

## Can a Person's "Slate" Ever Really Be "Cleaned"? The Modern-Day Implications of Pennsylvania's Clean Slate Act

Kimberly E. Capuder

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## NOTES

### CAN A PERSON'S "SLATE" EVER REALLY BE "CLEANED"? THE MODERN-DAY IMPLICATIONS OF PENNSYLVANIA'S CLEAN SLATE ACT

KIMBERLY E. CAPUDER<sup>†</sup>

#### INTRODUCTION

For many people, “a future without judgment” is becoming a reality.<sup>1</sup>

In 2006, Khalia was arrested for a “low-level counterfeiting charge.”<sup>2</sup> While Khalia was innocent and never convicted for the charged offense, she still had a criminal record.<sup>3</sup> Because she was concerned that future employers would “view her as a thief,” she never applied to any of her dream jobs.<sup>4</sup> But once Khalia’s arrest record was automatically sealed, she finally had enough confidence to send in a job application to a prestigious consulting firm, and was offered the position.<sup>5</sup> Khalia believes that her newly sealed criminal record “means a future without judgment.”<sup>6</sup> And this future without judgment was made possible by Pennsylvania’s Clean Slate Act.

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<sup>†</sup> Editor-in-Chief, *St. John’s Law Review*; J.D. Candidate, 2021, St. John’s University School of Law; B.A., 2018, Fordham University. I would like to extend my deepest gratitude to Professor Anna Roberts for her advice and mentorship, and to all the editors and members of the *St. John’s Law Review* for their thoroughness and dedication during this process. I also want to thank my family and friends for their never-ending support, love, and understanding throughout my law school career—I cannot imagine what the past three years would have been like without having each of you by my side.

<sup>1</sup> Rcourtney, *Clean Slate: A Future Without Judgment*, CMTY. LEGAL SERVS. OF PHILA. (Sept. 23, 2019), <https://mycleanslatepa.com/clean-slate-a-future-without-judgment/> [<https://perma.cc/GY6Y-N37J>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

On June 28, 2018, the Commonwealth of Pennsylvania became the first in the United States of America—out of all fifty states and the federal government—to institute legislation that provided for the automatic sealing of criminal records, with the enactment of title 18, section 9122.2 of the Pennsylvania Consolidated Statutes (“Clean Slate Act” or “the Act”).<sup>7</sup> This groundbreaking legislation officially went into effect on June 28, 2019, and by the end of June of 2020, thirty-four million criminal records had already been sealed, and forty-seven million criminal offenses—which account for more than half of the charges present in the state court database—had also already been sealed.<sup>8</sup> A multitude of public policy considerations were the driving forces behind the drafting and passing of the Act. These considerations included finding ways for certain people with criminal records to reduce stigma against them when applying for educational programs, employment opportunities, and housing arrangements.<sup>9</sup>

While Pennsylvania’s new set of laws has already changed peoples’ lives,<sup>10</sup> the Clean Slate Act does not come without its problems. First, while certain people are now eligible to have their criminal records sealed by the court system, this Act does not control news websites and other public information accessible online.<sup>11</sup> This means any admissions counselor, manager, or landlord can run a quick search on the Internet, discover this information, and continue to discriminate.<sup>12</sup> Second, a person can-

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<sup>7</sup> See 18 PA. CONS. STAT. § 9122.2 (2020); Jillian Atelsek, *Pa.’s Clean Slate Act, a One-of-a-Kind Law That Seals Some Criminal Files, Gets Official Introduction*, PENNLIVE PATRIOT-NEWS (June 28, 2019), <https://www.pennlive.com/news/2019/06/pas-clean-slate-act-a-one-of-a-kind-law-that-seals-some-criminal-files-gets-official-introduction.html> [<https://perma.cc/Y4B4-ZPS4>].

<sup>8</sup> Atelsek, *supra* note 7; Christen Smith, *One Year After Clean Slate Act, Pennsylvania Lawmakers Itching for More Reform*, CTR. SQUARE (July 2, 2020), [https://www.thecentersquare.com/pennsylvania/one-year-after-clean-slate-act-pennsylvania-lawmakers-itching-for-more-reform/article\\_ca1bca60-bc73-11ea-ba66-9bccf3d50afb.html](https://www.thecentersquare.com/pennsylvania/one-year-after-clean-slate-act-pennsylvania-lawmakers-itching-for-more-reform/article_ca1bca60-bc73-11ea-ba66-9bccf3d50afb.html) [<https://perma.cc/Y4FM-CSYW>].

<sup>9</sup> Atelsek, *supra* note 7.

<sup>10</sup> See *Get a Clean Slate in Pennsylvania: Clean Slate Stories*, CMTY. LEGAL SERVS. PHILA., <https://mycleanslatepa.com/> [<https://perma.cc/MK6D-T88D>] (last visited Feb. 10, 2021).

<sup>11</sup> Adam Richter, *Pennsylvania’s Clean Slate Law Doesn’t Wash Away News Archives*, READING EAGLE (Dec. 11, 2019), [https://www.readingeagle.com/opinion/columnists/pennsylvanias-clean-slate-law-doesnt-wash-away-news-archives-column/article\\_42b0a84a-ee2a-537e-afbb-964cbc3b9bb4.html](https://www.readingeagle.com/opinion/columnists/pennsylvanias-clean-slate-law-doesnt-wash-away-news-archives-column/article_42b0a84a-ee2a-537e-afbb-964cbc3b9bb4.html) [<https://perma.cc/TA7W-WG93>].

