a criminal record is sequestered and prevented from being accessed by the public.²⁷ Unlike an expunged record, a sealed criminal record is not actually destroyed.²⁸ Although expungement and sealing are different in theory, many states define expungement in a way that can incontrovertibly be referred to as criminal record sealing.²⁹ Further, sealing and expungement often provide similar relief, as both remove significant barriers to obtaining employment, housing, and other opportunities by limiting access to criminal histories.³⁰

Perhaps the most forceful argument against sealing criminal records is the concern that reasonable access to these records by certain governmental and private actors is necessary to ensure public safety.³¹ Without the ability to effectively screen employees, some believe that the well-being of the public

ton State, 12 SEATTLE J. FOR SOC. JUST. 1045, 1050–51 (2014) (explaining that expungement refers to the “complete destruction of records,” but that the term is often misused to refer to a less thorough act of concealing a record). The expungement of a record is defined by *Black’s Law Dictionary* as the “removal of a conviction (esp. for a first offense) from a person’s criminal record.” *Expungement of record*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁷ See Pagonis, *supra* note 26, § 18.2.1 (explaining how sealed records still exist, but are not accessible to the public); see also FLA. STAT. § 943.045(19) (2015) (defining “sealing of a criminal history record” as the preservation of a record in such a way that only individuals with a legal right to access the record or the information it contains are able to view the record); Kristin K. Henson, Note, *Can You Make This Go Away?: Alabama’s Inconsistent Approach to Expunging Criminal Records*, 35 CUMB. L. REV. 385, 394 & n.70 (2005) (describing how sealing a record involves blocking public access or view of the record without actually destroying it).

²⁸ See Pagonis, *supra* note 26, § 18.2.1; DeJarnatt, *supra* note 26, at 1058.

²⁹ See, e.g., IND. CODE ANN. § 35-38-9-6(b), (d) (West, Westlaw through 2015 1st Reg. Sess.) (allowing “expunged” records to be accessed by prosecutors upon motion for use in subsequent criminal proceedings); KAN. STAT. ANN. § 21-6614(k) (West, Westlaw through 2015 Reg. Sess.) (requiring access to “expunged” records in subsequent criminal proceedings and applications for certain government employment and licensure); Henson, *supra* note 27, at 393 (noting that the process of “expungement” in many states does not involve the destruction of criminal records and can be more accurately labeled as criminal record sealing); Mouzon, *supra* note 5, at 5 & n.15 (pointing out the dissimilar and broad language used by legislatures to define expungement). In Alabama for example, individuals can petition to have arrest records of misdemeanor and felony offenses expunged. See ALA. CODE §§ 15-27-1 to -2 (Supp. 2015). Under the Alabama statute, however, records are not destroyed, but are rather sequestered and statutorily mandated to remain open to government regulatory and licensing agencies, utilities, banks, and law enforcement. See *id.*

³⁰ See *Commonwealth v. Balboni*, 642 N.E.2d 576, 577–78 (Mass. 1994) (describing the similarity between the remedy offered by sealing and expungement); see also 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, 647–48 (2006) (identifying the argument that a variety of mechanisms can be efficacious in countering the negative impact of collateral consequences of criminal convictions).

³¹ See MINN. STAT. ANN. § 609A.03(5)(a)–(b) (West, Westlaw through 2015 Legis. Sess.) (stating that the individual benefits of expunging a criminal record must be balanced with potential disadvantages to public safety); James G. Gilbert, *Free Liberty to Search and View: A Look at Public Access to Criminal Offender Record Information in the Commonwealth*, 41 BOS. B.J. 12, 12, 22 (1997) (pointing out that some opponents of broad criminal record sealing schemas argue that access to criminal records is necessary to ensure the safety of the public).

is put at risk because individuals may be given responsibilities or roles inconsistent with prior violent, dishonest, or reckless conduct.³² Even in certain states with sealing statutes, specific provisions are included which mandate disclosure of criminal history information to specific categories of employers and governmental agencies.³³

There are also First Amendment arguments against criminal record sealing.³⁴ Although an individual may have a strong personal interest in having a criminal record sealed, some courts have determined that this personal interest must be weighed against the public's First Amendment right to access criminal records.³⁵ In 1980, in *Richmond Papers, Inc. v. Virginia*, the U.S. Supreme Court found that there is a presumption of open access under the First Amendment which attaches to criminal trials.³⁶ Proponents of open access to criminal proceedings argue that it is essential to directing

³² See Pierre H. Bergeron & Kimberly A. Eberwine, *One Step in the Right Direction: Ohio's Framework for Sealing Criminal Records*, 36 U. TOL. L. REV. 595, 597 (2005) (citing 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, 1726 (2003)) (stating that employers have legitimate reasons to want to know about certain past convictions of prospective employees in particular types of jobs); Mayfield, *supra* note 5, at 1069–70 (arguing that an inability to access criminal records may frustrate employers' attempts to prevent employee theft and to foster safe working conditions).

³³ See, e.g., MASS. ANN. LAWS ch. 6, § 172(6)–(32) (LexisNexis Supp. Dec. 2015) (permitting various governmental agencies and private actors such as providers of elder care, youth care, and housing to access sealed records); MO. ANN. STAT. § 610.120(1) (Vernon, Westlaw through 2015 Veto Sess.) (authorizing dissemination of expunged records to certain entities, including those that provide child or elderly care and security or private investigative services); NEV. REV. STAT. § 179A.100(7) (Michie, Lexis through 2015 Reg. Sess.) (requiring mandatory disclosure of criminal records to certain governmental agencies and entities such as the State Board of Nursing and State Gaming Control Board). In Massachusetts, for example, housing authorities can access sealed records in order to evaluate applications and further the "protection and well-being" of existing tenants. See MASS. ANN. LAWS ch. 6, § 172(7).

³⁴ See Gilbert, *supra* note 31, at 12 (commenting on how there has historically been a "generally accepted notion that the First Amendment contemplated public access to the criminal justice system"); Matthew D. Callanan, Note, *Protecting the Unconvicted: Limiting Iowa's Rights to Public Access in Search of Greater Protection for Criminal Defendants Whose Charges Do Not End in Convictions*, 98 IOWA L. REV. 1275, 1290–91 (2013) (explaining that open access to court proceedings is a longstanding and protected aspect of the American legal system).

³⁵ See *Newsday LLC v. County of Nassau*, 730 F.3d 156, 163–65 (2d Cir. 2014) (affirming that there is a presumptive right of access to court proceedings and records under the First Amendment that must be considered when courts are asked to seal documents); *Commonwealth v. Doe*, 648 N.E.2d 1255, 1258, 1260 (Mass. 1995) (citing *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984)) (noting that an individual's interest in privacy with respect to court records may not be reconcilable with the presumption of open access under the First Amendment).

³⁶ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580–81 (1980); see also *Newsday*, 730 F.3d at 163 ("The Supreme Court has held that the First Amendment presumptive right of access applies to all criminal trials.").

scrutiny at the criminal justice system in order to ensure its fairness and efficiency.³⁷

Finally, some opponents of criminal record sealing question the efficacy of judicially sealing a criminal record of a conviction or an arrest when such information is often publically available and easily accessible.³⁸ With the proliferation of searchable court databases, court records relating to criminal proceedings are increasingly available over the Internet.³⁹ Further, some private companies facilitate online criminal background checks, circumventing the need to turn to the court or a governmental agency to access an individual's criminal records.⁴⁰ In light of these realities, some argue that governmental efforts to seal and expunge records are ineffective, as court-ordered or statutorily-authorized sealing or expungement only extends to official records retained by governmental agencies.⁴¹

One prevalent argument in favor of criminal record sealing is the need to provide economic and social opportunities to ex-offenders in order to facilitate reintegration with society.⁴² Among other collateral consequences,

³⁷ See *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89, 90–91, 93 (D. Mass. 1993) (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986)) (stating the First Amendment presumption of openness promotes judicial transparency and accountability); Bergeron & Eberwine, *supra* note 32, at 606 (arguing that open access to court proceedings and records encourages the proper functioning of courts and the government more generally).

³⁸ See Michael H. Jagunic, Note, *The Unified "Sealed" Theory: Updating Ohio's Record-Sealing Statute for the Twenty-First Century*, 59 CLEV. ST. L. REV. 161, 170–72 (2011) (noting the rise in searchable criminal history databases and employers' use of these databases for hiring decisions); Wurie, *supra* note 24, at 34 (pointing out the argument that searchable online databases of criminal records diminish the efficacy of record sealing or expungement); see also *Pon*, 14 N.E.3d at 201 (noting that significant media attention on a particular case may be a factor that reduces an argument in favor of sealing a criminal record).

³⁹ See James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 183 (2008); Jagunic, *supra* note 38, at 163 (stating that 75% of counties in Ohio provide online access to criminal court records).

⁴⁰ See Geffen & Letze, *supra* note 4, at 1343 (discussing how easy to obtain, online criminal records have had a significant impact on housing and employment determinations); Jacobs & Crepet, *supra* note 39, at 185–86 (describing the prevalence of online background check companies and the large volumes of criminal background checks they perform); Love, *supra* note 8, at 17, 19 (commenting on how employers are increasingly relying on inexpensive and easy to obtain records from online background check providers).

⁴¹ See Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMM.LAW CONSPICUOUS 123, 123–24 (2010) (describing the inability to expunge criminal records when they are retained by a non-governmental agency); Love, *supra* note 32, at 1726; Mayfield, *supra* note 5, at 1068–69 (noting that unofficial "records" of alleged criminal conduct exist in the form of newspaper articles, police blotters, and witness accounts).

⁴² See GAEBLER, *supra* note 24, at 2 (commenting that the widespread availability of criminal records has a detrimental impact on ex-offenders and their families); SUBRAMANIAN ET AL., *supra* note 4, at 36 (arguing that increased access to criminal record sealing and expungement would promote greater educational and economic opportunity for ex-offenders); see also *Collateral Consequences of Criminal Convictions*, *supra* note 8, at 1–2 (statement of Rep. Scott, Member, H.

a criminal record can be a serious impediment to obtaining housing and gainful employment.⁴³ Proponents of criminal record sealing argue that limiting the dissemination of criminal record information is not only merciful, but is also a pragmatic solution to help curb the problem of rising prison populations.⁴⁴

Additionally, there is a fairness-based argument in favor of concealing criminal record information for individuals who were found to be not guilty or who were never prosecuted in a court of law.⁴⁵ Even where involvement in the criminal justice system results in a non-conviction, such as in the case of a dismissal or *nolle prosequi*, an individual may be left with an arrest record that may later appear on background checks.⁴⁶

Supporters of criminal record sealing also argue that public access to criminal records does not necessarily increase public safety and well-being.⁴⁷

Comm. on the Judiciary) (describing how a criminal record can act as a serious impediment to gaining meaningful employment).

⁴³ See *Doe*, 648 N.E.2d at 1261 (stating that the Massachusetts Supreme Judicial Court and many other courts have acknowledged that arrest and conviction records carry a risk of harm to individuals seeking social, educational, and employment opportunities); Victoria R. Kelleher, *Collateral Consequences*, in MASSACHUSETTS CONTINUING LEGAL EDUCATION, TRYING DRUG CASES IN MASSACHUSETTS § 15.4 (2010) (commenting on the markedly adverse impact of a criminal record on attempts to gain employment); Silva, *supra* note 7, at 205 (emphasizing how criminal convictions often lead to a variety of collateral consequences that remain after the completion of a term of imprisonment or period of probation); DeJarnatt, *supra* note 26, at 1066–67 (describing how empirical research has shown that private employers are less likely to hire someone if that individual has a criminal record).

⁴⁴ See Mouzon, *supra* note 5, at 7, 9–10, 13 (noting that over five hundred thousand prisoners are released from prison every year and that expungement represents a practical and direct solution for mitigating the difficulties associated with this transition); SUBRAMANIAN ET AL., *supra* note 4, at 9, 36 (arguing that increased access to sealing can help facilitate the reentry of ex-offenders through the reduction of collateral consequences associated with convictions); see also GAEBLER, *supra* note 24, at 4, 28 (remarking that allowing expungement of criminal records after a waiting period is a sound and just way to balance concerns of individual welfare and public safety).

⁴⁵ See Geffen & Letze, *supra* note 4, at 1347–48 (pointing out how criminal records containing only non-conviction data are routinely used against individuals while seeking housing or employment); Callanan, *supra* note 34, at 1278 (arguing that placing limitations on the access of criminal records for individuals who have not been convicted is consistent with the legal principle in the United States that individuals are innocent until proven guilty).

⁴⁶ See James Gempeler, *Expungement Revisited: Minnesota's New Second Chance Law*, 71 BENCH & B. MINN. 14, 15 (2014) (explaining that criminal records often consist of data beyond a particular conviction and disposition and may include details of the arrest and data collected by police and other governmental agencies); Love, *supra* note 8, at 17 (explaining that even arrest records can “derail” employment opportunities). *Black's Law Dictionary* defines *nolle prosequi* as “[a] legal notice that a lawsuit or prosecution has been abandoned.” *Nolle prosequi*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁴⁷ See Geffen & Letze, *supra* note 4, at 1341 (arguing that allowing for the expungement of records facilitates socially-desirable behavior in individuals which in turn increases public safety); DeJarnatt, *supra* note 26, at 1065–67 (commenting that increased employment is strongly correlated with increased public safety and decreased criminal activity).

Due to a lack of economic opportunity associated with having a criminal record, certain ex-offenders choose to resume criminal conduct.⁴⁸ In turn, the proliferation of and easy access to criminal record databases may serve to prevent ex-offenders from obtaining the opportunity to demonstrate meaningful personal change and to break the cycle of recidivism.⁴⁹

B. A Series of Legislative Failures at the Federal Level

A relatively uniform approach to criminal record sealing or expungement has remained elusive for defendants convicted of federal offenses.⁵⁰ For over a decade, numerous congressional attempts to introduce a broad and generally available criminal record sealing or expungement remedy have failed, leaving equitable expungement by federal courts as the sole remedy available for individuals seeking sealing or expungement at the federal level.⁵¹ Even among courts that have held that the judiciary possesses

⁴⁸ See Mouzon, *supra* note 5, at 4, 7 (marking on the role that collateral consequences of criminal convictions play in the recidivism of ex-offenders); DeJarnatt, *supra* note 26, at 1065–66 (noting that criminal records substantially interfere with ex-offenders’ ability to gain employment and that higher employment rates are correlated with increased public safety).

⁴⁹ See Jacobs, *supra* note 39, at 178–79 (suggesting that increased criminal behavior may be a tragic and unintended consequence of increased access to criminal record databases); Mouzon, *supra* note 5, at 2–3 (arguing that the availability of criminal record information can be “counter-productive” in that it prevents individuals from showing that they have made steps towards rehabilitation). Massachusetts Governor Deval Patrick cited the facilitation of opportunity for ex-offenders as an essential aspect of preventing crime and ensuring public safety. See Paul McMorrow, *Patrick Urges Passage of CORI Reform Bill*, BOS. GLOBE (Mar. 19, 2008), http://www.boston.com/news/local/articles/2008/03/19/patrick_urges_passage_of_cori_reform_bill/ [<https://perma.cc/DQ56-RNRL>].

⁵⁰ See Raj Mukherji, Note, *In Search of Redemption: Expungement of Federal Criminal Records* 2 (Law Sch. Student Scholarship, Paper 163, 2013), http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1163&context=student_scholarship [<https://perma.cc/2YUU-WR3J>] (stating that there is no generally applicable statute allowing expungement of criminal records at the federal level); *Expungement*, ELEC. PRIVACY INFO. CTR., <https://epic.org/privacy/expungement> [<https://perma.cc/D8N8-L9DY>] [hereinafter ELEC. PRIVACY INFO. CTR.] (commenting that there is no general federal statutory provision authorizing criminal record sealing or expungement); *infra* note 51 and accompanying text (describing how a circuit split exists as to whether or not to allow equitable expungement of criminal records).