<sup>12</sup> See Sarah Esther Lageson, *There’s No Such Thing as Expunging a Criminal Record Anymore*, SLATE (Jan. 7, 2019, 2:44 PM), <https://slate.com/technology/2019/>

not qualify to have her record automatically sealed unless she has paid “all court-ordered restitution,” and “the fee previously authorized to carry out the limited access and clean slate limited access provisions” which defeats one of the Clean Slate Act’s main public policy rationales: assisting people who have been unable to find employment.<sup>13</sup> Finally, the fact that a person may only be eligible to have her record sealed if the crime is classified as a second-degree misdemeanor or less serious offense and only *after* ten years from when the judgment of conviction was entered also contradicts this Act’s purpose.<sup>14</sup>

This Note argues that Pennsylvania’s Clean Slate Act is both important and necessary because of the assistance it provides, even with the current issues that exist. However, the legislature must develop solutions to address these issues so that Pennsylvania’s Clean Slate Act can be as positive an influence as possible; Pennsylvania’s Act is just the first of many similar pieces of legislation slated to be enacted in the near future. This Note is comprised of three parts. Part I explains the background of the Clean Slate Act, including its content, policy rationales, the type of individuals it has helped, and the overall movement behind this kind of legislation in the United States and beyond. Part II discusses the issues with this piece of legislation, and Part III discusses solutions to resolve these issues. For a variety of reasons, this Note recommends that, given the importance of the issue and the importance of this Act as a model for future legislation, reform should be attempted, including such that is informed by legislative examples from other jurisdictions.

## I. BACKGROUND

### A. *The Basic Content of Pennsylvania’s Clean Slate Act*

The basic eligibility requirements regarding who can qualify to have their criminal records automatically sealed by Pennsylvania’s Clean Slate Act are established in title 18, section 9122.2 of the Pennsylvania Consolidated Statutes. However, this new

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01/criminal-record-expungement-internet-due-process.html [https://perma.cc/5C87-PC96].

<sup>13</sup> See 18 PA. CONS. STAT. § 9122.2 (2020); Brief of Amici Curiae American Civil Liberties Union of Pennsylvania et al. in Support of Appellee Christian Ford at 22, Commonwealth v. Ford, 217 A.3d 824 (Pa. 2019) [hereinafter ACLU Brief].

<sup>14</sup> See § 9122.2; see also Sharon M. Dietrich, *Clean Slate Brings Automated and Expanded Criminal Record Sealing to Pennsylvania*, 90 PA. BAR ASS’N Q. 39, 40 (2019).

Act is a complex one; it is made up of multiple laws and provisions.<sup>15</sup> Indeed, Pennsylvania's criminal record sealing process is "getting better," but not "simpler."<sup>16</sup> Despite its complexity, the basic content of this legislation is broken into three parts: (a) the "general rule"; (b) its "[p]rocedures"; and (c) the "[l]imitation[s] on the release of [criminal] records."<sup>17</sup>

First, the beginning of the general rule in section 9122.2(a) allows those who have criminal records of a second-degree misdemeanor, third-degree misdemeanor, or a misdemeanor punishable by a prison sentence of no greater than two years to have their criminal records automatically sealed ("for limited access") if: (1) they have been "free for [ten] years from conviction for any offense punishable by imprisonment of one or more years"; and (2) "completion of each court-ordered financial obligation of the sentence has occurred."<sup>18</sup> Second-degree misdemeanors carry a sentence of one to two years and include offenses such as shoplifting, strangulation, and theft of property worth \$50.00 to \$200.00.<sup>19</sup> Meanwhile, third-degree misdemeanors carry a sentence of six months to one year and include offenses such as marijuana possession, open lewdness, and theft of property worth less than \$50.00.<sup>20</sup>

However, there are exceptions to the general rule in section 9122.2(a)(1) that bar certain individuals from benefiting from automatic sealing.<sup>21</sup> These exceptions exclude criminal convictions relating to dangers against persons, familial offenses, firearms offenses, sexual offenses, animal cruelty, and corruption of minors.<sup>22</sup> Those who have been convicted of: (1) "[a] felony"; (2) "[t]wo or more offenses punishable by imprisonment of more than two years"; or (3) "[f]our or more offenses punishable by imprisonment of one or more years" are also precluded from having their criminal records automatically sealed.<sup>23</sup> Additionally, where it appears that a limited access order should not have been

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<sup>15</sup> Dietrich, *supra* note 14. *See generally* §§ 9122.1–6.

<sup>16</sup> Dietrich, *supra* note 14.

<sup>17</sup> § 9122.2.

<sup>18</sup> § 9122.2(a)(1).

<sup>19</sup> *Pennsylvania Crime Classification*, DAVID J. COHEN LAW FIRM, LLC, <https://www.davidcohenlawfirm.com/pennsylvania-crime-classification> [https://perma.cc/32YV-4MUP] (last visited Feb. 10, 2021).

<sup>20</sup> *Id.*

<sup>21</sup> *See* § 9122.3(a); Dietrich, *supra* note 14, at 46.

<sup>22</sup> § 9122.3(a)(1).

<sup>23</sup> § 9122.3(a)(2).

granted pursuant to the Clean Slate Act, a prosecutor may petition the court to vacate the order.<sup>24</sup> Moreover, if a person whose criminal record has been sealed is convicted of another misdemeanor or felony offense, a prosecutor can make a motion for the court to vacate a defendant’s limited access order.<sup>25</sup> Nevertheless, defendants can still petition to have their criminal records sealed if not done automatically.<sup>26</sup>

The second part of the general rule provides that those who have a criminal record, with charges not resulting in a conviction, will have their criminal records automatically sealed.<sup>27</sup> Typically, these are people charged with crimes, but never convicted.<sup>28</sup> And the third part of the general rule permits those with a summary offense conviction to have their criminal records automatically sealed ten years after the judgment of conviction and after all court-ordered financial obligations have been satisfied.<sup>29</sup> Sometimes, summary offenses in Pennsylvania can result in up to ninety days in jail—although jail time is uncommon—and these offenses often carry a maximum fine of \$300.00.<sup>30</sup> Summary offenses include disorderly conduct, harassment, and underage drinking.<sup>31</sup>

Next, the procedures in section 9122.2(b) explain how eligible criminal records are automatically sealed.<sup>32</sup> Each month, the Administrative Office of Pennsylvania Courts (“AOPC”) sends a list of the criminal records eligible for limited access sealing to the Pennsylvania State Police (“state police”) central repository.<sup>33</sup> Then, if the state police determine that a criminal record is not eligible to be sealed, they notify the AOPC within thirty days of this discovery.<sup>34</sup> Next, the AOPC removes the ineligible records from the list of eligible records to be sealed.<sup>35</sup> The final step is for each court of common pleas, Pennsylvania’s trial courts of general jurisdiction, to issue a monthly order for the eligible

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<sup>24</sup> § 9122.4(a).

<sup>25</sup> § 9122.4(b).

<sup>26</sup> § 9122.1(a).

<sup>27</sup> § 9122.2(a)(2).

<sup>28</sup> See Dietrich, *supra* note 14, at 46.

<sup>29</sup> § 9122.2(a)(3).

<sup>30</sup> *Pennsylvania Crime Classification*, *supra* note 19.

<sup>31</sup> *Id.*

<sup>32</sup> See § 9122.2(b); Dietrich, *supra* note 14, at 47.

<sup>33</sup> § 9122.2(b)(1).

<sup>34</sup> § 9122.2(b)(3).

<sup>35</sup> § 9122.2(b)(4).

criminal records to be sealed for limited access.<sup>36</sup> Ultimately, the AOPC and the state police seal eligible criminal records by “computer query.”<sup>37</sup>

Finally, section 9122.2(c) limits the release of sealed criminal records, subject to certain provisions in section 9121(b), and has been amended to provide that criminal records sealed under the Clean Slate Act may not be shared with any individuals or non-criminal justice agencies.<sup>38</sup> However, criminal justice and law enforcement agencies will still have access to sealed criminal records under the Clean Slate Act.<sup>39</sup> Additionally, these records can be accessed pursuant to court orders for child custody and negligent hiring cases, federally required background checks, and admission to the bar.<sup>40</sup>

### B. *The Public Policy Supporting Pennsylvania's Clean Slate Act*

The Clean Slate Act has enjoyed support from both ends of the political spectrum, with some even calling this support “unprecedented.”<sup>41</sup> The bill's two primary Republican sponsors, Senator Scott Wagner and Representative Sheryl Delozier, were joined by two lead Democratic sponsors, Senator Anthony Williams and Representative Jordan Harris.<sup>42</sup> In addition to widespread support in Pennsylvania's legislature, the Clean Slate Act received “unconventional support” and endorsement from divergent political organizations, including the liberal Center for American Progress and the conservative FreedomWorks foundation.<sup>43</sup>

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<sup>36</sup> § 9122.2(b)(5); *Pennsylvania Courts of Common Pleas*, UNIFIED JUD. SYS. PA., <http://www.pacourts.us/courts/courts-of-common-pleas/> [https://perma.cc/8XRD-XGN6] (last visited Feb. 10, 2021).

<sup>37</sup> Dietrich, *supra* note 14, at 47.

<sup>38</sup> §§ 9122.2(c), 9121(b); Dietrich, *supra* note 14, at 49.

<sup>39</sup> § 9121(a). *See also* Dietrich, *supra* note 14, at 49 n.84 (“These agencies include courts with criminal jurisdiction, state and local police, correctional facilities, probation agencies, prosecutors, and parole and pardon boards.”).

<sup>40</sup> § 9121(b.2).

<sup>41</sup> *See* Dietrich, *supra* note 14, at 45.

<sup>42</sup> *Id.* Ultimately, “[m]ore than half of the Senate sponsored the Senate bill.” *Id.* Additionally, only two legislators voted against the bill in the House of Representatives. *Id.* at 46.

<sup>43</sup> *Id.* at 45. Other supporters included the Pennsylvania Chamber of Business and Industry, Koch Industries, Americans for Prosperity PA, the Pennsylvania District Attorneys Association, and “[e]ven the Philadelphia Eagles.” *Id.* Philadelphia Eagles players Malcom Jenkins, Chris Long, and Torrey Smith traveled to the Pennsylvania Capitol to meet with legislators to talk about criminal justice reform bills, specifically the Clean Slate Act, which they were “particularly passionate about.” Tim McManus, *Malcolm Jenkins Among Players Lobbying for Reform*, ESPN

The main policy reasoning behind the Clean Slate Act is to allow those with criminal records to reduce the stigma against themselves so that they can find employment, housing, and educational opportunities more easily.<sup>44</sup> In fact, at the bill signing, Governor Tom Wolf noted, “I am proud to sign this legislation, which will make it easier for those who have interacted with the justice system to reduce the stigma they face when looking for employment and housing.”<sup>45</sup> Moreover, this policy reasoning is evident in prior drafts of the Clean Slate Act, in which the General Assembly declared that the “clean slate remedy” will give “a strong incentive for avoidance of recidivism by offenders” and “hope for the alleviation of the hardships of having a criminal record by offenders who are trying to rehabilitate themselves.”<sup>46</sup>

Additionally, these policy reasons are further supported by research and studies that have analyzed those with criminal records in their search for jobs, housing, and schooling.<sup>47</sup> For example, a recent study on access to employment opportunities found that employers are sixty percent more likely to offer an applicant a callback interview to an applicant who does not have a criminal record.<sup>48</sup> In this study, most of the applicants with criminal records had only one “low-level, nonviolent felony” from

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(Oct. 24, 2017), [http://www.espn.com/nfl/story/\\_/id/21139673/players-head-pennsylvania-capitol-lobby-criminal-justice-reform](http://www.espn.com/nfl/story/_/id/21139673/players-head-pennsylvania-capitol-lobby-criminal-justice-reform) [https://perma.cc/N3QC-6SZW].