⁵¹ See Silva, *supra* note 7, at 186–87 (explaining that several federal court jurisdictions have determined that courts have an inherent power to allow expungement of criminal records in certain instances); Mukherji, *supra* note 50, at 46 (describing how Congress has yet to enact any broadly applicable statute that provides criminal record sealing or expungement relief). Currently, there is a split among the U.S. Courts of Appeals Circuit Courts as to whether federal courts can expunge federal criminal records on equitable grounds through the exercise of inherent judicial powers. See Mouzon, *supra* note 5, at 23–24 (explaining that inherent powers are seen as powers of the federal court which allow the courts to commit actions “necessary to effect justice”); Silva, *supra* note 7, at 186–87. On one hand, the First, Third, Eighth, and Ninth Circuits have held that federal courts do not have the jurisdiction to expunge criminal records on equitable grounds alone. See *United States v. Coloian*, 480 F.3d 47, 52 (1st Cir. 2007); *United States v. Rowlands*, 451 F.3d 173, 178–79 (3d Cir. 2006); *United States v. Meyer*, 439 F.3d 855, 859–60, 862 (8th Cir. 2006); *United*

the authority to expunge criminal records, this power is understood as limited and only available in rare circumstances.⁵²

Thus far, legislative efforts to create a broad federal approach to criminal record sealing or expungement have been repeatedly killed or abandoned.⁵³ In 2000, U.S. Congressman Charlie Rangel introduced the Second-Chance for Ex-Offenders Act, which would have allowed for the expungement of criminal records for individuals who had never committed a violent felony or misdemeanor.⁵⁴ After the bill failed to pass the House of Representatives, Congressman Rangel continued to reintroduce it in subsequent legislative sessions, but each effort was in vain.⁵⁵ Similarly, the Fresh Start

States v. Sumner, 226 F.3d 1005, 1013–15 (9th Cir. 2000); *see also* Ritesh Patel, Hall v. Alabama: Do Federal Courts Have Jurisdiction to Expunge Criminal Records?, 34 AM. J. TRIAL ADVOC. 401, 401 (2010) (commenting on how the First, Third, Eighth, and Ninth Circuits have decided that they do not have jurisdiction to expunge criminal records). On the other hand, the Second, Fourth, Fifth, Seventh, Tenth, and D.C. Circuits have decided that inherent judicial powers authorize granting expungement requests for equitable reasons. *See, e.g.*, United States v. Flowers, 389 F.3d 737, 739–40 (7th Cir. 2004); United States v. Pinto, 1 F.3d 1069, 1070 (10th Cir. 1993); Livingston v. U.S. Dep’t of Justice, 759 F.2d 74, 78 (D.C. Cir. 1985); United States v. Schnitzer, 567 F.2d 536, 539–40 (2d Cir. 1977); *see also* Wurie, *supra* note 24, at 46 & n.93 (listing the decisions of the Second, Fourth, Fifth, Seventh, Tenth, and D.C. Circuits that have claimed proper jurisdiction to expunge criminal records).

⁵² *See* Flowers, 389 F.3d at 739 (declaring it evident that the interest of the individual very rarely outweighs the interests of the public in such a way that calls for equitable expungement); Pinto, 1 F.3d at 1070 (explaining that expungement through equitable powers only occurs in “extreme circumstances”); George Blum et al., *Court’s Authority to Order Expungement*, in 21 AM. JUR. 2D CRIMINAL LAW § 1220 (2014) (explaining that judicial expungement is typically reserved for “unusual or extreme cases” and is not used to deal with issues such as arrest records in cases where an individual is not convicted). Accordingly, even if the circuit split were to be resolved in favor of uniform equitable expungement, the majority of arrestees or ex-offenders would be unlikely to benefit from this change due to the high burden placed on individuals to demonstrate that his or her record should be expunged and the presumption of the courts that such a remedy is for rare and extreme circumstances. *See* Silva, *supra* note 7, at 187–88 (commenting that obtaining a judicial expungement on grounds of equity requires a showing of “exceptional hardship” or that expungement is called for under the “application of fairness and justice”).

⁵³ *See* Mouzon, *supra* note 5, at 13, 36; Mukherji, *supra* note 50, at 41, 42; *infra* notes 54–60 and accompanying text; *see also* ELEC. PRIVACY INFO. CTR., *supra* note 50 (describing how there is no broadly-applicable statute regarding sealing or expungement at the federal level). A couple of targeted and limited expungement statutes have been passed by Congress. *See* Wurie, *supra* note 24, at 42–44; Mukherji, *supra* note 50, at 26–27. For example, under 18 U.S.C. § 3607, Congress authorized the federal courts to expunge the records of individuals who successfully complete a period of probation for certain minor drug possession crimes and have their cases dismissed. 18 U.S.C. § 3607 (2012); *see* Wurie, *supra* note 24, at 43.

⁵⁴ *See* H.R. 5433, 106th Cong. §§ 3361–3362 (2d Sess. 2000). In addition to never having committed a violent crime, individuals seeking expungement had to remain free of substance abuse for at least one year, complete high school or a GED program, and complete at least one year of community service. *See id.* § 3362.

⁵⁵ *See* H.R. 2065, 112th Cong. (1st Sess. 2011); H.R. 623, 110th Cong. (1st Sess. 2007); H.R. 662, 109th Cong. (1st Sess. 2005); H.R. 1434, 108th Cong. (1st Sess. 2003); Mouzon, *supra* note 5, at 36 & n.146. In 2005, minor changes were made such as limiting application of the bill to first-time, non-violent offenders. *See* H.R. 662 §§ 3632–3633.

Act of 2011, introduced by Congressman Steve Cohen, would have allowed for the expungement of particular non-violent criminal records for first-time offenders, but it too failed to be enacted.⁵⁶

Legislative efforts to provide broader access to criminal record sealing or expungement at the federal level have continued to be introduced.⁵⁷ In March 2015, Senators Rand Paul and Cory Booker introduced the Record Expungement Designed to Enhance Employment Act of 2015 or “RE-DEEM Act,” a bill that seeks to allow criminal record sealing for certain non-violent offenders.⁵⁸ The bill would allow individuals to petition to seal records of non-violent federal offenses, provided that the petitioner has not been convicted of more than two “covered” felonies or convicted of one “non-covered” felony, such as a crime of violence or a sex offense.⁵⁹ The bill outlined a multifactor test that courts would use to determine whether to seal a criminal record, balancing the interests of the public, any legitimate governmental concerns about sealing criminal record information, the interests of the petitioner in making the information private, and the demonstrated efforts of the petitioner at rehabilitation.⁶⁰

C. The Disparate Approach to Sealing and Expungement at the State Level

Among the states, material differences exist between the procedures, eligibility requirements, and timeframes for sealing or expunging criminal records.⁶¹ In addition to the terminology used, states differ as to the amount

⁵⁶ See H.R. 2449, 112th Cong. (1st Sess. 2011). The bill also failed to pass the House of Representatives when it was reintroduced in 2013. See H.R. 3014, 113th Cong. (1st Sess. 2013).

⁵⁷ See S. 675, 114th Cong. (1st Sess. 2015); H.R. 1672, 114th Cong. (1st Sess. 2015); S. 2567, 113th Cong. (2d Sess. 2014); H.R. 5158, 113th Cong. (2d Sess. 2014); H.R. 3014.

⁵⁸ See S. 675.

⁵⁹ See *id.* § 3631. Individuals would be eligible to petition for sealing one year after a conviction and the day of the disposition for a non-conviction. See *id.* § 3632(a)(2).

⁶⁰ See *id.* § 3632(b)(3). Although sealing would not be automatic, the bill would open up eligibility to a large range of individuals with conviction and arrest histories to have their records sealed. See Press Release, Senator Rand Paul, Sens. Paul and Booker Introduce Criminal Justice Reform Legislation (July 8, 2014), <https://votesmart.org/public-statement/893522/sens-paul-and-booker-introduce-criminal-justice-reform-legislation#.VpU7fvkrlgs> [<https://perma.cc/VYB5-8XJ4>]. In addition to criminal record sealing for adults, the bill also seeks to provide automatic expungement of juvenile records for children under fifteen years old, automatic sealing for children over fifteen years old, offer incentives for states to raise the minimum age for criminal responsibility to eighteen years old, remove restrictions on government welfare for certain drug offenders, and place limitations on the use of solitary confinement for juveniles. See *id.*

⁶¹ See, e.g., KY. REV. STAT. ANN. § 431.078(1) (LexisNexis Supp. 2015) (allowing individuals convicted of misdemeanors to file for expungement five years from the date the individual completes their sentence or period of probation); OHIO REV. CODE ANN. § 2953.32(A)(1) (West Supp. 2015) (authorizing individuals to apply to have their records sealed after one year following final discharge for a misdemeanor conviction and after three years following final discharge for a

of discretion inherent in the decision to allow or deny a petition for sealing or expungement.⁶²

In many states, judges are tasked with making sealing or expungement decisions, often through consideration of discretionary factors such as the individual's interest in privacy, the individual's demonstrated change in conduct or rehabilitation, and the general interest of the public in keeping the record open to promote public safety.⁶³ In New York, the burden is on district attorneys to argue that sealing a non-conviction record is contrary to the public interest.⁶⁴

Other states, however, have opted to allow for automatic sealing or expungement of certain records.⁶⁵ "Automatic" sealing or expungement means either that records are sealed or expunged by default following certain dispositions or that individuals are allowed to file a petition to seal or expunge that will automatically be accepted if certain statutory factors are satisfied.⁶⁶

felony conviction); VA. CODE ANN. § 19.2-392.2(A) (Supp. 2015) (allowing expungement of police and court records for any individual whose criminal charges result in acquittal, *nolle prosequi*, or dismissal); WASH. REV. CODE § 10.97.060 (2014) (permitting individuals to request that certain "non-conviction" data, such as a record of an arrest, to be "deleted" from a criminal record).

⁶² Silva, *supra* note 7, at 191–95 (noting the different degrees of discretion built into the sealing or expungement systems in Massachusetts, California, and Connecticut); DeJarnatt, *supra* note 26, at 1051 (describing how states endow their respective courts with varying degrees of discretion to make sealing or expungement determinations); SUBRAMANIAN ET AL., *supra* note 4, at 2, 34 (commenting on how many recent state level reforms gave discretionary authority to judges, prosecutors, or both).

⁶³ See, e.g., TENN. CODE ANN. § 40-32-101(g)(5) (Lexis through 2015 Reg. Sess.) (instructing courts to balance the interests of the ex-offender with the "best interests of justice and public safety" when deciding whether to allow the expungement of certain eligible felony offenses); UTAH CODE ANN. § 77-40-107(8)(d) (Supp. 2015) (instructing judges only to grant petitions for expungement if the requests are not "contrary to the interests of the public"). In Vermont, judges considering whether to allow a motion for sealing or expungement are instructed to consider whether granting a petition is in accordance with the interests of justice. See VT. STAT. ANN. tit. 13 § 7602(b)(1)(D) (2015). Similarly, in Missouri, the statute governing expungement states that judges should consider whether the "circumstances and behavior" of the petitioner suggest that expungement is proper and whether the request is "consistent with the public welfare." See MO. REV. STAT. § 610.140.5(4)–(5) (Supp. 2013).

⁶⁴ See N.Y. CRIM. PROC. LAW § 160.50(1), (3) (McKinney, Westlaw through L. 2015, ch. 589).

⁶⁵ See, e.g., DEL. CODE ANN. tit. 11 § 4373(a) (Supp. 2014) (mandating expungement of misdemeanor records for first offenders who are not convicted of the offense for which they seek expungement); MASS. GEN. LAWS ch. 276, § 100A (2014) (allowing automatic record sealing upon petition for most misdemeanors and felony offenses after certain waiting periods); TEX. CODE CRIM. PROC. ANN. art. 55.01 (West Supp. 2015) (stating that automatic "expunction" is available for certain individuals charged with, but not convicted of, a criminal offense); see also DeJarnatt, *supra* note 26, at 1051 (noting that several states allow for automatic sealing or expungement, but the majority do not).

⁶⁶ Compare CONN. GEN. STAT. § 54-142a(a) (2013) (ordering automatic erasure of police and court records when a criminal defendant is found not guilty), and MASS. GEN. LAWS ch. 276, § 100C para. 1 (2014) (instructing the clerk and commissioner of probation to automatically seal

In Connecticut, for example, courts automatically order the “erasure” of records of acquittals, dismissals, *nolle prosequis*, and cases continued without prosecution for thirteen months.⁶⁷

Jurisdictions also differ as to which offenses and dispositions are eligible for sealing or expungement.⁶⁸ Most states offer some form of sealing or expungement for non-conviction records, but are more restrictive or prohibitive for sealing conviction records, especially for felonies.⁶⁹ In Missouri, for example, arrest records that are disposed of in favor of the defendant may be sealed and a narrow range of misdemeanor offenses can be expunged.⁷⁰ In Mississippi, expungement is only available for non-conviction records and a small category of misdemeanors.⁷¹ Some states have provisions that allow for sealing or expungement for certain categories of first time offenders who successfully complete a period of probation or diversion

records of criminal cases where there is an acquittal, there has been no indictment by a grand jury, or where the court has not found probable cause), with MASS. GEN. LAWS ch. 276, § 100A (allowing individuals to petition to have conviction records sealed and instructing the commissioner of probation to automatically allow these petitions provided certain statutory eligibility factors are satisfied). Advocates of automatic sealing argue that it contributes to more equitable outcomes and helps reduce expense and potential confusion for individuals seeking sealing or expungement. See GAEBLER, *supra* note 24, at 24, 29 (commenting that automatic expungement helps reduce delays, confusion, and expense involved in petitioning the court and arguing for relief at a hearing); David L. Warnock & William H. Murphy, Commentary, *No Conviction? Erase the Record*, BALT. SUN (Aug. 13, 2014), http://articles.baltimoresun.com/2014-08-13/news/bs-ed-expungements-20140813_1_expungement-public-record-city-district-court [<https://perma.cc/U38R-WG2S>] (arguing that non-conviction records should be expunged automatically due the cost and confusion of having to petition to have a record expunged).

⁶⁷ See CONN. GEN. STAT. § 54-142a(a)–(c). “Erasure,” as used in the statute, does not refer to the physical destruction of records, but rather to the act of sealing the records and keeping them from public view. See *Doe v. Manson*, 438 A.2d 859, 861 (Conn. 1981).

⁶⁸ See, e.g., ALASKA STAT. § 12.62.180(b) (2014) (permitting criminal records to be sealed only when petitioner shows beyond a reasonable doubt that a conviction was the product of false accusation or mistaken identity); IDAHO CODE ANN. § 67-3004(10) (2014) (authorizing only the expungement of non-conviction records for individuals who were not charged within one year of arrest or summons or who were acquitted); KY. REV. STAT. ANN. § 431.078(1) (LexisNexis Supp. 2015) (allowing individuals to petition to expunge misdemeanor offenses, but not felonies); 12 R.I. GEN. LAWS § 12-1.3-2(a) (Supp. 2015) (authorizing first-time, non-violent offenders to expunge a misdemeanor or felony).

⁶⁹ See, e.g., KY. REV. STAT. ANN. § 431.078(1) (allowing the possibility to seal only misdemeanors and not felonies); LA. CODE CRIM. PROC. ANN. art. 978 (Supp. 2015) (allowing individuals to petition to expunge only one felony offense, with exceptions, following a ten-year waiting period); see also Mouzon, *supra* note 5, at 32–34 (explaining that many states permit expungement of misdemeanor convictions and a narrower group of states allow for expungement of felony convictions).

⁷⁰ See MO. REV. STAT. § 610.105(1) (Supp. 2013) (providing for the closure of records in cases that end favorably for the defendant); *id.* § 610.140.2(1)–(2) (allowing for expungement of a select type of misdemeanor and felony offenses). The offenses that are eligible to be expunged include first time offenses for fraudulent credit card use, passing a bad check, disturbing the peace, negligent burning of debris, and gambling. See *id.* § 610.140.2(2).