<sup>44</sup> *Clean Slate Law Offers Second Chances*, NORTHCENTRALPA.COM (July 27, 2019), [https://www.northcentralpa.com/news/clean-slate-law-offers-second-chances/article\\_a8fedd48-afd3-11e9-a872-8765950a4241.html](https://www.northcentralpa.com/news/clean-slate-law-offers-second-chances/article_a8fedd48-afd3-11e9-a872-8765950a4241.html) [https://perma.cc/7TVW-SDCB].

<sup>45</sup> Press Release, Tom Wolf, Governor of Pennsylvania, Governor Wolf Signs Clean Slate Bill, Calls for More Criminal Justice Reform (June 28, 2018), <https://www.governor.pa.gov/newsroom/governor-wolf-signs-clean-slate-bill-calls-for-more-criminal-justice-reform/> [https://perma.cc/RPC8-PXLV].

<sup>46</sup> H.R. 1419, 202d Gen. Assemb., Reg. Sess. (Pa. 2018) (“After less violent individuals convicted of crimes have served their sentences and remained crime free long enough to demonstrate rehabilitation, the individuals’ access to employment, housing, education and other necessities of life should be fully restored.”).

<sup>47</sup> See, e.g., Amanda Agan & Sonja Starr, *The Effect of Criminal Records on Access to Employment*, 107 AM. ECON. REV. 560, 560 (2017); Sonja Starr & J.J. Prescott, *Michigan Set-Asides Found To Increase Wages and Reduce Recidivism*, 30 FED. SENT’G REP. 361, 361 (2018); Rebecca Oyama, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 186 (2009); Marsha Weissman et al., *The Use of Criminal History Records in College Admissions Reconsidered*, CTR. FOR CMTY. ALTERNATIVES 3, <http://www.communityalternatives.org/wp-content/uploads/2020/02/use-of-criminal-history-records-reconsidered.pdf> [https://perma.cc/PKE8-B7BV] (last visited Feb. 11, 2021).

<sup>48</sup> Agan & Starr, *supra* note 47.



a couple of years prior to the survey.<sup>49</sup> Fortunately, it seems that the drafters of the Clean Slate Act were at least somewhat cognizant of this, and drafted extra provisions that dictate an individual who has had their criminal record sealed “may respond as if the offense did not occur” if “required or requested to provide [this] information.”<sup>50</sup> This provision is essential for two reasons. First, preliminary research has found that one year after a person’s criminal record is sealed, she earns about twenty-two percent more money and is six-and-a-half percentage points more likely to have a job.<sup>51</sup> Second, nearly thirty percent of occupations require their workers to have licenses,<sup>52</sup> and this provision gives those with newly sealed criminal records a better opportunity to obtain occupational licenses and receive greater consideration when applying to these types of jobs.<sup>53</sup>

In addition to employers, landlords and college admissions offices oftentimes also take a stigmatizing view of applicants with criminal records. In one survey, it was found that eighty percent of landlords check prospective tenants’ criminal records, and sixty-six percent of colleges collect criminal record information from prospective applicants.<sup>54</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> 18 PA. STAT. CONS. STAT. § 9122.5(a)(1) (2020).

<sup>51</sup> Starr & Prescott, *supra* note 47.

<sup>52</sup> Brad Hershbein, David Boddy & Melissa S. Kearney, *Nearly 30 Percent of Workers in the U.S. Need a License To Perform Their Job: It Is Time To Examine Occupational Licensing Practices*, BROOKINGS (Jan. 27, 2015), <https://www.brookings.edu/blog/up-front/2015/01/27/nearly-30-percent-of-workers-in-the-u-s-need-a-license-to-perform-their-job-it-is-time-to-examine-occupational-licensing-practices/> [<https://perma.cc/3HVX-WHYZ>].

<sup>53</sup> See Dietrich, *supra* note 14, at 40, 49 (“State and federal laws bar individuals with certain convictions from working in such occupations as long-term health care, child care, educational services, and transportation. In many other occupations, criminal convictions prevent workers from obtaining or retaining mandatory occupational licenses.” (footnotes omitted)); see also § 9124(b)(2) (mandating that information regarding “[c]onvictions which have been . . . subject to limited access under section[ ] . . . 9122.2” cannot be considered in applications for job licenses). Additionally, members of the Pennsylvania government are steadfastly working at removing these licensing barriers for formerly incarcerated individuals: Governor Wolf signed Senate Bill 637, which removes those barriers, into law in the summer of 2020. See *Smith*, *supra* note 8.

<sup>54</sup> Oyama, *supra* note 47, at 192–93; Weissman et al., *supra* note 47, at i.

C. *Examples of the Kinds of People Whom Pennsylvania’s Clean Slate Act Has Helped*

One in three Pennsylvanians has a criminal record.<sup>55</sup> And even though Pennsylvania’s Clean Slate Act has only been in effect since June 28, 2019, up to ten million cases have already been sealed.<sup>56</sup> In addition to Khalia, whose story is told above,<sup>57</sup> countless others have benefited from the Clean Slate Act. One such person is Mr. Amos.<sup>58</sup> Although the charges against him had been dismissed, they were still on his criminal record and impeded his ability to find employment opportunities.<sup>59</sup> When his record was finally sealed, he explained his excitement about all the new doors that have opened up for him: “A huge weight has been lifted off of me. I can finally go for a better job, with benefits and a union and the ability to move up. I can finally provide for my family. I’ve been stuck in a dead-end job.”<sup>60</sup>

Keith has also benefited from the Clean Slate Act.<sup>61</sup> He was convicted of misdemeanor theft and a DUI when he was in high school.<sup>62</sup> Ten years later, the Clean Slate Act allowed his convictions to finally be sealed after years of struggling to find employment and support his family.<sup>63</sup> Similarly, the Clean Slate Act has helped Mary, who had her two misdemeanor theft convictions from 2000 sealed.<sup>64</sup> Those convictions stemmed from her past drug usage, but she has been sober for eighteen years and is glad that her past will no longer reflect on the person she is today.<sup>65</sup> Additionally, Marilyn has been assisted by the Clean Slate Act.<sup>66</sup> She once had two marijuana possession charges from the mid-2000s on her criminal record, even though the charges

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<sup>55</sup> Rcourtney, *Automated Sealing in Action*, CMTY. LEGAL SERVS. OF PHILA. (Aug. 12, 2019), <https://mycleanslatepa.com/automated-sealing-in-action/> [<https://perma.cc/HZN2-4XL9>].

<sup>56</sup> Rcourtney, *supra* note 1.

<sup>57</sup> See *supra* text accompanying notes 2–6.

<sup>58</sup> Rcourtney, *supra* note 55.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Rcourtney, *Keith’s Story*, CMTY. LEGAL SERVS. OF PHILA. (June 20, 2019), <https://mycleanslatepa.com/keiths-story/> [<https://perma.cc/5PTY-NFVV>].

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Rcourtney, *Mary’s Story*, CMTY. LEGAL SERVS. OF PHILA. (June 20, 2019), <https://mycleanslatepa.com/marys-story/> [<https://perma.cc/5MVA-MRMH>].

<sup>65</sup> *Id.*

<sup>66</sup> Rcourtney, *Clean Slate in Action: Marilyn’s Story*, CMTY. LEGAL SERVS. OF PHILA. (Sept. 3, 2019), <https://mycleanslatepa.com/marilyns-story/> [<https://perma.cc/Y8UM-2Z2E>].

were dismissed.<sup>67</sup> Now, her record is sealed.<sup>68</sup> Ultimately, this is just a handful of the millions of people who have had their lives positively changed by this legislation.

*D. Pennsylvania's Clean Slate Act's Position Within a Growing Movement*

Pennsylvania's Clean Slate Act is part of a growing movement to automatically seal criminal records throughout the United States and other countries. For example, New Zealand enacted its version of the Clean Slate Act in 2004,<sup>69</sup> and Utah just became the second state in the United States to pass its version of this legislation.<sup>70</sup> Moreover, federal and state lawmakers are considering proposals to enact this kind of groundbreaking legislation.<sup>71</sup> Each jurisdiction takes a slightly different approach compared to Pennsylvania's, which will be discussed more fully in Parts II.C and III.C of this Note.<sup>72</sup> For immediate purposes, a brief overview of the varying Clean Slate acts is appropriate.<sup>73</sup>

First, the earliest of the Clean Slate laws is New Zealand's Criminal Records (Clean Slate) Act, which has been effective since 2004, and provides for the sealing of criminal records, including certain convictions that are at least seven years old.<sup>74</sup> Before one can qualify to have her criminal record sealed in New Zealand, she cannot have had any other convictions within the past seven years and must have paid all fines and monetary penalties resulting from the court's sentencing.<sup>75</sup> Additionally, the person cannot have been: (1) imprisoned or detained at any point; (2) banned from driving; (3) convicted of disqualifying crimes, such as crimes of sexual abuse against children; or (4) held in a

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<sup>67</sup> Cmty. Legal Servs. of Phila., *Clean Slate: Moving Pennsylvanians Forward*, YOUTUBE (Sept. 25, 2019), <https://www.youtube.com/watch?v=Yj0G2c99osE>.

<sup>68</sup> Rcourtney, *supra* note 66.

<sup>69</sup> *See infra* notes 74–76 and accompanying text.

<sup>70</sup> *See infra* notes 77–79 and accompanying text.

<sup>71</sup> *See infra* notes 80–87 and accompanying text.

<sup>72</sup> *See* discussion *infra* Sections II.C, III.C.

<sup>73</sup> *See infra* notes 74–87 and accompanying text.

<sup>74</sup> *See* Criminal Records (Clean Slate) Act 2004, pt 1, s 4; Tanya Surrey, *Wiping the Slate Clean*, N.Z. LAW (Apr. 9, 2019), <https://nzlaw.co.nz/news/wiping-the-slate-clean/> [<https://perma.cc/HJP2-BGG8>].