⁷¹ See MISS. CODE ANN. § 99-19-71(1)–(2)(a) (2015).

program.⁷² In certain states, however, even sealing or expunging non-conviction data remains a significant challenge or a completely unavailable option.⁷³

Finally, the amount of time that an individual must wait in order to be eligible to petition to seal or expunge a particular type of criminal record or offense depends on the statutory schema of the state in which they are seeking the remedy.⁷⁴ In Massachusetts, for example, individuals can seek to seal non-conviction records immediately, but must wait five years to petition to seal a misdemeanor conviction and ten years to petition to seal a felony conviction.⁷⁵ In Nevada, the waiting period for both felonies and misdemeanors depends on the type and severity of the offense.⁷⁶ For example, gross misdemeanors are eligible for sealing after five years whereas ordinary misdemeanors are eligible for sealing after only two years.⁷⁷ Similarly, timelines for

⁷² See, e.g., HAW. REV. STAT. ANN. §§ 712-1255(1)–(2), 712-1256(1) (Michie, Lexis through 2015 Legis. Sess.) (allowing first time drug offenders under the age of twenty to have their records expunged after successfully completing a term of probation and having their case dismissed); N.C. GEN. STAT. § 15A-145(a) (Lexis through 2015 Reg. Sess.) (allowing individuals who committed misdemeanors while under the age of eighteen or alcohol-related misdemeanors while under the age of twenty-one to petition for expunction of their record following a waiting period); 12 R.I. GEN. LAWS § 12-1.3-2 (allowing non-violent first offenders to have misdemeanor or felony convictions expunged after a waiting period); see also Silva, *supra* note 7, at 158 (remarking that as of 2010, seventeen states had pathways for sealing or expunging “first and minor offenses”).

⁷³ See, e.g., ARIZ. REV. STAT. ANN. § 13-4051(A) (Supp. 2015) (authorizing only individuals who have been “wrongfully” arrested to petition court for a notation indicating that they have been cleared of a charge); CAL. PENAL CODE § 851.8(a)–(b) (West Supp. 2015) (allowing expungement of an arrest record only where no accusatory pleading has been filed or where an individual petitions a court for a determination that they are in fact innocent in spite of the filing of an accusatory pleading); N.M. STAT. ANN. § 29-3-8.1(A) (Supp. 2013) (permitting expungement of arrest information only for misdemeanors that were not crimes of moral turpitude).

⁷⁴ See, e.g., ARK. CODE ANN. §§ 16-90-1405(a), 16-90-1406 (Supp. 2015) (allowing individuals to petition to seal records after sixty days in the case of a misdemeanor and five years in the case of an eligible, first felony offense); OHIO REV. CODE ANN. § 2953.32(A)(1) (West Supp. 2015) (permitting individuals to seek to seal their records one year after their sentence is completed for a misdemeanor conviction and three years after their sentence is completed for an eligible felony conviction); GAEBLER, *supra* note 24, at 28 (describing how states allow for the possibility of sealing generally only after a certain waiting period since the offense or conviction occurred).

⁷⁵ See MASS. GEN. LAWS ch. 276, §§ 100A, 100C (2015). In Utah, most non-conviction records are eligible to be sealed after thirty days whereas conviction records involve waiting periods between three to ten years after the end of a sentence depending on the severity and classification of the offense. See UTAH CODE ANN. §§ 77-40-104(1), 77-40-105(3) (LexisNexis 2012 & Supp. 2015). For example, individuals must wait ten years to expunge a conviction of negligent motor vehicle homicide involving alcohol or drugs, seven years to expunge a felony, and three to five years to expunge a misdemeanor depending on its classification. See UTAH CODE ANN. §§ 58-37-8(2)(g), 77-40-105(3) (LexisNexis 2015).

⁷⁶ See NEV. REV. STAT. ANN. § 179.245 (Michie, Lexis through 2015 Reg. Sess.) (outlining the various sealing timeframes that differ according to the severity and classification of the underlying criminal offense).

⁷⁷ See *id.* § 179.245(1)(d), (1)(f). According to Nevada statute, a “misdemeanor” is a crime punishable by a fine up to \$1000 or incarceration of up to six months in a county jail. See *id.*

sealing felonies depend on the classification of the offense, with waiting periods of fifteen years for category A or B felonies, twelve years for category C or D felonies, and seven years for category E felonies.⁷⁸

II. THE EVOLVING LEGISLATIVE AND JUDICIAL APPROACH TO CRIMINAL RECORD SEALING IN MASSACHUSETTS

Over the years, Massachusetts has developed a comprehensive system for criminal record management and sealing.⁷⁹ Under the Massachusetts schema, individuals can seek to seal records of acquittals, *nolle prosequis*, dismissals, and convictions for misdemeanor and felony offenses.⁸⁰ In recent years, however, the availability and implications of criminal record sealing have changed dramatically in Massachusetts.⁸¹ Section A will discuss the creation and evolution of Massachusetts's criminal record management system.⁸² Section B will examine the sealing of conviction data

§ 193.120(3). A “gross misdemeanor” is every other criminal offense short of a felony, which is a crime that can lead to the death penalty or incarceration in state prison. *See id.* § 193.120(2), (4).

⁷⁸ *See id.* § 179.245(1)(a)–(c). The particular category for a felony in Nevada depends on the possible punishment for the offense. *See id.* § 193.130(2). Category A felonies involve sentences of life in prison or the death penalty, whereas category E felonies involve state prison sentences of not less than one year and not more than four years in state prison. *See id.* § 193.130(2)(a), (e).

⁷⁹ *See Commonwealth v. Balboni*, 642 N.E.2d 576, 578 (Mass. 1994) (quoting *Commonwealth v. Vickey*, 412 N.E.2d 877, 883 (Mass. 1980)) (stating that the Massachusetts legislature provided a clear framework for criminal record sealing that should not be enlarged by the courts); *PRIEST ET AL.*, *supra* note 11, at 5, 11 (describing the historical development and current schema for criminal record management and sealing in Massachusetts). In Massachusetts, the Supreme Judicial Court has repeatedly found that judges generally do not have the authority to order the expungement of criminal records. *See Commonwealth v. Alves*, 15 N.E.3d 247, 247, 249–51 (Mass. 2014) (explaining that sealing is the applicable remedy in Massachusetts that will be applied in “all but the most exceptional circumstances”); *Commonwealth v. Moe*, 974 N.E.2d 619, 621, 624 (Mass. 2012) (stating that expungement is not available because sealing is the “sole remedy” under the applicable statute); *Commonwealth v. Boe*, 924 N.E.2d 239, 244, 247 (Mass. 2010) (finding that since the legislature did not statutorily provide for the option of expungement in the sealing statute, it should not be judicially created by the courts). In 1994, in *Commonwealth v. Balboni*, the Supreme Judicial Court of Massachusetts explained that although fundamentally different, sealing and expungement offer the same relief of “ensuring the confidentiality” of an individual’s criminal record. *See* 642 N.E.2d at 577–78. An exception to this restriction on expungement of records is in cases where an individual is wrongfully convicted of a felony offense and subsequently receives a gubernatorial pardon or other judicial relief “on grounds which tend to establish the innocence of the individual.” *See* MASS. GEN. LAWS ch. 258D, §§ 1, 7(A) (2014).

⁸⁰ *See* MASS. GEN. LAWS ch. 276, §§ 100A, 100C (2014).

⁸¹ *See Commonwealth v. Pon*, 14 N.E.3d 182, 190–91, 193 (Mass. 2014) (providing an overview of the 2010 reforms to the Criminal Offender Record Information (“CORI”) system); *Massing*, *supra* note 12, at 24 (commenting that the central goals of CORI reform were to streamline and add clarity to the process of obtaining criminal records, while at the same time providing greater opportunity for ex-offenders); *infra* notes 95–112, 137–153 accompanying text (examining the judicial and legislative changes to the CORI system beginning in 2010).

⁸² *See infra* notes 85–112 and accompanying text.

under the Massachusetts criminal record sealing statute.⁸³ Finally, section C will discuss the sealing of non-conviction data following the Massachusetts Supreme Judicial Court's 2014 decision in *Commonwealth v. Pon*.⁸⁴

A. The Criminal Offender Record Information System

In 1972, the Massachusetts legislature passed the Criminal Offender Record Information Act ("CORI Act" or "the Act"), which established the Criminal Offender Record Information ("CORI") system.⁸⁵ The CORI Act was part of an effort to centralize the collection, dissemination, and sealing of criminal record information or CORI reports in Massachusetts.⁸⁶ The Act was also a pioneering piece of legislation in that it was the first state-level effort to create a cohesive and unified management system for all criminal record information.⁸⁷ After years of debate and gradual modifications, the CORI system was significantly overhauled in 2010 in order to balance private and public interests surrounding the sealing of criminal records.⁸⁸

1. The Passage of the Act and Its Original Intentions

The original CORI system rigorously limited access to criminal records.⁸⁹ In order to manage the proper restriction of criminal record data, the CORI Act authorized the creation of the Criminal History Systems Board

⁸³ See *infra* notes 113–120 and accompanying text.

⁸⁴ See *infra* notes 121–153 and accompanying text.

⁸⁵ See 1972 Mass. Acts 813–20; Gilbert, *supra* note 31, at 12. The CORI system is a centralized, state-run database of criminal record information that is governed by the Department of Criminal Justice Information Services ("DCJIS"). See MASS. GEN. LAWS ch. 6, § 167 (2014); Pangonis, *supra* note 26, § 18.1.

⁸⁶ See 1972 Mass. Acts 814–15; PRIEST ET AL., *supra* note 11, at 5. A CORI report is a record of an individual's formal involvement in the Massachusetts criminal justice system from arrest through the completion of a sentence. See MASS. GEN. LAWS ch. 6, § 167; Pangonis, *supra* note 26, § 18.1.

⁸⁷ See Jonathan Brant et al., *Public Records, FIPA and CORI: How Massachusetts Balances Privacy and the Right to Know*, 15 SUFFOLK U. L. REV. 23, 57–58 (1981) (explaining that Massachusetts developed a centralized system for criminal record management to "establish minimum security and privacy safeguards for all criminal offender record information"); Gilbert, *supra* note 31, at 12 (describing Massachusetts's role as a pioneer in creating a centralized system to control the management and dissemination of criminal records).

⁸⁸ See MASS. ANN. LAWS ch. 6, § 172 (LexisNexis Supp. Dec. 2015); PRIEST ET AL., *supra* note 11, at 5 (explaining that the 2010 CORI Reform Act included major changes to the way criminal record information was stored, accessed, and disseminated in Massachusetts); Massing, *supra* note 12, at 21 (commenting on how both "employers and advocates for ex-offenders alike" agreed that the CORI system needed to be changed prior to the 2010 legislation).

⁸⁹ See 1972 Mass. Acts 817–18; Georgia K. Cristley & Agapi Koulouris, *What Access Do Employers Have to CORI?*, in MASSACHUSETTS CONTINUING LEGAL EDUCATION, MASSACHUSETTS CRIMINAL OFFENDER RECORD INFORMATION (CORI) LAW § 2.1 (2013) (describing the strict limitations on access and dissemination of criminal records).

("CHSB") and gave it the power to determine who, when, and how criminal record information could be released and accessed.⁹⁰ Under section 172, CORI reports were only allowed to be given to criminal justice agencies and other agencies and actors that were specifically authorized by statute.⁹¹

Although some championed the 1972 CORI Act as a vital tool for securing privacy and providing opportunity to ex-offenders, others, including landlords, employers, and victims' rights advocates, viewed the Act's extremely restrictive approach to allowing access to criminal record information as problematic.⁹² In the years following its passage, a number of legislative actions and judicial challenges began to influence the discussion about the CORI system and how publicly available criminal record information should be.⁹³ In turn, the legislature modified and slightly relaxed the stringent limitations on access envisioned by the CORI Act in the decades that followed the Act's passage.⁹⁴

⁹⁰ See 1972 Mass. Acts 814–15; Gilbert, *supra* note 31, at 12. This centralized body was composed of a variety of law enforcement and judicial authorities, including the Attorney General, Chairman of the Massachusetts Defenders Committee, the Chairman of the Parole Board, the Commissioner of the Department of Correction, the Police Commissioner of the City of Boston, and the Chief Justices of the District, Superior, and Supreme Judicial Courts. See 1972 Mass. Acts 814–15.

⁹¹ See 1972 Mass. Acts 817–18.

⁹² See Brant et al., *supra* note 87, at 65–66 (explaining that the CORI Act placed "significant limitations" on access to criminal record information); Gilbert, *supra* note 31, at 12 (describing how groups such as employers, victim advocacy groups, and politicians began to voice "growing dissatisfaction" with the stifling impact on access to criminal record information inherent in the CORI system); Massing, *supra* note 12, at 21–22 (commenting on the tension between advocates in favor of personal privacy and members of the business community who wanted greater access to criminal record information); Kenneth J. Botty, *CORI Reform Bill Failure Is a Loss for Mass. Public*, WORCESTER TELEGRAM & GAZETTE, Jan. 21, 1990, at C2, 1990 WLNR 4143704 (arguing that the CORI Act jeopardized public safety by giving too much privacy protection to ex-offenders).

⁹³ See Gilbert, *supra* note 31, at 12; PRIEST ET AL., *supra* note 11, at 5. Despite several judicial challenges to the CORI Act, the courts did little to interfere with the restrictions to access that the Act established. See Brant et al., *supra* note 87, at 72 (commenting that in the decade following the passage of the CORI Act, the Massachusetts courts were deferential to the aims of privacy and limitation on access of information that the legislature established). One relatively minor judicial pushback against the CORI Act came in 1993, in *Globe Newspaper Co. v. Fenton*, when the U.S. District Court for the District of Massachusetts held that the Act's restriction on obtaining and disclosing alphabetical indices of criminal court cases violated the First Amendment. See 819 F. Supp. 89, 91, 98–99 (D. Mass. 1993). In spite of this holding, the court expressly declined to consider broader challenges to the constitutionality of the CORI Act's other restrictions on the use and availability of criminal record information. See *id.* at 100.

⁹⁴ See Gilbert, *supra* note 31, at 22; Martin W. Healy, *Commentary: Healy on the Hill*, MASS. LAW. WKLY., June 12, 2006, at 6, 2006 WLNR 27169451 (noting that multiple legislative reforms to the CORI Act focused on addressing the unavailability of criminal record information). In 1977, the CORI Act was amended to include dissemination of criminal records to individuals and agencies when such access was in accordance with the public interest. See Brant et al., *supra* note 87, at 66. Despite this new route to obtaining access to criminal record information, it was the burden of the individual seeking access to prove his or her request comported with the interests of the public. See Gilbert, *supra* note 31, at 13. In 1990, an amendment required that criminal history information

2. The 2010 CORI Reform

In response to longstanding debate over the proper operation of the CORI system, Governor Deval Patrick sought to introduce reforms that would increase the public availability of criminal record information while simultaneously introducing procedural protections to promote opportunity and facilitate reintegration for ex-offenders.⁹⁵ In 2010, the Massachusetts legislature passed the CORI Reform Act, a piece of legislation which made numerous changes to the way that CORIs are accessed, disseminated, and sealed.⁹⁶

One major aspect of the Act was to broaden access to criminal records for employers, housing providers, and certain governmental and non-governmental agencies through the implementation of a digitized database called iCORI.⁹⁷ Under the revised statute, employers and landlords can obtain “Standard Access” that enables them to obtain CORI reports for the purposes of evaluating candidates for employment, housing, volunteer opportunities, and professional or occupational licensure.⁹⁸ For these private

be publicly accessible for a short amount of time following the release of an offender from custody or incarceration. *See id.* at 22. In that same year, public housing authorities were authorized to access CORI for screening of prospective tenants in order to ensure the continued safety of existing tenants. *See* CLAIRE KAPLAN, THE BOS. FOUND., CORI: BALANCING INDIVIDUAL RIGHTS AND PUBLIC ACCESS, 8 (2005), www.crj.org/page/-/cjifiles/CORIREport_2.pdf [<https://perma.cc/S53X-H8X4>]. In 2002, changes to the CORI Act allowed access to criminal record information for camps and other organizations that provided services to children under the age of eighteen. *See* 2002 Mass. Acts 1159–60.

⁹⁵ *See* McMorro, *supra* note 49; *see also* Pon, 14 N.E.3d at 191 (noting that certain agencies and entities have legitimate needs to access criminal records); Kelleher, *supra* note 43, § 15.4 (describing how the reforms intended to recalibrate the individual’s interest in privacy with the need for public safety).