<sup>75</sup> *Clean Slate Scheme*, N.Z. MINISTRY OF JUST., <https://www.justice.govt.nz/criminal-records/clean-slate/> [<https://perma.cc/2LZC-EMDS>] (last updated Mar. 11, 2020).

hospital due to one’s mental state because of a court’s order in a criminal case.<sup>76</sup>

More recently, Utah’s Clean Slate legislation was signed into law on March 28, 2019, and became effective on May 12, 2020.<sup>77</sup> Utah’s Clean Slate scheme provides for the sealing of criminal records of mostly lower-level crimes, and excludes felonies, DUIs, and violent misdemeanors, such as domestic violence.<sup>78</sup> Further, Utah provides for a sliding-scale approach as to how many years a person must be crime-free from the date she was sentenced depending on the offense level of the misdemeanor: “five years for a Class C misdemeanor”; “six years for a Class B misdemeanor”; and seven years for the Class A misdemeanor of drug possession.<sup>79</sup>

In addition to the Clean Slate acts that have already been enacted, lawmakers in the federal government’s House of Representatives proposed the Clean Slate Act of 2019 on April 22, 2019, which provides for the automatic sealing of criminal records for those who have been convicted of federal nonviolent drug offenses.<sup>80</sup> A person’s record would become automatically sealed one year after she has fulfilled all requirements of her sentence, unless the individual has been convicted of another crime within that time frame.<sup>81</sup> As Representative Lisa Blunt Rochester, one of the co-sponsors of this bill, explained, “If our goal is to reduce recidivism and improve the lives of millions of Americans, we cannot allow hardworking and reformed citizens to be defined by their worst mistakes in life. With an inerascable

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<sup>76</sup> *Id.*; Criminal Records (Clean Slate) Act 2004, pt 2, s 7.

<sup>77</sup> UTAH CODE ANN. § 77-40-102(5)(a)(iii) (West 2020); *Utah Governor Signs Landmark Clean Slate Legislation*, CRIME & JUST. INST. (Mar. 29, 2019), <https://www.cjinsitute.org/news-article/utah-governor-signs-landmark-clean-slate-legislation/> [<https://perma.cc/2DVT-MCLY>] (“Since the passage of Pennsylvania’s bill last June [2018], state legislatures across the country have begun considering Clean Slate bills.”).

<sup>78</sup> § 77-40-102(5); Jessica Miller, *Utah Lawmakers Pass the “Clean Slate” Bill To Automatically Clear the Criminal Records of People Who Earn an Expungement*, SALT LAKE TRIB. (Mar. 16, 2019), <https://www.sltrib.com/news/2019/03/14/utah-lawmakers-pass-clean/> [<https://perma.cc/NE8K-TC32>].

<sup>79</sup> § 77-40-102(5)(a)(iii); *Utah Governor Signs Landmark Clean Slate Legislation*, *supra* note 77.

<sup>80</sup> Clean Slate Act of 2019, H.R. 2348, 116th Cong. § 3560(b)(1); Deb Erdley, *Federal Clean Slate Law Unveiled with Bipartisan Support*, TRIBLIVE (Apr. 24, 2019, 5:00 PM), <https://triblive.com/news/world/federal-clean-slate-law-unveiled-with-bipartisan-support/> [<https://perma.cc/P8V2-QXC3>].

<sup>81</sup> H.R. 2348 § 3560(b)(1).

criminal record, they are locked out of the American Dream.”<sup>82</sup> A companion bill to the House of Representative’s Clean Slate Act of 2019 is expected to be proposed in the United States Senate.<sup>83</sup>

Moreover, Connecticut legislators proposed a Clean Slate Law in January 2019, and while that bill unfortunately died in the General Assembly, new Clean Slate bills have been proposed in 2020, this time with the support of Connecticut’s Governor, Ned Lamont.<sup>84</sup> Connecticut’s proposed automatic sealing bill would provide for sealing of misdemeanor offenses after seven years and sealing of nonviolent felonies after twelve years.<sup>85</sup> Finally, another state that has passed its own version of a Clean Slate Act is Colorado.<sup>86</sup> While Colorado’s Clean Slate Act does not involve an automatic sealing process like the others, “most criminal records, except for those that involve violence, sexual crimes and some traffic-related offenses, can be sealed” and “the process has been simplified.”<sup>87</sup>

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<sup>82</sup> Erdley, *supra* note 80.

<sup>83</sup> *Id.* In December of 2020, Senators Bob Casey and Joni Ernst introduced bipartisan legislation in the Senate for the Clean Slate Act “to give more than 70 million Americans, with nonviolent criminal records, a second chance to fully participate in society.” Press Release, Bob Casey, United States Senator for Pennsylvania, Casey, Ernst Introduce Legislation to Seal Low-Level, Nonviolent Criminal Records (Dec. 17, 2020), <https://www.casey.senate.gov/newsroom/releases/casey-ernst-introduce-legislation-to-seal-low-level-nonviolent-criminal-records> [<https://perma.cc/39SS-RU5Y>].

<sup>84</sup> H.R. 5712, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019); Hearst Conn. Media Ed. Bd., *Editorial: Make Clean Slate a Priority in 2020*, CONN. POST (Jan. 10, 2020, 12:00 AM), <https://www.ctpost.com/opinion/article/Editorial-Make-Clean-Slate-a-priority-in-2020-14962419.php> [<https://perma.cc/HE8E-XWFD>]; Walker Strong, *Lamont Administration: Clean Slate Legislation Not Perfect, But It’s a Good Start*, CT NEWS JUNKIE (Mar. 10, 2020, 4:00 AM), [https://www.ctnewsjunkie.com/archives/entry/20200310\\_clean\\_slate\\_legislation/](https://www.ctnewsjunkie.com/archives/entry/20200310_clean_slate_legislation/) [<https://perma.cc/9WUR-AUTU>].

<sup>85</sup> S. 403, 2020 Gen. Assemb., Feb. Sess. (Conn. 2020).

<sup>86</sup> Alonzo Martinez, *Colorado Has Launched an Employment Law Revolution—Is Your State Next?*, FORBES (Sept. 10, 2019, 2:00 PM), <https://www.forbes.com/sites/alonzomartinez/2019/09/10/colorado-has-launched-an-employment-law-revolution-is-your-state-next/> [<https://perma.cc/8JE2-AKLC>].

<sup>87</sup> *Id.* Additionally, “Washington state, North Carolina, Louisiana, California, and New Jersey have introduced or passed measures that move toward automated record-clearing.” Press Release, Ctr. for Am. Progress, On Its One Year Anniversary, Pennsylvania’s Clean Slate Law Has Cleared Nearly 35 Million Records (June 30, 2020), <https://www.americanprogress.org/press/statement/2020/06/30/486967/release-one-year-anniversary-pennsylvanias-clean-slate-law-cleared-nearly-35-million-records/> [<https://perma.cc/B4ZK-HZCR>]. Further, Michigan has also enacted Clean Slate legislation that allows for the automatic clearing of its residents’ criminal records, for up to two felonies and four misdemeanors, although “[c]rimes punishable by more than 10 years in prison, violent crimes, ‘crimes of dishonesty’ such as forgery, human trafficking and other serious crimes aren’t eligible.” Riley Beggin, *Whitmer Signs Clean Slate Michigan, Allowing Automatic Felony Expungement*, BRIDGE MICH. (Oct.

## II. THE ISSUES

A. *Criminal Records in the Age of the Internet*

Online, the past remains fresh. The pixels do not fade with time as our memories do. Since we live in a world where everything is saved—archived instead of deleted—“memories have a way of forcing themselves to the surface in the most unexpected ways.”<sup>88</sup>

The twenty-first century is the age of the Internet.<sup>89</sup> We rely on the Internet each and every day to provide us with an instant wealth of information. However, this wealth of information also gives greater public access to criminal records.<sup>90</sup> This poses an issue for Pennsylvania’s Clean Slate Act because the main purpose of the Act is to seal criminal records and prevent the public from accessing these sealed records. However, this purpose continues to be thwarted because the Act does not control the dissemination of these potentially sealed records from their outset, which means they can still be distributed to information vendors, media agencies, and news outlets.<sup>91</sup> Pennsylvania’s Clean Slate Act currently does not provide for any solution to this issue.<sup>92</sup>

Although the Clean Slate Act protects criminal records that have been automatically sealed from becoming available to non-criminal justice agencies,<sup>93</sup> this level of protection is not enough.

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12, 2020), <https://www.bridgemi.com/michigan-government/whitmer-signs-clean-slate-michigan-allowing-automatic-felony-expungement> [https://perma.cc/K7VD-7K7W].

<sup>88</sup> Meg Leta Ambrose et al., *Seeking Digital Redemption: The Future of Forgiveness in the Internet Age*, 29 SANTA CLARA COMPUT. & HIGH TECH. L.J. 99, 111 (2012) (footnotes omitted) (quoting Kashmir Hill, *How the Past Haunts Us in the Digital Age*, FORBES (Oct. 4, 2011, 9:39 AM), <https://www.forbes.com/sites/kashmirhill/2011/10/04/how-the-past-haunts-us-in-the-digital-age/> [https://perma.cc/M68U-7YXP]).

<sup>89</sup> See Rebecca Vallas & Sharon Dietrich, *One Strike and You’re Out*, CTR. FOR AM. PROGRESS (Dec. 2, 2014, 7:35 AM), <https://www.americanprogress.org/issues/poverty/reports/2014/12/02/102308/one-strike-and-youre-out/> [https://perma.cc/N57P-JXCK].

<sup>90</sup> Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 341 (“A common practical critique of sealing and expungement laws is that they are essentially useless in our current information environment. Once information is released, it is disseminated into the digital world in so many potential venues that a person can never fully ‘expunge’ anything.”).

<sup>91</sup> See Richter, *supra* note 11 (“Once news articles, images, blog posts, comments, etc., appear online, they never really disappear.”).

<sup>92</sup> See 18 PA. CONS. STAT. § 9122.2(c) (2020); see also Richter, *supra* note 11 (explaining that public records, including “police blotters, court dockets, press releases[,] and news articles” are not subject to the Clean Slate Act).

<sup>93</sup> See § 9122.2(c).

Myriad information can be shared in the timeframe between when a person is first arrested to when she is finally able to have her record automatically sealed.<sup>94</sup> In fact, under this Act, individuals must wait ten years before their records can be sealed.<sup>95</sup> This poses a problem: citizens who are one step away from seemingly entering a future without judgment can be denied such reprieve by one simple Google search.<sup>96</sup> Scholars have even noted the unlikelihood that criminal record information can be made confidential when it has already been publicly accessible for an extended period of time.<sup>97</sup>

For example,<sup>98</sup> Alan, a fifty-one-year-old New Jersey “father and IT professional,” was surprised to wake up one morning at 6:00 a.m. to police officers at his door.<sup>99</sup> The police had a warrant because Alan had allegedly failed to appear in court a few months earlier.<sup>100</sup> Eventually, after Alan was fingerprinted, photographed, and waited five days to see a judge, the judge dismissed the pending charges and expunged his arrest record because the summons to appear in court had been mailed to an incorrect address.<sup>101</sup> Four months after the incident, Alan received his expungement order.<sup>102</sup> However, two months after his expungement became official, “Alan was dismayed when he Googled himself and found his booking photo posted to dozens of online mug-shot galleries.”<sup>103</sup> However, it did not stop there: Alan also found information about himself on government websites, PDFs of weekly arrests that had been indexed by Google, and the local county jail roster, just by searching his name online.<sup>104</sup> Alan was embarrassed and terrified: “That makes it really hard. People will look you up once they know your name . . . . It’s not justice.”<sup>105</sup>

In light of the major policy implications considered throughout the Clean Slate Act’s drafting and enactment, the fact that arrest records, mug shots, and court records are labeled as public information in most states poses a major issue: even with the

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<sup>94</sup> See Lageson, *supra* note 12.