⁹⁶ *See* An Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information, 2010 Mass. Acts ch. 256; PRIEST ET AL., *supra* note 11, at 5. Part of the change was to eliminate the Criminal History Systems Board (“CHSB”) and replace it with the DCJIS, an agency responsible for the online maintenance and dissemination of CORI reports. *See* PRIEST ET AL., *supra* note 11, at 5.

⁹⁷ *See* MASS. ANN. LAWS ch. 6, § 172(a)(3) (authorizing businesses, landlords, and volunteer agencies to request certain criminal record information); Margaret H. Paget, *Employment, in* CRIME AND CONSEQUENCE, *supra* note 26, § 3.2.3 (providing a summary of the iCORI database and how employers and housing providers can use it to access criminal record information); John S. Gannon, *Are You Prepared for CORI Reform?*, 23 No. 3 MASS. EMP. L. LETTER 1, 1 (2012) (explaining the scope and operation of the iCORI system); *Summary of Levels of CORI Access with Requestor Types*, MASS. DEP’T OF CRIMINAL JUSTICE INFO. SERV., <http://www.mass.gov/eopss/agencies/djjs/summary-of-levels-of-cori-access-with-requestor-types.html> [<https://perma.cc/2GR3-3EBY>] [hereinafter *Levels of CORI Access*] (providing an overview of the information that can be accessed via the iCORI system for particular requestors).

⁹⁸ *See* MASS. ANN. LAWS ch. 6, § 172(a)(3); Gannon, *supra* note 97, at 1. This is in stark contrast to the pre-2010 approach to CORIs which limited access to a narrow group of employers and government agencies that were statutorily or discretionarily authorized to access CORI reports. *See* Massing, *supra* note 12, at 22 (describing how only 5000 private employers were authorized to obtain CORI reports before the 2010 reform).

employers and landlords, CORI reports are limited in scope to include felony convictions within ten years of the disposition of the case, misdemeanor convictions within five years of the disposition of the case, and pending criminal charges.⁹⁹ In addition to employers and landlords, the iCORI system is available to general and open access by the public with a more limited availability of criminal record information.¹⁰⁰ Additionally, Massachusetts adopted a “safe harbor” provision for employers which limits liability for negligent hiring decisions made within ninety days of obtaining an official CORI report.¹⁰¹

Certain agencies and entities are statutorily given “Required Access” which provides agencies and organizations with more detailed and unfiltered CORI reports in comparison to “Standard Access.”¹⁰² Entities and organizations that are provided “Required Access” are further subdivided between “Required 1” through “Required 4” levels of access.¹⁰³ Required 1 Access, the lowest required access designation, permits entities such as hospitals, banks, and insurance companies to see all unsealed adult and youthful offender convictions, as well as records of pending offenses.¹⁰⁴ Required 2 Ac-

⁹⁹ See MASS. ANN. LAWS ch. 6, § 172(a)(3). “Standard Access” also includes access to all conviction records for murder, manslaughter, and sex offenses regardless of the amount of time since the offense has passed if the conviction has not been sealed. *Implementing CORI Reform*, MASS. DEP’T OF CRIMINAL JUSTICE INFO. SERV., <http://www.mass.gov/eopss/docs/chsb/implementing-cori-reform.pdf> [hereinafter *Implementing Cori Reform*]. For the purposes of the statute, pending criminal charges include continued without a finding (“CWOFF”) dispositions that have not yet been dismissed. See MASS. ANN. LAWS ch. 6, § 172(a)(3). A CWOFF prevents a guilty finding from being entered against a defendant and instead provides an opportunity for the defendant to complete a term of probation and have the case against them dismissed. See MASS. GEN. LAWS ch. 278, § 18 (2014).

¹⁰⁰ See MASS. ANN. LAWS ch. 6, § 172(a)(4). “Open Access” to the public is limited to: felony convictions which carry a potential of five or more years in prison provided that the disposition occurred within the last ten years, information on the location and custody of any individual currently incarcerated, on probation, or on parole, any felony conviction within two years of the disposition, and any misdemeanor convictions within one year of the disposition. See *id.* “Open Access” also includes access to all conviction records for murder, manslaughter, and sex offenses regardless of the amount of time since the offense has passed if the conviction has not been sealed. See *Implementing Cori Reform*, *supra* note 99.

¹⁰¹ See MASS. ANN. LAWS ch. 6, § 172(e); Paget, *supra* note 97, § 3.2.3. This limited liability provision is notably absent when an entity relies on a third-party criminal record service and thus promotes use of the more limited iCORI system. See MASS. ANN. LAWS ch. 6, § 172(e); Paget, *supra* note 97, § 3.2.3.

¹⁰² See MASS. ANN. LAWS ch. 6, § 172(a)(2) (authorizing entities and organizations that are required to obtain CORI reports by statute or regulation to obtain sufficient information to satisfy their statutory or regulatory obligation); *Implementing Cori Reform*, *supra* note 99.

¹⁰³ See Cristley & Koulouris, *supra* note 89, § 2.2.5 (describing the various levels of “Required Access”); *Implementing Cori Reform*, *supra* note 99.

¹⁰⁴ See Cristley & Koulouris, *supra* note 89, § 2.2.6(c) (listing the various entities and organizations that receive Required 1 Access); *Levels of CORI Access*, *supra* note 97 (providing an overview of the types of entities that are statutorily given Required 1 Access and the underlying purposes for the access); see also MASS. COMMISSION AGAINST DISCRIMINATION, MCAD FACT SHEET: CRIMINAL OFFENDER RECORD INFORMATION ADMINISTRATIVE PROCEDURE REFORMS 4

cess allows organizations such as in-home care providers, day care operators, nursing homes, and providers of services to children under eighteen years old to view CORI reports containing all adult convictions, youthful offender convictions, non-conviction records that have not been sealed, and records of pending offenses.¹⁰⁵ Required 3 Access allows camps to obtain adult, youthful offender, and juvenile offender convictions, as well as non-conviction records and records of pending offenses.¹⁰⁶ Finally, Required 4 Access, the highest required access designation, allows the Massachusetts Department of Early Education to receive all conviction and non-conviction records, as well as sealed records and records of pending offenses.¹⁰⁷

Although the CORI Reform Act substantially increased access to criminal records, it also contained a variety of measures designed to offer procedural safeguards and enable reintegration for individuals with criminal records.¹⁰⁸ First, the CORI Reform Act made it illegal for employers to request that prospective employees provide copies of their CORI reports.¹⁰⁹ Second, the revised statute made it unlawful for employers to inquire about criminal histories in preliminary written job applications.¹¹⁰ Third, if an employer or

(2010), <http://www.mass.gov/mcad/resources/employers-businesses/criminal-records-fact-sheet.pdf> [<https://perma.cc/AN83-BKLV>] (explaining that certain financial institutions are statutorily mandated under federal law to inquire as to whether a prospective employee has ever been convicted of a crime involving dishonesty, breach of trust, or money laundering).

¹⁰⁵ See MASS. GEN. LAWS ch. 6, § 172C (2014) (giving CORI report access to in-home care providers); *id.* § 172E (allowing dissemination of criminal record information for long term care and assisted living facilities); *id.* § 172H (permitting release of criminal offender information to providers of services for children under eighteen years old); Cristley & Koulouris, *supra* note 89, § 2.2.6(c) (listing the entities and organizations that receive Required 2 Access and detailing the specific statutory basis for the access); *Levels of CORI Access*, *supra* note 97 (listing what entities receive Required 2 Access and the purposes for the access).

¹⁰⁶ See MASS. GEN. LAWS ch. 6, § 172G (2014); *Levels of CORI Access*, *supra* note 97.

¹⁰⁷ See MASS. GEN. LAWS ch. 6, § 172F (requiring that the Department of Early Education and Care receive all conviction and non-conviction records for the purposes of evaluating any facility or program that offers services to children); *Levels of CORI Access*, *supra* note 97.

¹⁰⁸ See PRIEST ET AL., *supra* note 11, at 5, 7 (summarizing the procedural protections and other benefits to individuals with criminal records contained in the CORI Reform Act); Massing, *supra* note 12, at 22–24 (commenting on how the CORI Reform Act increased the availability of official CORI information while simultaneously incorporating a variety of restrictions on when and how the criminal record information could be used).

¹⁰⁹ See MASS. ANN. LAWS ch. 6, § 172(d) (LexisNexis Supp. Dec. 2015). This barrier ensures that employers have access to only the criminal record information that they are statutorily entitled to receive. See *id.* § 172; MASS. GEN. LAWS ch. 6, § 175. If employers were authorized to request prospective employees to provide CORI reports, the employer would be able to see the full and unrestricted CORI report that individuals are statutorily authorized to personally receive. See MASS. GEN. LAWS ch. 6, § 175.

¹¹⁰ See 2010 Mass. Acts 1090–91. Commonly referred to as a “ban the box” initiative, this component of the revised statute provides opportunity for individuals with criminal records to obtain interviews and seek to explain elements of their criminal records if necessary. See MASS. ANN. LAWS ch. 151B, § 4(9½) (LexisNexis Supp. Dec. 2015); PRIEST ET AL., *supra* note 11, at 8 (noting that the “ban the box” provision was intended to increase the numbers of individuals with

landlord chooses not to hire or rent to an individual based on the existence of a criminal record, the employer or landlord must provide a copy of the CORI report to the individual and give them the opportunity to contest the accuracy of the information.¹¹¹ Finally, individuals are permitted to obtain their own CORI reports in order to provide an opportunity to ensure the accuracy of the record and to see who has viewed the record.¹¹²

B. The Sealing of Criminal Convictions Under Chapter 276, Section 100A of the Massachusetts General Laws

In order to counterbalance the impact of increased access to records and further the interest in promoting opportunities for ex-offenders, the CORI Reform Act significantly decreased the waiting period for automatic sealing under chapter 276, section 100A of the Massachusetts General Laws.¹¹³ Before the second phase of CORI reform went into effect in 2012, individuals convicted of a misdemeanor had to wait ten years to have their record sealed and individuals convicted of a felony had to wait fifteen years.¹¹⁴ CORI reform reduced the waiting period to seal to five years for a misdemeanor conviction, ten years for a felony conviction, and fifteen years for certain sex offenses.¹¹⁵ Although pleased with the decreased waiting

CORI records who were obtaining interviews). Certain employers are exempted from this provision if federal or state law mandates that individuals with certain convictions should be disqualified from obtaining a particular type of employment. *See* 2010 Mass. Acts 1090–91.

¹¹¹ *See* MASS. ANN. LAWS ch. 6, § 172(c) (LexisNexis Supp. Dec. 2015); Carie Torrence, *Massachusetts Becomes the Second State to “Ban the Box” on All Employment Applications*, LITTLER MENDELSON P.C., (Aug. 11, 2010), <http://www.littler.com/publication-press/publication/massachusetts-becomes-second-state-ban-box-all-employment-applications> [<https://perma.cc/373E-P5CQ>] (explaining that an employer who obtains a criminal record of a prospective employee must disclose this information to the prospective employee or face potential civil and criminal sanctions).

¹¹² *See* MASS. ANN. LAWS ch. 6, § 172(a)(5); *Know Your CORI Rights*, GREATER BOS. LEGAL SERVS. 12 (2014) [hereinafter *CORI Rights*], <http://www.masslegalhelp.org/cori/booklets-folder/know-your-cori-rights.pdf> [<https://perma.cc/VXX2-AMJU>]. This comprehensive personal right to access CORI reports was a targeted response to previous issues and concerns with the accuracy of the information maintained by the CHSB. *See* Healy, *supra* note 94, at 6 (describing how numerous anecdotal accounts existed regarding inaccurate information in the CORI system and arguing for changes to the system to allow easier fact checking and error correction); Kaplan, *supra* note 94, at 12, 16–17 (noting that prior to the 2010 reform, it was difficult to detect and remove errors in particular CORI reports and that certain commentators felt that the CORI system needed additional safeguards in place to ensure the accuracy of criminal record information).

¹¹³ *See* Massing, *supra* note 12, at 22. As the requirements for sealing under section 100A are procedural in nature, sealing is automatic upon petition by an eligible individual. *See* MASS. GEN. LAWS ch. 276, § 100A (2014).

¹¹⁴ *See Pon*, 14 N.E.3d at 192 n.17 (discussing the previously longer waiting periods for record sealing); *Commonwealth v. Gavin G.*, 772 N.E.2d 1067, 1073 (Mass. 2002) (noting that, as of 2002, there was a ten- to fifteen-year waiting period to seal convictions under section 100A).

¹¹⁵ *See* MASS. GEN. LAWS ch. 276, § 100A. Additionally, the time period for sealing now begins following release from custody whereas the waiting period under the prior version of the

periods, many proponents of increased access to criminal record sealing had hoped for an even more expeditious route to sealing.¹¹⁶

In addition to the mandated waiting period, individuals seeking to seal under section 100A must satisfy several procedural requirements.¹¹⁷ First, an individual must not have been found guilty of an additional misdemeanor or felony in the five or ten years respectively preceding the criminal offense they are petitioning to seal.¹¹⁸ Additionally, sealing is not available for individuals convicted of certain criminal offenses, including firearms offenses, crimes against public justice, and crimes committed by public officials in the scope of their official conduct.¹¹⁹ Even if information is sealed under section 100A, however, it is still accessible by certain statutorily authorized entities.¹²⁰

statute did not begin until the completion of a period of probation or other state supervision. *See id.* (allowing sealing of conviction records if, along with satisfying other statutory requirements, an individual “has not been *imprisoned* in any state or county in the case of a misdemeanor, within the preceding 5 years, and in the case of a felony, within the preceding 10 years” (emphasis added)); Kelleher, *supra* note 43, § 15.4.3 (explaining that under the amended section 100A, the waiting period for sealing begins after an individual is released from custody, whereas before it began after an individual’s court-ordered supervision was finished).

¹¹⁶ *See* Massing, *supra* note 12, at 21 (describing how before the passage of the CORI Reform Act, there were several legislative efforts to more ambitiously decrease waiting periods for sealing); PRIEST ET AL., *supra* note 11, at 5 (noting State Senator Cynthia Creem’s desire to have changed waiting periods to three years for misdemeanors and seven years for felonies); John C. Drake, *Advocates of Limiting Use of Crime Records Fault Patrick Bill*, BOSTON.COM (May 23, 2008), http://www.boston.com/news/local/articles/2008/05/23/advocates_of_limiting_crime_record_use_fault_patrick_bill/?page=full [<https://perma.cc/7HEJ-34NW>] (explaining how advocates believed that waiting periods of five years and ten years for a misdemeanor and felony respectively were too long). In support of this position, advocates cited a 2006 study that argued that after seven years, there is an insignificant difference in the risk of recidivism for individuals with a prior criminal record and those with none. *See* Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 CRIME & DELINQUENCY 64, 64 (2007); Drake, *supra*; *see also* PRIEST ET AL., *supra* note 11, at 17 (explaining how some advocates of CORI reform believed that three- and seven-year waiting periods for misdemeanor and felony convictions respectively should be adopted). Similarly, a 2002 study by the Bureau of Labor Statistics at the Department of Justice found that two-thirds of recidivism occurs in the first year following an individual’s release from incarceration. *See* TEX. CRIMINAL JUSTICE COAL., COST-SAVING STRATEGIES FOR TEXAS’ CRIMINAL AND JUVENILE JUSTICE SYSTEMS, PART 2 OF 4, at 2 (2011) (citing PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 3 (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf> [<https://perma.cc/BP6F-6S6J>]), [http://www.texasjc.org/sites/default/files/uploads/Cost-Saving%20Strategies%20-%20Part%202%20\(Feb%202011\).pdf](http://www.texasjc.org/sites/default/files/uploads/Cost-Saving%20Strategies%20-%20Part%202%20(Feb%202011).pdf) [<https://perma.cc/S44H-RSJR>]).

¹¹⁷ MASS. GEN. LAWS ch. 276, § 100A.

¹¹⁸ *Id.*

¹¹⁹ *Id.*; *see* MASS. GEN. LAWS ch. 140, §§ 121–31H (2014); MASS. GEN. LAWS ch. 268, §§ 1–40 (2014); MASS. GEN. LAWS ch. 268A, §§ 1–29 (2014).

¹²⁰ *See* MASS. ANN. LAWS ch. 6, § 172(a)(1)–(2) (LexisNexis Supp. Dec. 2015); Cristley, *supra* note 89, § 2.2.5; *Levels of CORI Access*, *supra* note 97. In 1978, the Massachusetts Supreme Judicial Court in *Rzezniak v. Chief of Police of Southampton* weighed in on the need to balance the

C. Discretionary Criminal Record Sealing Under Chapter 276, Section 100C of the Massachusetts General Laws Before and After Commonwealth v. Pon

Pursuant to chapter 276, section 100C, paragraph 1 of the Massachusetts General Laws, criminal records relating to cases that end in acquittals, fail to produce indictments, or do not result in a finding of probable cause are automatically sealed by the Massachusetts Commissioner of Probation.¹²¹ Another concession made by the legislature during the passage of the CORI Reform Act was to increase access to sealing of non-conviction data under section 100C, paragraph 1.¹²² As part of the CORI Reform Act, the legislature allowed for automatic sealing of non-conviction data for CWOs that result in dismissals.¹²³

Unlike section 100C, paragraph 1, cases that end in a dismissal or *nolle prosequi* pursuant to section 100C, paragraph 2 can be sealed only if a Massachusetts court determines that “substantial justice would be served” by sealing.¹²⁴ Because the statute does not define what “substantial justice” means in this context, the term has been left to the courts to be interpret-

right to privacy under the CORI Act with the right of criminal justice agencies to access criminal record information. *See* 373 N.E.2d 1128, 1131–33 (Mass. 1978). In *Rzeznik*, an individual with two prior felony convictions was denied a firearms license even though the record of his past felonies had been sealed. *See* MASS. GEN. LAWS ch. 140, § 122B (1973); *Rzeznik*, 373 N.E.2d at 1131. The statute stated that a chief of police was not permitted to grant firearm licenses to any individual who had been convicted of a felony in any state or jurisdiction. *See* MASS. GEN. LAWS ch. 140, § 122B; *Rzeznik*, 373 N.E.2d at 1131 & n.1. The court held that under the CORI Act, criminal justice agencies were statutorily authorized to access criminal records, including those that had previously been judicially sealed. *See Rzeznik*, 373 N.E.2d at 1132–33; *see also* Gilbert, *supra* note 31, at 13 (“The Supreme Judicial Court declined to read the sealing statute so as to preclude access to a sealed criminal record through CORI by a criminal justice agency.”). This remains good law under the CORI Reform Act. *See* MASS. ANN. LAWS ch. 6, § 172(a)(1).

¹²¹ *See* MASS. GEN. LAWS ch. 276, § 100C para. 1 (2014). The law states,

In any criminal case wherein the defendant has been found not guilty by the court or jury, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court, . . . courts in which the proceedings occurred or were initiated shall likewise seal the records of the proceedings in their files.

Id.

¹²² *See id.*; Pangonis, *supra* note 26, § 18.3.1 (describing how restrictive language preventing automatic sealing in cases where there was a period of probation prior to dismissal was deleted from section 100C as part of the CORI Reform Act).

¹²³ *See* MASS. GEN. LAWS ch. 276, § 100C para. 1; MASS. GEN. LAWS ch. 278, § 18 (2014); Pangonis, *supra* note 26, § 18.3.1.

¹²⁴ *See* MASS. GEN. LAWS ch. 276, § 100C para. 2; *Commonwealth v. Doe*, 648 N.E.2d 1255, 1258 (Mass. 1995) (stating that a different standard applies for sealing non-conviction records depending on whether a particular case falls under paragraph 1 or paragraph 2 of section 100C).

ed.¹²⁵ In the wake of the CORI Reform Act, the Supreme Judicial Court deviated from a long-standing interpretation of “substantial justice” in order to better align itself with the Massachusetts legislature.¹²⁶

1. The Hardline Standard Established by *Commonwealth v. Doe*

In 1995, in *Commonwealth v. Doe*, the Supreme Judicial Court of Massachusetts weighed in on the proper definition and application of the “substantial justice” standard in determining whether to seal a criminal record that resulted in a dismissal or *nolle prosequi* pursuant to chapter 276, section 100C, paragraph 2 of the Massachusetts General Laws.¹²⁷ In doing so, the Supreme Judicial Court created a rigid standard that weighed heavily against discretionary sealing in such cases.¹²⁸

In defining “substantial justice,” the Supreme Judicial Court sought to balance the public’s right to access information regarding criminal proceedings under the First Amendment and the individual’s interest in privacy and preventing the dissemination of criminal record information.¹²⁹ The Supreme Judicial Court looked to the U.S. Court of Appeals for the First Circuit’s 1989 decision in *Globe Newspaper Co. v. Pokaski* for guidance.¹³⁰ In that decision, the First Circuit held that the broad strokes attempt to limit the public’s access to criminal records of cases that result in *nolle prosequi* or dismissals under the second paragraph of section 100C triggered First

¹²⁵ See MASS. GEN. LAWS ch. 276, § 100C para. 2; *Pon*, 14 N.E.3d at 189; *Doe*, 648 N.E.2d at 1258. The Massachusetts Supreme Judicial Court has stated that the term “substantial justice” does not “lend itself to a clear definition.” *Pon*, 14 N.E.3d at 189–90.

¹²⁶ See *Pon*, 14 N.E.3d at 189; Jennifer S. Lynn, *Recent Changes in the Discretionary Sealing Process for CORI Records*, STRANG, SCOTT, GIROUX & YOUNG, LLP (Mar. 30, 2015), <http://www.strangscott.com/recent-changes-in-the-discretionary-sealing-process-for-cori-records> [perma.cc/42UY-FBD8] (explaining that the *Pon* decision deviated significantly from past court precedent and served to lower the standard for discretionary sealing under the first paragraph of section 100C).

¹²⁷ *Doe*, 648 N.E.2d at 1256, 1259. The defendant in the criminal case that led to the decision in *Doe* was an eighteen-year-old student who had been charged with multiple criminal offenses, including rape. *Id.* at 1257. After determining that the underlying allegations lacked merit, the Suffolk District Attorney decided not to prosecute the case and entered a *nolle prosequi*. See *id.* Shortly after the *nolle prosequi* was entered, the defendant filed a petition to seal the record of his case in accordance with section 100C, paragraph 2 on the grounds that a criminal record would adversely impact his future employment and educational opportunities. See *id.* Initially, the defendant’s petition to have his record sealed was denied by a judge in Roxbury District Court who found that the defendant had failed to show that the criminal record would cause anything more than “a potential harm to his reputation, employment prospects or privacy.” See *id.*

¹²⁸ See *Doe*, 648 N.E.2d at 1256, 1260–61; see also *Pon*, 14 N.E.3d at 186 (describing the *Doe* standard as “stringent”).

¹²⁹ See *Doe*, 648 N.E.2d at 1258.

¹³⁰ See *id.* at 1258–60.

Amendment concerns.¹³¹ The Supreme Judicial Court interpreted the First Circuit's guidance from *Pokaski* as establishing a strict and demanding standard for the discretionary sealing of criminal records.¹³²

According to the Supreme Judicial Court, in order for the "substantial justice" standard to be satisfied, a defendant had to show that his or her personal interest in sealing a record "clearly outweighs the constitutionally-based value" of public access to the criminal record.¹³³ To do so, the court required the defendant to demonstrate that the inability to seal his or her criminal record would pose a specific personal harm beyond a general threat to "reputation and privacy interests."¹³⁴ Additionally, the Supreme Judicial Court instructed judges reviewing petitions for sealing to evaluate all relevant details and factors, including the reason or reasons why a particular criminal case was dismissed or *nolle prossed*.¹³⁵ The Supreme Judicial Court emphasized that sealing of criminal records should be reserved for "exceptional cases."¹³⁶

2. Recalibration in *Commonwealth v. Pon*

In the wake of significant changes to the CORI system and record sealing statutes, the Massachusetts Supreme Judicial Court in 2014 in *Common-*

¹³¹ See *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502, 510 (1st Cir. 1989). The First Circuit determined that a compelling interests and least restrictive means test governed the discretionary sealing of records allowed by section 100C, paragraph 2. See *id.* at 505. The First Circuit stated that the statute should not "infringe upon the First Amendment any more than is necessary to promote [its] objectives." *Id.*

¹³² See *Doe*, 648 N.E.2d at 1259–61. The *Doe* court established a two-stage hearing process whereby defendants seeking to seal records under section 100C, paragraph 2 had to first make a prima facie case establishing that sealing is warranted. See *id.* at 1259. Should a defendant succeed in making this prima facie showing, a second hearing would be ordered and the public must be given notice and opportunity to oppose the defendant's request to seal the record. See *id.* at 1260.

¹³³ See *id.* at 1260–61. Additionally, the defendant had to show that his or her privacy interests have not already been irrevocably impacted by the public nature of the criminal proceedings against them. See *id.* at 1259.

¹³⁴ See *id.* at 1259. The court tempered this requirement slightly by stating that defendant did not have to show an "actual likelihood of immediate harm." See *id.* at 1261.

¹³⁵ See *id.* at 1260–61.

¹³⁶ See *id.* at 1259; see also Jeffrey J. Pyle, *The Unwarranted Secrecy of Criminal Justice Information in Massachusetts*, 59 BOS. B.J. 17, 21 (2015) ("The value of open court proceedings is so weighty, and the First Amendment right so strong, that both the *Pokaski* and *Doe* courts anticipated that few defendants would be able to seal records under this standard."). Although it established a strict standard for discretionary sealing in *Doe*, the Supreme Judicial Court did recognize that significant personal and societal interests exist for sealing criminal records. See 648 N.E.2d at 1258, 1261. In addition to a general interest in privacy, the *Doe* court acknowledged that criminal records could have adverse impacts on an individual's ability to obtain employment and educational advancement. See *id.* at 1258, 1261.

wealth v. Pon reevaluated the *Doe* decision's longstanding sealing standard.¹³⁷ The Supreme Judicial Court determined that the *Doe* court's interpretation of "substantial justice" presented too high a bar for discretionary record sealing and was incongruous with the intentions of the Massachusetts legislature.¹³⁸

In *Pon*, the Supreme Judicial Court found that criminal records from cases resulting in *nolle prosequis* or dismissals are not subject to a First Amendment presumption of availability.¹³⁹ In doing so, the court departed from the guidance of the First Circuit in *Pokaski* and from its own prior decision in *Doe*.¹⁴⁰ Because the U.S. Supreme Court has never decided the issue of whether First Amendment presumption of access applies to criminal records from cases resulting in a *nolle prosequi* and dismissal, the Supreme Judicial Court determined that it was not required to follow the First Circuit's guidance from *Pokaski*.¹⁴¹ As a result, the court found that the par-

¹³⁷ See *Pon*, 14 N.E.3d at 186 (finding that the *Doe* court's "stringent standard" for discretionary sealing was inconsistent with the Massachusetts legislature's new approach to criminal record management pursuant to the CORI Reform Act); *Doe*, 648 N.E.2d at 1260–61 (laying out the "substantial justice" standard used for discretionary sealing).

¹³⁸ See *Pon*, 14 N.E.3d at 186, 194; *supra* notes 95–112 and accompanying text (describing the massive legislative overhaul of the Massachusetts system for criminal record management and access). The criminal case that led to the decision in *Pon* involved a defendant who received a CWF for operating a motor vehicle under the influence of alcohol and leaving the scene of property damage. See *Pon*, 14 N.E.3d at 186–87. Ultimately, the case against the defendant was dismissed following a recommendation from the probation department. See *id.* at 187. After the case was dismissed, the defendant petitioned to seal his criminal record under paragraph 2 of section 100C. See *id.* While the case was being litigated, the Commissioner of Probation sealed the record of the defendant's recent arrest under section 100A and therefore the issue of sealing this particular defendant's criminal record was moot by the time the Supreme Judicial Court was set to issue its opinion. See *id.* Despite the defendant's record being sealed, the Supreme Judicial Court decided to use the case to provide a new standard for evaluating the "substantial justice" requirement for discretionary sealing of criminal records under section 100C, paragraph 2. See *id.* at 188.

¹³⁹ See *Pon*, 14 N.E.3d at 196. The Supreme Judicial Court used a two-stage constitutional inquiry for determining whether First Amendment public access applied to these particular types of criminal records. See *id.*; see also *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986) (examining how the U.S. Supreme Court has approached the First Amendment right of access to criminal proceedings in past cases). First, the Supreme Judicial Court held that criminal records of cases resulting in a dismissal or *nolle prosequi* have not historically been treated as open to the public in the same sense that other criminal records, such as those resulting in convictions, have been. See *Pon*, 14 N.E.3d at 195. Second, the court found that open access to the particular types of criminal records being considered did not play a significant role in fostering transparency and public scrutiny of the criminal justice system. See *id.* at 195–96.

¹⁴⁰ See *Pon*, 14 N.E.3d at 196; see also *Pokaski*, 868 F.2d at 502, 505 (stating that there is a First Amendment right of public access to records related to criminal proceedings); *Doe*, 648 N.E.2d at 1259–61 (describing the more rigid standard for discretionary sealing that the *Pon* court decided to abandon).

¹⁴¹ See *Pon*, 14 N.E.3d at 194. Many states hold this view of the persuasive authority, and not binding authority, of federal courts other than the U.S. Supreme Court. See, e.g., *Cook v. Poplewell*, 394 S.W.3d 323, 346 (Ky. 2011) (stating that the decisions of the U.S. Court of Appeals for the Sixth Circuit are not binding on the Kentucky Supreme Court); *French v. Hines*, 957 A.2d 1000, 1035 n.21 (Md. Ct. Spec. App. 2008) (stating that Maryland courts are not required to fol-

ticular criminal records being considered were not subject to a First Amendment presumption of public access, but rather were governed by the less stringent common-law presumption of public access.¹⁴²

Under the common-law presumption of public access, the Supreme Judicial Court held that criminal records from cases resulting in a dismissal or *nolle prosequi* could be sealed pursuant to section 100C, paragraph 2 based on a showing of “good cause.”¹⁴³ The new “good cause” interpretation of “substantial justice” decreased the burden on defendants seeking discretionary sealing.¹⁴⁴

After explaining the rationale for its “good cause” standard, the Supreme Judicial Court went on to outline the balancing test that judges should apply in determining whether to seal a criminal record of a dismissal or *nolle prosequi*.¹⁴⁵ In framing its multi-factor balancing test, the Supreme Judicial Court noted that the public’s interest in having access to records must be weighed against the significant private and governmental interests that weigh in favor of sealing.¹⁴⁶ First, judges should examine the particular disadvantages that individuals will encounter due to public access of their criminal records.¹⁴⁷ Next, judges should consider efforts and proof of rehabilitation by individuals seeking to have their records sealed.¹⁴⁸ Third, judg-

low guidance of lower federal courts); *Combs v. Ins. Co. of Ill.*, 497 N.E.2d 503, 507 (Ill. App. Ct. 1986) (explaining that the U.S. Supreme Court is the only federal court whose decisions are binding with respect to the decisions of courts in Illinois).

¹⁴² See *Pon*, 14 N.E.3d at 196–97 (citing *Nixon v. Warner Commc’ns*, 435 U.S. 589, 602 (1978); New Eng. Internet Café, LLC v. Clerk of the Superior Court for Criminal Bus., 966 N.E.2d 797, 803 (Mass. 2012)).

¹⁴³ See *Pon*, 14 N.E.3d at 197–98.

¹⁴⁴ See *id.* at 198; *Massachusetts Ruling Reduces Access to Criminal Court Records*, PRINCE LOBEL BLOG (Aug. 15, 2014), <http://www.princelobel.com/news-publications-382.html> [<https://perma.cc/S9AW-76DV>] [hereinafter *Massachusetts Ruling Reduces Access*] (arguing that the new standard is “weighted in favor of sealing”); *SJC Establishes New Standard to Seal Criminal Cases*, GREATER BOS. LEGAL SERV., <http://www.gbls.org/news/sjc-establishes-new-standard-seal-criminal-cases> [<https://perma.cc/P6HL-7QN5>] [hereinafter *SJC Establishes New Standard to Seal*] (stating that the new standard will facilitate increased opportunity for criminal record sealing).

¹⁴⁵ See *Pon*, 14 N.E.3d at 198–200.

¹⁴⁶ See *id.* at 199–200. These interests include promoting privacy, increasing access to gainful employment and suitable housing, and combating recidivism. See *id.*

¹⁴⁷ See *id.* at 200. Unlike *Doe*, individuals seeking to seal their records are not required to show that they are at risk of specific harm. See *id.*; *Doe*, 648 N.E.2d at 1259 (“A defendant must show that specific harm is threatened by the continued existence of the record.”). Defendants must, however, proffer with “sufficient particularity and credibility” a presently existing or likely to exist disadvantage resulting from the availability of their criminal record. See *Pon*, 14 N.E.3d at 200. The court provided a non-exhaustive list of potential disadvantages, including unemployment, underemployment, homelessness, inability to pursue certain categories of employment, and inability to participate in social and communal activities caused by the existence of a criminal record. See *id.* at 201.

¹⁴⁸ See *Pon*, 14 N.E.3d at 201 (stating that evidence of rehabilitation can include “[e]mployment attempts, community or civic engagement, successful completion of a probationary period or a sobri-

es should decide whether sealing a criminal record would actually serve to mitigate the adverse effects of its public availability.¹⁴⁹ Fourth, judges should inquire as to the individual's likelihood of reoffending by examining relevant factors from the time of the offense.¹⁵⁰ Fifth, judges should take note of the amount of time that has passed since the underlying offense.¹⁵¹ Finally, judges should inquire as to the factors and rationales behind why the particular case ended in a *nolle prosequi* or dismissal.¹⁵² In addition to these specific factors, judges are also instructed to consider "any relevant information" necessary to balance the relevant interests in play.¹⁵³

III. THE MASSACHUSETTS MODEL: HOW MASSACHUSETTS CAN BECOME AN EXEMPLAR FOR STATE AND FEDERAL APPROACHES TO CRIMINAL RECORD SEALING AND EXPUNGEMENT

Over the last five years, Massachusetts has created a more holistic and comprehensive scheme for criminal record sealing.¹⁵⁴ This Part argues that

ety or mental health treatment, lack of further contact with the criminal justice system, or other accomplishments").

¹⁴⁹ *See id.* In making this determination, the court instructed judges to consider the type of crime that was committed, the "stigma or stereotypes" associated with that type of crime, and whether sealing can be accomplished without creating a danger for the community. *See id.* The court also noted that a particularly newsworthy case may not be amenable to sealing due to the erosion of the defendant's privacy. *See id.*

¹⁵⁰ *See id.* For example, a defendant's youth at the time of committing a criminal offense weighs in favor of sealing. *See id.* at 201–02 (citing *Diatchenko v. Dist. Att'y*, 1 N.E.3d 270, 283–85 (Mass. 2013)). Prior criminal activity, however, "weighs against sealing, as it suggests a greater likelihood of re-offense." *See id.* at 202.

¹⁵¹ *See id.* at 202. When analyzing the temporal component, judges are instructed to balance the public's opportunity to access records and the risk that the defendant might reoffend. *See id.* After some time has passed, there is a stronger argument for sealing as the risk of reoffending falls and the public's need for access is lessened. *See id.*

¹⁵² *See id.* These factors include whether the case was dismissed with or without prejudice and whether it was the product of an agreed-upon disposition. *See id.*

¹⁵³ *See id.* at 200 (citing *New Eng. Internet Café, LLC*, 966 N.E.2d at 809). In addition to instituting a "good cause" interpretation of the "substantial justice" standard, the Supreme Judicial Court also made a noteworthy change to the procedural process for sealing *nolle prosequi* and dismissed criminal records under paragraph 2 of section 100C. *See id.* at 203–05. The court determined that, in accordance with the new lowered standard, a single hearing would be sufficient to determine whether "good cause" exists to seal a criminal record for a case that resulted in a dismissal or *nolle prosequi*. *See id.* at 204. With this new, simplified procedural standard, the court sought to promote the dual purposes of improving judicial economy and reducing the burden on *pro se* petitioners seeking to have their records sealed. *See id.*

¹⁵⁴ *See Commonwealth v. Pon*, 14 N.E.3d 182, 190–91, 193–94 (Mass. 2014) (stating that a more open standard for the discretionary sealing of certain non-conviction records was in accordance with the Massachusetts legislature's general intent to increase access to criminal records in the name of public safety while also allowing record sealing to promote second chances for individuals with criminal records); Massing, *supra* note 12, at 24 (explaining that CORI reform was aimed to "demystify" criminal records and provide opportunities for individuals with criminal records to be rehabilitated).

Massachusetts, in light of the recent judicial and legislative overhaul to its system of criminal record sealing, has the potential to serve as a model for reform at the state and federal level.¹⁵⁵ Section A argues that other states and the federal government should enact or incorporate certain aspects of the Massachusetts system for criminal record sealing and record management alongside existing record sealing statutes.¹⁵⁶ Section B argues that Massachusetts should reevaluate several elements of the CORI Reform Act and the decision in *Commonwealth v. Pon* in order to better serve as an exemplar for other jurisdictions.¹⁵⁷

A. What's Working: Elements of the Massachusetts Approach That Should Be Adopted at the State and Federal Level

If legislatures are committed to providing meaningful pathways for rehabilitation and reducing recidivism, they must create more comprehensive and expeditious opportunities for criminal record sealing or expungement.¹⁵⁸ The changes that have taken place in Massachusetts have dramatically impacted the ease, speed, and general availability of criminal record sealing for the state's residents.¹⁵⁹ These reforms represent necessary and judicious elements of a cohesive criminal record sealing statute that should be emulated by other states and the federal government.¹⁶⁰

1. Other States and the Federal Government Should Allow Broader Access to Automatic Sealing or Expungement

One of the most impactful elements of the Massachusetts approach for ex-offenders is the ability to access criminal record sealing for the vast majority of criminal offenses, including misdemeanor and felony convic-

¹⁵⁵ See *infra* notes 158–221 and accompanying text.

¹⁵⁶ See *infra* notes 158–194 and accompanying text.

¹⁵⁷ See *infra* notes 195–221 and accompanying text.

¹⁵⁸ See Mouzon, *supra* note 5, at 2 (arguing that criminal histories can serve as a “life-long handicap” for individuals and limit their ability to find gainful employment and social acceptance); SUBRAMANIAN ET AL., *supra* note 4, at 13 (“Cleansing a criminal record can be a useful tool to shield individuals from the continuing negative effects of a conviction.”); see also GAEBLER, *supra* note 24, at 5, 32 (noting that a criminal record results in negative social and economic consequences and arguing that Texas should give further consideration to how it manages and distributes criminal history information).

¹⁵⁹ See, e.g., *Pon*, 14 N.E.3d at 197 (easing the burden on individuals seeking to seal records of *nolle prosequis* and dismissals); 2010 Mass. Acts 1095–96 (reducing waiting periods for automatic sealing of misdemeanor and felony convictions); Pangonis, *supra* note 26, § 18.3.1 (describing how the CORI Reform Act authorized the possibility of discretionary sealing of non-conviction data in cases that involved a period of probation, but ended in a dismissal).

¹⁶⁰ See *infra* notes 161–194 and accompanying text.

tions.¹⁶¹ Even in the states that do allow for the sealing or expungement of convictions, many statutes involve detailed restrictions based on the type and classification of offense and the prior history of the offender.¹⁶² These limitations on the availability of sealing or expungement prevent many ex-offenders from obtaining relief.¹⁶³

Providing greater access to criminal record sealing or expungement does not mean that states have to offer a remedy for all offenses in a uniform manner.¹⁶⁴ Rather, states should recalibrate the balance between the individual and public interests with respect to particular categories or types of criminal offenses and thereby facilitate more genuine opportunities for individuals to cleanse their records.¹⁶⁵

¹⁶¹ See MASS. GEN. LAWS ch. 276, § 100A (2014) (authorizing automatic sealing of misdemeanor convictions after a five-year waiting period and felony convictions after a ten-year waiting period, provided that there have been no guilty findings during the statutory waiting period); PRIEST ET AL., *supra* note 11, at 11 (remarking that the “best way” for individuals to avoid negative ramifications associated with a criminal record is to have the record sealed). Massachusetts does not allow sealing for a narrow group of criminal offenses, such as certain firearms offenses, crimes against public justice, and criminal offenses committed by public officials while acting under the color of their authority. See MASS. GEN. LAWS ch. 276, § 100A.

¹⁶² See, e.g., KY. REV. STAT. ANN. § 431.078(1), (4)(c) (LexisNexis Supp. 2015) (allowing an individual to seal only a misdemeanor offense provided that the individual has not been convicted of another misdemeanor in the last five years and has no prior felony convictions); MISS. CODE ANN. § 99-19-71(1)–(2)(a) (2015) (authorizing expungement for a first offender who has committed a misdemeanor or a narrow range of felonies such as passing a bad check or possession of a controlled substance); OKLA. STAT. tit. 22, § 18(A) (Supp. 2015) (limiting expungement of felonies to non-violent offenses where the individual received a gubernatorial pardon, had his or her case dismissed after successfully completing a deferred judgment, has never had a prior conviction, or has waited at least ten years).

¹⁶³ See Love, *supra* note 8, at 20 (explaining that the majority of states place restrictions on sealing or expungement which make the remedies unavailable to repeat offenders and/or violent offenders); SUBRAMANIAN ET AL., *supra* note 4, at 36 (arguing that eligibility restrictions, confusing procedural barriers, and long waiting periods undermine the accessibility and efficacy of criminal record sealing and expungement statutes); see also GAEBLER, *supra* note 24, at 24–25 (commenting that the numerous restrictions and limitations on the ability to petition for “expunction” of a record in Texas translates into low numbers of ex-offenders benefitting from the relief).

¹⁶⁴ See Silva, *supra* note 7, at 191, 195–96 (describing how expungement statutes arise out of the state legislative process and how non-uniform approaches to sealing and expungement can be successful and efficacious in their own right); AM. CIVIL LIBERTIES UNION ET AL., *supra* note 9, at 8–12 (describing how recent legislative reform efforts around sealing and expungement have varied greatly in their scope and proposed availability); see also *Collateral Consequences of Criminal Convictions*, *supra* note 4, at 141 (statement of Rep. Cohen, Member, H. Comm. on the Judiciary) (arguing that states should be given incentives by the federal government to develop laws that offer expungement remedies). Massachusetts, for example, retains a distinction between misdemeanor, felony, and sexual offenses that is reflected in different waiting periods required before sealing can occur. See MASS. GEN. LAWS ch. 276, § 100A (allowing sealing for misdemeanor convictions after five years, felonies after ten years, and certain sex offenses after fifteen years).

¹⁶⁵ See Love, *supra* note 8, at 24 (arguing that the efficacy of certain states’ sealing or expungement provisions is limited because certain offenders are unable to access the remedy); DeJarnatt, *supra* note 26, at 1082 (acknowledging that a perfect solution for sealing and expunge-

The federal government and states should enact or revise sealing or expungement statutes in a way that diminishes discretion and provides broad access to the remedy.¹⁶⁶ Even if a particular offense or category of crime is eligible for sealing, some states endow the judiciary with significant discretion to determine whether or not a particular individual should be allowed to seal or expunge a particular criminal record.¹⁶⁷ Where this broad discretionary power exists, ex-offenders living within the same state may be faced with disparate or arbitrary decisions based on minor differences between their cases or based on the particular judge who hears the petition to seal or expunge.¹⁶⁸

2. Other Jurisdictions Should Emulate the Targeted Availability Restrictions and Procedural Protections Provided Under the CORI Reform Act

Although sealing or expungement is available in some form in the majority of states, its impact on ex-offenders is inherently limited in scope if

ment has not been identified, but arguing that states could offer ex-offenders more robust sealing or expungement remedies without harming the public well-being).

¹⁶⁶ See *Silva*, *supra* note 7, at 198 (describing expungement as an efficacious vehicle to combat recidivism and facilitate rehabilitation and reintegration); AM. CIVIL LIBERTIES UNION ET AL., *supra* note 9, at 8 (highlighting the argument that sealing or expungement statutes can serve to alleviate collateral consequences of criminal convictions and facilitate successful reintegration for ex-offenders); SUBRAMANIAN ET AL., *supra* note 4, at 34, 42 (arguing that too much discretion in a sealing or expungement statute may undermine its efficacy by allowing individual judges and prosecutors to oppose petitions that otherwise satisfy statutory requirements).

¹⁶⁷ See, e.g., TENN. CODE ANN. § 40-32-101(g)(1)(A), (g)(5) (Lexis though 2015 Reg. Sess.) (instructing courts to balance the interests of the ex-offender with the “best interests of justice and public safety” when deciding whether to allow the expungement of certain eligible felony offenses); WYO. STAT. ANN. §§ 7-13-1501(g), 1502(g) (2014) (allowing a court to deny a petition to expunge a record of a misdemeanor or felony if it determines that petitioner is a danger to “himself, any identifiable victim or society”); see also GAEBLER, *supra* note 24, at 24 (describing how Texas’s discretionary expungement statute was criticized for causing “inconsistent and possibly unfair application across the state”). In the District of Columbia, for example, the court is instructed to balance the interests of the individual in sealing his or her record against the interests of the community in accessing the record to balance public safety and society’s interest in the rehabilitation of the individual. See D.C. CODE § 16-803(h)(1) (Supp. 2015). Under this discretionary standard, the court may take into account factors such as the nature and kind of the offense, how many arrests and or convictions the individual is seeking to seal, the individual’s involvement in the underlying offense, and victim impact statements. See *id.* § 16-803(h)(2).

¹⁶⁸ See *Henson*, *supra* note 27, at 390–92 (arguing that discretionary judicial expungement in Alabama can lead to unequal and unpredictable results for ex-offenders seeking a second chance); GAEBLER, *supra* note 24, at 24 (pointing out that some critics say that giving too much discretion to judges or prosecutors to influence expungement decisions leads to “inconsistent and possibly unfair” results); see also Joseph C. Dugan, *I Did My Time: The Transformation of Indiana’s Expungement Law*, 90 IND. L.J. 1321, 1342 (2015) (expressing concern that the high degree of discretion in Indiana’s expungement statute will result in inconsistent and arbitrary decisions on particular expungement petitions).

there are no procedural protections in place to restrict or discourage employers and housing providers from inquiring about criminal histories, obtaining and utilizing third party criminal background checks, or accessing inaccurate records.¹⁶⁹ In its recent CORI reform, Massachusetts has taken several important steps to enhance the practical efficacy of its sealing statute and to control the use and accuracy of the records it maintains that other jurisdictions should replicate.¹⁷⁰

First, other jurisdictions should create granular access controls that dictate who can access criminal records and what information those records contain in a particular request.¹⁷¹ In Massachusetts, the CORI Reform Act limits most requestors, such as general employers and landlords, to “Standard Access,” but allows more comprehensive access to certain entities that work with vulnerable populations or who are statutorily required to have certain information.¹⁷² States should emulate Massachusetts’s tiered approach to access and craft the availability of criminal record information in direct relation to the statutory or regulatory obligations and particular vulnerabilities of their agencies and organizations.¹⁷³ This approach allows for the dissemination of information necessary to ensure public safety while

¹⁶⁹ See Geffen & Letze, *supra* note 4, at 1371–72 (describing the harms to ex-offenders when criminal records are not properly maintained or adequately expunged); PRIEST ET AL., *supra* note 11, at 11–12 (pointing out that access to criminal record information through third parties, such as consumer reporting agencies, is a potential threat to the efficacy of criminal record sealing in Massachusetts). Effectively limiting access to criminal record and arrest information is an undeniable challenge considering the realities attendant to the modern digital age. See Jagunic, *supra* note 38, at 170–72 (highlighting the broad availability and use of commercial criminal background checks, as well as the potential inaccuracy of state-run criminal record services).

¹⁷⁰ See Pon, 14 N.E.3d at 190–93 (describing the efforts of Massachusetts legislatures to encourage use of official CORI reports while placing deliberate limits on what information can be accessed and who can access it); PRIEST ET AL., *supra* note 11, at 5 (explaining how the CORI Reform Act made changes to the law aimed at controlling who can access CORI reports and what information they can see); *infra* notes 171–176 and accompanying text.

¹⁷¹ See MASS. ANN. LAWS ch. 6, § 172 (LexisNexis Supp. Dec. 2015) (outlining the dissemination of CORI reports and the maintenance of the CORI system in Massachusetts); GAEBLER, *supra* note 24, at 12–15 (pointing out that criminal records, including those held by state-run agencies, are increasingly becoming accessible to the public to the detriment of ex-offenders and arrestees and recommending that Texas further restrict the use and availability of criminal record information).

¹⁷² See MASS. ANN. LAWS ch. 6, § 172(a)(2)–(3) (stating that the specific criminal history information that a requestor receives depends on the nature of the entity and the level of access given to the entity by statute); *Levels of CORI Access*, *supra* note 97 (providing an overview of the different levels of access that various entities are given by statute). “Standard Access” means that these entities can only see pending cases, misdemeanors less than five years old, and felonies less than ten years old. See *Levels of CORI Access*, *supra* note 97.

¹⁷³ See MASS. ANN. LAWS ch. 6, § 172(a)(2); *Implementing Cori Reform*, *supra* note 99 (laying out the different levels of “Required Access” that give certain organizations and entities access to additional criminal record information).

simultaneously restricting the ability of most requestors to access outdated and irrelevant criminal justice information.¹⁷⁴

Second, after establishing these specified access rights, legislatures should encourage requestors to use state-run record keeping systems in lieu of commercial vendors that may provide inaccurate or even sealed criminal record information.¹⁷⁵ Although total prevention of improper use and access of criminal record information may be impracticable, states can and should attempt to minimize the prejudicial impact of these records by incentivizing usage of official and accurate databases.¹⁷⁶

In addition to more targeted access and procedural protections for requestors, states and the federal government should mimic the numerous protective provisions geared towards ex-offenders and arrestees under the CORI system.¹⁷⁷ First, legislatures in other jurisdictions should introduce strict measures to ensure the accuracy and proper dissemination of their own internal information.¹⁷⁸ Massachusetts facilitated this goal both by allowing individuals to audit their own CORI records and mandating that the Department of Criminal Justice Information Services develop policies to ensure the ongoing accuracy of criminal records and to prevent unauthorized individuals from accessing certain criminal record information.¹⁷⁹

¹⁷⁴ See MASS. ANN. LAWS ch. 6, § 172(a)(6)–(32) (listing the entities and types of organizations that are statutorily provided with “Required Access”); *Levels of CORI Access*, *supra* note 97 (offering an overview of certain agencies and organizations that are given “Standard Access” or “Required Access”). For example, whereas general employers and housing providers are only able to access conviction records within a specified time period, organizations with more recognizable vulnerabilities or statutory obligations are permitted to access CORI reports that contain records of youthful offender convictions, juvenile offender convictions, or non-conviction records. See PRIEST ET AL., *supra* note 11, at 10; *Implementing Cori Reform*, *supra* note 99.

¹⁷⁵ See PRIEST ET AL., *supra* note 11, at 12 (explaining how commercial vendors sometimes release sealed records because they purchase records in bulk and then fail to keep records up to date with official databases); Katie Johnston, *Access, Limits on Criminal Records*, BOS. GLOBE (May 7, 2012), <https://www.bostonglobe.com/business/2012/05/06/access-limits-criminal-records/nzR3LSxq0NwFBOZKnTVfiM/story.html> (pointing out that commercial criminal records vendors sometimes disseminate erroneous information); *CORI Rights*, *supra* note 112, at 16 (describing how the CORI Reform Act has built-in incentives for employers that seek to discourage use of third-party commercial criminal records vendors).

¹⁷⁶ See *Pon*, 14 N.E.3d at 191–92; PRIEST ET AL., *supra* note 11, at 11. In *Pon*, the Supreme Judicial Court directly acknowledged that the existence of third-party record providers may frustrate attempts to encourage usage of the iCORI system. See 14 N.E.3d at 203 n.35. The court, however, decided that the presence of commercial vendors and electronically available information should not serve to negate the intentions of the legislature to create a centralized and official system for the dissemination of criminal records. See *id.*

¹⁷⁷ See *infra* notes 178–184 and accompanying text.

¹⁷⁸ See GAEBLER, *supra* note 24, at 23 (arguing that state-level control over the availability of criminal record information is “notoriously weak”); Healy, *supra* note 94 (arguing that inaccurate criminal records frustrate the underlying goals of criminal record sealing).

¹⁷⁹ See MASS. GEN. LAWS ch. 6, § 171 (2014) (requiring that the DCJIS develop and maintain regulations and training to ensure that entities with access rights to CORI reports request, main-

Measures such as these serve to combat the dissemination of inaccurate criminal record information and promote opportunity and rehabilitation for ex-offenders.¹⁸⁰

Second, other jurisdictions should adopt more automatic and streamlined procedure for sealing convictions.¹⁸¹ In Massachusetts, an individual seeking to seal a conviction record can simply fill out a one page “Petition to Seal” that will automatically be accepted provided that the individual has met the eligibility requirements.¹⁸² Unlike Massachusetts, many jurisdictions that discretionarily seal or expunge conviction records require more burdensome procedures for sealing records that may require legal representation and end up being cost prohibitive.¹⁸³ Further, state legislatures should rely more on recent scholarship addressing the risk of recidivism amongst

tain, and disseminate the information in a lawful manner); MASS. ANN. LAWS ch. 6, § 172(5) (LexisNexis Supp. Dec. 2015) (authorizing individuals to have full access to their own CORI reports); MASS. GEN. LAWS ch. 6, § 175 (2014) (giving individuals the right to review their own criminal record information and receive assistance in correcting the information if there are errors). Under the revised statute, individuals are able to view their own report and receive assistance from any involved criminal justice agency in correcting any inaccuracies in the system. MASS. GEN. LAWS ch. 6, § 175. Individuals are also offered a chance to contest the accuracy of their criminal records following receipt of an adverse decision from an employer or housing provider. See 803 MASS. CODE REGS. § 2.17(6) (2012); Gannon, *supra* note 97, at 1.

¹⁸⁰ See *Pon*, 14 N.E.3d at 191–92 (stating that one of the significant procedural protections offered by CORI reform was to facilitate the accuracy of criminal record information which in turn provides better outcomes for individuals with criminal histories or arrest records); Jagunic, *supra* note 38, at 186 (arguing that credit reporting agencies should be required under state law to provide individuals with an opportunity to contest the accuracy of criminal record information before reports are disseminated). In turn, this will translate to improved accuracy for third-party background check providers that obtain and disseminate criminal records from state-run databases. See GAEBLER, *supra* note 24, at 13 (arguing that a particular state’s failure to keep criminal record information up to date will contribute to inaccurate information being collected and disseminated by third-party services).

¹⁸¹ See MASS. GEN. LAWS ch. 276, § 100A; Silva, *supra* note 7, at 192 (characterizing the Massachusetts approach to sealing conviction records as “fairly standardized,” involving a form that is “easily accessible and uncomplicated”).

¹⁸² See MASS. GEN. LAWS ch. 276, § 100A (stating that the Commissioner of Probation “shall comply” with the petitioner’s request provided that the statutory elements, such as a waiting period and absence of a conviction of a narrow range of disqualifying offenses, are satisfied); *Petition to Seal*, MASS. COURT SYS., www.mass.gov/courts/docs/probation/sealingpetition.pdf [<https://perma.cc/VD7J-GQPR>]. Most notably, individuals must wait five years in the case of a misdemeanor and ten years in the case of a felony to file a petition to seal a criminal record. See MASS. GEN. LAWS ch. 276, § 100A.

¹⁸³ See GAEBLER, *supra* note 24, at 29 (describing how the procedure for sealing or expungement in some states involves the need to hire an attorney, pay filing fees, and participate in a formal hearing). Compare MASS. GEN. LAWS ch. 276, § 100A (providing a simple and straightforward route to record sealing), with KAN. STAT. ANN. § 21-6614(f)–(g) (West, Westlaw through 2015 Reg. Sess.) (requiring a hearing on a petition to expunge where the court considers whether the expungement is “consistent with the public welfare”), and S.C. CODE ANN. § 17-22-940(A) (2014 & Supp. 2014) (requiring a nonrefundable payment of \$250 to file a petition to expunge a criminal record).

ex-offenders instead of endowing the judiciary with the ability to make speculative and subjective determinations about particular ex-offenders.¹⁸⁴

3. *Commonwealth v. Pon* Should Be Upheld if Challenged and Should Represent a National Baseline for Access to Criminal Record Sealing

The Massachusetts Supreme Judicial Court's 2014 decision in *Commonwealth v. Pon* substantially changed the state's approach to discretionarily sealing criminal records resulting in non-convictions.¹⁸⁵ If the decision is attacked collaterally, the Supreme Judicial Court's approach should be maintained.¹⁸⁶ First, the Supreme Judicial Court emphasized that state courts are not required to follow the decisions of federal courts unless those federal court decisions were accompanied by a decision from the U.S. Supreme Court.¹⁸⁷ In turn, the Supreme Judicial Court was justified in finding that the First Amendment presumption of access does not necessarily apply to all criminal records despite the First Circuit's decision to the contrary.¹⁸⁸ Additionally, given the absence of a comprehensive approach to judicially or legislatively authorized sealing at the federal level, the Supreme Judicial Court

¹⁸⁴ See Kurlychek et al., *supra* note 116, at 64, 80 (explaining that after seven years of lawful behavior, there is a negligible risk that ex-offenders will reoffend); LANGAN & LEVIN, *supra* note 116, at 3 (finding that two-thirds of offenders in a sample group reoffended within the first year following release).

¹⁸⁵ See *Pon*, 14 N.E.3d at 189, 194 (finding that the older, more restrictive standard for sealing records under chapter 276, section 100C, paragraph 2 of the Massachusetts General Laws was contrary to the legislative intent behind the 2010 CORI Reform Act); Tom Egan, *Mass Supreme Judicial Court Eases Standard for Sealing of Criminal Record*, MASS. LAW. WKLY. (Aug. 15, 2014), <http://masslawyersweekly.com/2014/08/15/sjc-eases-standard-for-sealing-of-criminal-record> [https://perma.cc/KK33-XMUU] (describing how the change in the interpretation of the discretionary sealing statute would make it easier for individuals to seal their records).

¹⁸⁶ See *infra* notes 187–189 and accompanying text.

¹⁸⁷ See *Pon*, 14 N.E.3d at 194 (citing *Commonwealth v. Montanez*, 447 N.E.2d 660, 661–62 (Mass. 1983)); see also *Pollution Control Fin. Auth. v. County of Somerset*, 735 A.3d 633, 643 (N.J. Super. Ct. App. Div. 1999) (“The only federal court decisions which constitute binding precedent for state courts are decisions of the United States Supreme Court.”); *State v. Woods*, 524 S.E.2d 363, 365 (N.C. Ct. App. 2000) (“[W]ith the exception of the United States Supreme Court, federal appellate decisions are not binding upon either the appellate or trial courts of this State.”). Because there has not been a specific U.S. Supreme Court decision on sealing records of dismissal or *nolle prosequis*, the Supreme Judicial Court acted within its authority when it decided not to follow the persuasive authority provided by the First Circuit. See *Pon*, 14 N.E.3d at 194.

¹⁸⁸ See *Pon*, 14 N.E.3d at 195–96 (finding that a First Amendment presumption of access has not historically attached to criminal records ending in dismissal or *nolle prosequi* and that unrestricted access to these particular non-conviction records is not necessary to facilitate the just and fair functioning of the court system); see also *State v. D.H.W.*, 686 So. 2d 1331, 1336 (Fla. 1996) (holding that the First Amendment presumption of access does not necessarily attach to all criminal proceedings).

should have the liberty to fashion a judicial interpretation of a state statute that is in line with the decisions of the state's legislature.¹⁸⁹

Other jurisdictions should follow Massachusetts's example and adopt comprehensive statutes that allow for the sealing of criminal records for cases that do not result in a conviction as a national minimum standard.¹⁹⁰ Following the decision in *Pon*, the overall ability to seal non-conviction data in Massachusetts has increased significantly.¹⁹¹ In addition to automatic sealing of records of acquittals and unreturned indictments, individuals can now have records of a dismissal or *nolle prosequi* sealed under section 100C, paragraph 2 upon a showing of good cause.¹⁹² Neither of these dispositions represents a finding of guilt by an impartial finder of fact and therefore collateral consequences should not attach.¹⁹³ Especially in states that lack procedural protections that limit the ability of employers, housing providers, and other entities from inquiring about criminal backgrounds, a statutory remedy allowing individuals to seal non-conviction records is necessary to prevent discrimination and disadvantage.¹⁹⁴

¹⁸⁹ See *Pon*, 14 N.E.3d at 193–94 & n.21 (explaining that the interpretation of a discretionary sealing statute had not been changed in approximately twenty years and needed to be reconsidered in order to align with the intent of the state's lawmakers in passing the CORI Reform Act); Mukherji, *supra* note 50, at 2 (commenting on how there is no uniform or broadly-applicable schema for sealing or expunging records at the federal level); Wurie, *supra* note 24, at 46 (describing the inconsistent and seldom-used practice of equitable expungement of criminal records at the federal level).

¹⁹⁰ See Callanan, *supra* note 34, at 1304 (suggesting record sealing as a potential solution to protect individuals from the adverse use of non-conviction records); GAEBLER, *supra* note 24, at 26–27 (arguing that there should be a relatively uniform national approach that places substantial limitations on the dissemination of non-conviction records).

¹⁹¹ See *Pon*, 14 N.E.3d at 194, 197–98; Michael DelSignore, *SJC Lowers the Burden for Sealing Criminal Records in Massachusetts*, MASS. CRIM. DEF. LAW. BLOG, (Aug. 22, 2014, 5:12 AM), <http://www.massachusettscriminaldefenselawyerblog.com/2014/08/sjc-rules-in-favor-of-defendan.html> [<https://perma.cc/9982-4USY>] (explaining that the new standard established by *Pon* places a diminished burden on the individual to successfully petition to have his or her record sealed).

¹⁹² See MASS. GEN. LAWS ch. 276, § 100C (2014) (authorizing automatic sealing of records for cases ending in acquittal or where there is no indictment or finding of probable cause and authorizing discretionary sealing of records for cases that have been dismissed or *nolle prossed*); *Pon*, 14 N.E.3d at 197–98 (holding that courts should allow for the discretionary sealing of records of dismissals and *nolle prosequis* when there is a showing that “good cause exists for sealing”).

¹⁹³ See *Doe*, 648 N.E.2d at 1260 (explaining that a case might be *nolle prossed* or dismissed due to reasons such as mistaken misidentification, lack of evidence, or a refusal of a witness to participate); Callanan, *supra* note 34, at 1278 (arguing that collateral consequences should not attach to non-convicted individuals, even if it means that some factually guilty individuals will benefit); Wurie, *supra* note 24, at 37 (arguing that criminal background checks should not include non-conviction information because that information is unnecessary and irrelevant to the purposes of a background check).

¹⁹⁴ See Love, *supra* note 8, at 17 (explaining that an arrest record alone can be a serious impediment to opportunity in certain cases); Shawn D. Stuckley, Note, *Collateral Effects of Arrests*

B. Continued Reform: Steps That Massachusetts Should Take to Emerge as the Model for Progressive Criminal Record Sealing

Although Massachusetts has made significant progress, the marked shift towards more open access of criminal records in the state necessitates continued legislative and judicial attention to ensure that the individual interests of privacy and opportunity are preserved.¹⁹⁵ This section argues that several aspects of CORI reform and *Pon* should be recalibrated in favor of the individual's right to privacy and rehabilitation.¹⁹⁶

1. Decrease Waiting Times for Automatic Sealing Pursuant to Chapter 276, Section 100A of the Massachusetts General Laws

In order to establish itself as a national model for criminal record sealing, Massachusetts should decrease the required waiting period before individuals can seek to seal criminal convictions.¹⁹⁷ The conclusions of certain scientific studies have raised a material question as to whether general public welfare and safety would be enhanced by providing ex-offenders with added opportunity to seal records sooner rather than later.¹⁹⁸ Recognizing this, several states have enacted statutes that allow ex-offenders to seal or expunge their records in a shorter timeframe than allowed by the Massachusetts statute.¹⁹⁹ In order to provide more meaningful and efficacious oppor-

in *Minnesota*, 5 U. ST. THOMAS L.J. 335, 343 (2008) (arguing that unlike records of convictions, non-conviction data is highly prejudicial and "arguably irrelevant").

¹⁹⁵ See *Pon*, 14 N.E.3d at 192–93 (recognizing that increased access to criminal record sealing can mitigate the problems of diminished privacy and access to employment caused by more readily available criminal record information); Massing, *supra* note 12, at 22 (describing how the CORI Reform Act sought to balance individual interests of economic and social opportunity with the public interest of broader access to CORI data); PRIEST ET AL., *supra* note 11, at 17 (identifying several aspects of the CORI Reform Act that could be further modified).

¹⁹⁶ See *infra* notes 197–221 and accompanying text.

¹⁹⁷ See MASS. GEN. LAWS ch. 276, § 100A (requiring individuals to wait five years before petitioning to seal a misdemeanor conviction and ten years before petitioning to seal a felony conviction); PRIEST ET AL., *supra* note 11, at 17 (arguing that waiting periods to seal convictions should be shorter and noting that advocates have argued for three- and seven-year waiting periods for misdemeanor and felony convictions respectively).

¹⁹⁸ See Kurlychek et al., *supra* note 116, at 80 (pointing out the predictive value of a criminal record diminishes with the passage of time and that after seven years, the likelihood that an ex-offender will commit a new offense is equal to an individual with no criminal history); LANGAN & LEVIN, *supra* note 116, at 3 (finding that the majority of ex-offenders in a sample group who reoffended did so within the first year after they were released).

¹⁹⁹ Compare ARK. CODE ANN. §§ 16-90-1405 to -1406 (Supp. 2015) (allowing individuals to petition to seal records after sixty days in the case of a misdemeanor and five years in the case of an eligible felony offense), and OHIO REV. CODE ANN. § 2953.32(A)(1) (West Supp. 2015) (permitting individuals to seek to seal their records one year after their sentence is completed for a misdemeanor conviction and three years after their sentence is completed for an eligible felony conviction), with MASS. GEN. LAWS ch. 276, § 100A (requiring individuals to wait five years to seal a misdemeanor conviction and ten years to seal a felony conviction).

tunity for rehabilitation, Massachusetts and other jurisdictions should provide more rapid access to criminal record sealing.²⁰⁰

Even states, such as Massachusetts, that are unwilling to uniformly decrease waiting times could model their statutes after Nevada's offense-based approach to sealing criminal records.²⁰¹ In Nevada, the legislature established a granular system of waiting periods that allows for sealing of misdemeanor convictions after two to five years and felony convictions after seven to fifteen years.²⁰² In Massachusetts, the legislature could keep ten years for a felony and five years for a misdemeanor as maximum waiting periods, but could also have in place a graded system in which certain less serious offenses would become eligible for automatic sealing in a more timely fashion.²⁰³ For example, a more offense-specific system could mandate that relatively serious misdemeanors, such as assault and battery, remain at a five-year waiting period while simultaneously allowing earlier access to sealing for less serious misdemeanors, such as refusing to disperse from an assembly or riot.²⁰⁴ Additional distinctions, such as non-violent versus violent offenses and first offenses versus repeat offenses, could also serve as benchmarks to create more targeted waiting period times.²⁰⁵

²⁰⁰ See Kurlychek et al., *supra* note 116, at 81 (“[I]t is perhaps surprising that knowledge about the proper use of criminal history information could lag so far behind the actual practice of using that information to make decisions about opportunities for ex-offenders.”); GAEBLER, *supra* note 24, at 16 (discussing how certain states have relied on scientific and academic scholarship to determine waiting periods for sealing and expungement statutes).

²⁰¹ See MASS. GEN. LAWS ch. 276, § 100A; NEV. REV. STAT. ANN. § 179.245 (Michie, Lexis through 2015 Reg. Sess.) (basing the timeframes for sealing criminal convictions on the type of offense that a petitioner is seeking to seal); see also PRIEST ET AL., *supra* note 11, at 17 (arguing for shorter waiting periods for automatic sealing in Massachusetts).

²⁰² See NEV. REV. STAT. ANN. § 179.245(1) (Lexis). The kind and severity of the criminal offense correlate to the waiting period for sealing, with category E felony offenses requiring a seven-year waiting period and category A and B felony offenses requiring a fifteen-year waiting period. See *id.*

²⁰³ See MINN. STAT. ANN. § 609A.02(3) (West, Westlaw through 2015 Legis. Sess.) (allowing individuals to petition to seal criminal convictions after waiting periods of two years for a petty misdemeanor, four years for a gross misdemeanor, and five years for certain felony offenses); NEV. REV. STAT. ANN. § 179.245 (Lexis) (providing graduated waiting periods for particular categories of misdemeanor and felony offenses that correlate with the type and severity of those offenses); N.H. REV. STAT. ANN. § 651:5 (Supp. 2015) (permitting ex-offenders to petition to “annul” records of violations after one year, class A and B misdemeanors after three years, class B felonies after five years, and class A felonies after ten years).

²⁰⁴ See NEV. REV. STAT. ANN. § 179.245 (Lexis). Compare MASS. GEN. LAWS ch. 265, § 13A (2014) (stating that assault and battery involves a maximum penalty of two and one-half years in a house of correction or a maximum \$1000 fine), with MASS. GEN. LAWS ch. 269, § 2 (2014) (stating that failure to respond to an order to depart from an assembly or riot carries a maximum punishment of one year of imprisonment or a maximum \$500 fine).

²⁰⁵ See Love, *supra* note 32, at 1719 (explaining how certain states provide sealing or expungement remedies for first offenders or for conviction records relating to less serious criminal offenses); Silva, *supra* note 7, at 158 (stating that many states have expungement or sealing statutes for first offenders and individuals who commit more minor offenses).

2. Eliminate the Discretionary Aspect of Chapter 276, Section 100C, Paragraph 2 of the Massachusetts General Laws or Clarify the Interpretation of the “Good Cause” Standard in *Pon*

Although the decision in *Pon* provided an easier path for individuals to seal records of non-convictions under chapter 276, section 100C, paragraph 2 of the Massachusetts General Laws, the newer standard still leaves judges with a substantial amount of discretion to decide whether or not to grant a petitioner’s request to seal a record of a dismissal or a *nolle prosequi*.²⁰⁶ In turn, this grant of discretion creates uncertainty and the possibility for unfair results and arbitrary decisions.²⁰⁷ Additionally, by retaining discretion and saddling the petitioner with the burden to show that “good cause” exists, the Massachusetts scheme adds an expense for petitioners that could be avoided through a more automatic and streamlined process.²⁰⁸

To limit this discretion, the legislature should revise section 100C, paragraph 2 to make all non-conviction data eligible for automatic sealing.²⁰⁹ Even though it abandoned the First Amendment standard dictated by the First Circuit, the Supreme Judicial Court in *Pon* maintained that the common-law presumption of public access should apply to records of dismissal or *nolle prosequi*.²¹⁰ None of the sources the court cited in support of this proposition, however, establish that records pertaining to acquittals should be treated differently from *nolle prosequis* or dismissals for the purposes of

²⁰⁶ See *Pon*, 14 N.E.3d at 198–99 (stating that decisions regarding discretionary sealing under section 100C are made using a multifactor balancing test); DelSignore, *supra* note 191 (explaining that even though *Pon* lowered the burden on petitioners, decisions to seal records of dismissals and *nolle prosequis* are still discretionary); *SJC Establishes New Standard to Seal*, *supra* note 144 (commenting on how the *Pon* decision created an easier to satisfy standard for sealing records of dismissals and *nolle prosequis*).

²⁰⁷ See Henson, *supra* note 27, at 397–98 (arguing that legislatures should create explicit standards for expungement statutes in order to effect the intent of legislatures and produce consistent results); GAEBLER, *supra* note 24, at 24 (pointing out how discretion in the context of criminal record sealing has the potential to produce inconsistent decisions about whether a particular record should be sealed).

²⁰⁸ See *Pon*, 14 N.E.3d at 197; GAEBLER, *supra* note 24, at 29 (describing how discretionary sealing statutes that require hearings involve an expense that is absent in more automatic or direct statutes).

²⁰⁹ See CONN. GEN. STAT. § 54-142a (2013) (allowing for automatic erasing of criminal records pertaining to dismissals, acquittals, and *nolle prosequis*); SUBRAMANIAN ET AL., *supra* note 4, at 36 (arguing that states should make sealing of non-conviction data automatic in order to promote broader access to relief from collateral consequences); Warnock & Murphy, *supra* note 66 (arguing that there should be automatic expungement of records in all cases where individuals are charged with, but not convicted of an offense).

²¹⁰ See *Pon*, 14 N.E.3d at 196–97 (“Although these records are not subject to a First Amendment presumption, we conclude that they are subject to a common-law presumption of public access.”).

the common-law presumption of open access.²¹¹ Further, Connecticut, a state that has also recognized the principle of common-law presumption of public access to records, already has automatic sealing available for acquittals, dismissals, *nolle prosequis*, and cases continued without prosecution.²¹² Accordingly, there should be no legal barrier to legislatively extending automatic sealing to *nolle prosequis* and dismissals and thereby eliminating the distinction between paragraph 1 and paragraph 2 of section 100C.²¹³

If the legislature does not act to further change section 100C, the Supreme Judicial Court should streamline and clarify its interpretation of paragraph 2 in a subsequent decision.²¹⁴ Although it is more receptive to requests to seal, the new sealing standard under *Pon* involves a complex, six-factor balancing test that also allows judges to consider “any relevant information” when determining whether or not to seal a record.²¹⁵ In its decision, the Supreme Judicial Court blows both hot and cold when it suggests the scales are tipped towards sealing due to legislative intent while simultaneously emphasizing the public’s right to know, creating a comprehensive balancing test, and instructing judges to consider all relevant information.²¹⁶

²¹¹ See *Nixon v. Warner Commc’ns*, 435 U.S. 589, 597 (1978) (making no reference to any distinction between a record of an acquittal and a record of a *nolle prosequi* or dismissal with respect to the common-law presumption of public access); *New Engl. Internet Café, LLC v. Clerk of the Superior Court for Criminal Bus.*, 966 N.E.2d 797, 803 (Mass. 2012) (same); see also *Pon*, 14 N.E.3d at 196–98 (referencing sources in support of its finding that a common-law presumption of open access to applies to records of *nolle prosequis* and dismissals).

²¹² See CONN. GEN. STAT. § 54-142a(a) (authorizing automatic “erasure” of acquittals and dismissals “upon the expiration of the time to file a writ of error or take an appeal, if an appeal is not taken, or upon final determination of the appeal sustaining a finding of not guilty or a dismissal, if an appeal is taken”); *id.* § 54-142a(c)(1)–(2) (authorizing the automatic “erasure” of *nolle prosequis* and cases continued without prosecution after thirteen months).

²¹³ See *Pon*, 14 N.E.3d at 198 & n.24 (finding that a balancing test will apply to discretionary sealing determinations and leaving it to the legislature to make further changes to section 100C); see also CONN. GEN. STAT. § 54-142a (allowing for automatic sealing of all non-conviction data); MASS. GEN. LAWS ch. 276, § 100C (authorizing automatic sealing for cases resulting in acquittals, findings of no probable cause, and no indictments, but requiring discretionary sealing for cases ending in dismissals and *nolle prosequis*).

²¹⁴ See *Pon*, 14 N.E.3d at 200–02 (describing the six-prong balancing test that judges should consider when making discretionary sealing determinations); *Massachusetts Ruling Reduces Access*, *supra* note 144 (arguing that the standard is unnecessarily complicated due to the Supreme Judicial Court’s overt deference to the legislature combined with its decision to provide a multifaceted and non-exclusive balancing test); see also SUBRAMANIAN ET AL., *supra* note 4, at 34, 42 (pointing out that judicial discretion in the context of sealing decisions can jeopardize access to the desired remedy).

²¹⁵ See *Pon*, 14 N.E.3d at 200–02.

²¹⁶ See *id.*; *Massachusetts Ruling Reduces Access*, *supra* note 144 (criticizing the new standard as lacking in clarity, while simultaneously arguing that it unduly favors sealing).

One solution would be to substitute the existing balancing test with a shorter revised test that includes more tangible and objective factors.²¹⁷ For example, instead of ambiguously instructing judges to consider the length of time since the underlying offense, the court should offer a more concrete timeline to guide judges making sealing decisions.²¹⁸ Another solution would be to emulate New York and create a presumption in favor of sealing a record that can be rebutted by a prosecutor upon a showing that such a decision is contrary to the public interest.²¹⁹

Whether by legislative or judicial action, the sealing remedy for non-conviction data under chapter 276, section 100C of the Massachusetts General Laws should be made more universally available.²²⁰ This would be consonant with the legislative intent of the CORI Reform Act to diminish the collateral consequences associated with criminal records and would also further Massachusetts's position as an exemplar for criminal record sealing reform.²²¹

CONCLUSION

For many individuals, the existence of a criminal record can be a lingering and debilitating handicap that serves to restrict access to employment, housing, and social opportunities long after a sentence has been completed. If the purpose of a criminal record is to protect society and not solely to punish individuals for their transgressions, states should increase ac-

²¹⁷ See *Pon*, 14 N.E.3d at 198, 200–02; see also Christina Miller & Pauline Quirion, *How to Seal and Expunge Nonconvictions and First-Time Drug Possession Offenses*, in MASSACHUSETTS CONTINUING LEGAL EDUCATION, MASSACHUSETTS CRIMINAL OFFENDER RECORD INFORMATION (CORI) LAW § 5.6 (2012) (providing a non-exclusive list of over fifteen factors which judges may consider when deciding whether to seal a record).

²¹⁸ See *Pon*, 14 N.E.3d at 200–02 (stating that judges should consider how much time has elapsed when deciding whether to discretionarily seal a record); *Massachusetts Ruling Reduces Access*, *supra* note 144 (criticizing the increased discretion given to judges under the new standard).

²¹⁹ See N.Y. CRIM. PROC. LAW § 160.50(3) (McKinney, Westlaw through L. 2015, ch. 589). As section 100C, paragraph 2 is currently constructed, “substantial justice” could be interpreted as best served when an individual requests the remedy and is otherwise eligible. See MASS. GEN. LAWS ch. 276, § 100C.

²²⁰ See SUBRAMANIAN ET AL., *supra* note 4, at 34, 42 (arguing that the process for sealing non-conviction records should be simplified and there should be further limits on the dissemination of non-conviction data); Warnock & Murphy, *supra* note 66 (arguing that non-conviction data should be automatically expunged).

²²¹ See *Pon*, 14 N.E.3d at 186 (stating that the CORI Reform Act contained “demonstrable legislative concern . . . about the negative impact of criminal records on the ability of former criminal defendants to reintegrate into society and obtain gainful employment”); PRIEST ET AL., *supra* note 11, at 5 (remarking that one of the main goals of the CORI Reform Act was to give individuals with criminal histories greater access to employment and housing options); see also Callanan, *supra* note 34, at 1278 (arguing that non-conviction records should not trigger collateral consequences as individuals should be presumed innocent until proven guilty).

cess to sealing or expungement in order to facilitate reintegration and reduce recidivism. Through its recent legislative and judicial revisions, Massachusetts has established a comparatively robust and offender-oriented system for the sealing and governance of criminal records. But, in order to emerge as the preeminent model for record sealing, Massachusetts should aim to recalibrate its standards in favor of personal privacy, opportunity, and individual welfare.

CHRIS SKALL