<sup>95</sup> See § 9122.2(a).

<sup>96</sup> See Lageson, *supra* note 12; Richter, *supra* note 11.

<sup>97</sup> See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 120–21 (2015).

<sup>98</sup> This example is by comparison to expungement of criminal records generally.

<sup>99</sup> Lageson, *supra* note 12.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

sealing of a criminal record, future landlords and employers will still be able to locate a person’s arrest with an Internet search.<sup>106</sup> Future employers can search a potential employee’s name on websites like “Maryland Judiciary Case Search” or “Crimewatch”—a popular website in Pennsylvania—both of which give public access to court records.<sup>107</sup> In addition, there also are private commercial information vendors that sell online criminal background checking services.<sup>108</sup> These websites are easily accessible as their content is offered “free of charge” for anyone to view.<sup>109</sup> However, those who have had their record expunged or sealed and want their photographs removed from the site must pay a fee for the website to perform that service.<sup>110</sup>

While the Clean Slate Act is supposed to help people put their past behind them, the fact that their records are still available in this way perpetuates society’s view of them as “second-class citizens.”<sup>111</sup> Statistics show that ninety-two percent of employers perform criminal background checks on some applicants,<sup>112</sup> and seventy-three percent perform criminal background checks on all applicants.<sup>113</sup> Moreover, studies have found that job applicants without criminal records receive more than double the number of callback interviews than applicants with criminal records.<sup>113</sup> And the way to resolve this disparity is not necessar-

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<sup>106</sup> *Id.*

<sup>107</sup> Roberts, *supra* note 90, at 328 & n.46; Dylan Segelbaum, *They Were Arrested for Having Some Weed in Pa. Their Mugshots Still Follow Them Online*, YORK DAILY REC. (July 1, 2020, 11:21 AM), <https://www.ydr.com/story/news/watchdog/2020/07/01/news-releases-mugshots-possession-of-small-amount-of-marijuana-pennsylvania/5220460002/> [https://perma.cc/44T9-GBG9].

<sup>108</sup> Roberts, *supra* note 90, at 328–29, 329 n.47 (listing examples of these sites, “CriminalWatchdog.com,” “Info Link Screening Services, Inc.,” and “NetDetective”). Overall, because of the United States’ “national obsession with viewing other people’s dirty laundry,” mugshot websites and criminal record check websites like “Instant Checkmate,” are rising in prominence. *Id.* at 329; *see also* Ambrose et al., *supra* note 88, at 142 & n.300 (listing more examples of these sites, “<http://www.crowwingcriminals.com>” and “<http://www.mugshots.com>”).

<sup>109</sup> Roberts, *supra* note 90, at 329.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 329–30. If an employer can perform an Internet search of a prospective employee’s name whose criminal record is sealed and still find mugshots, prior charges, and news articles about that person, it is as if her record still exists. While this is the reality of the situation, the Clean Slate Act is not to blame.

<sup>112</sup> *Id.* at 329; *see also* JACOBS, *supra* note 97, at 89.

<sup>113</sup> J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2469 (2020).



ily simple.<sup>114</sup> While public access to this kind of information is part of the American democracy, this “unfettered disclosure” has prompted the question, why bother “promising people the benefits of sealing their criminal records if anyone can still find them online?”<sup>115</sup>

*B. Requiring Individuals To Pay Court-Ordered Restitution and Other Fees To Be Eligible for Automatic Sealing Perpetuates Poverty*

A person cannot qualify to have her record automatically sealed under the Clean Slate Act unless she has paid “all court-ordered restitution” and “the fee previously authorized to carry out the limited access and clean slate limited access provisions.”<sup>116</sup> While this provision of Pennsylvania’s Clean Slate Act is an improvement from its original requirement of having people pay “each court-ordered financial obligation of the sentence,”<sup>117</sup> it still proves to be a problem for some who cannot pay and would otherwise be eligible to have their records automatically sealed. This “poverty trap[]” also undermines one of the law’s main public policy rationales: to assist people who have struggled to find employment, and as a result, have been living with little money.<sup>118</sup> Poverty traps penalize indigent people by keeping them locked into a cycle of poverty that thwarts their ability to provide for themselves. This provision of the Clean Slate Act does just that by preventing certain people from having their criminal records sealed, which in turn prevents them from being able to find work, resulting in financial hardship.<sup>119</sup>

The informational website about Pennsylvania’s Clean Slate Act previously highlighted that paying court fines and costs was

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<sup>114</sup> Lageson, *supra* note 12 (“This puts a [job applicant] in a tricky position—should he really tell a potential employer he doesn’t have a record? That’s technically correct. But he faces the potential possibility that he will suddenly appear to be both a liar and a person with a criminal past.”).

<sup>115</sup> *Id.*

<sup>116</sup> 18 PA. CONS. STAT. § 9122.2(a) (2020).

<sup>117</sup> Act of June 28, 2018, No. 402, 2018 Pa. Laws No. 56, § 2 (amended 2020).

<sup>118</sup> See ACLU Brief, *supra* note 13, at 21 (citing *Confronting Criminal Justice Debt: A Guide for Policy Reform*, HARV. L. SCH. CRIM. JUST. POL’Y PROGRAM 1, 15 (Sept. 2016), <http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf> [<https://perma.cc/6FZ5-U3XQ>] [hereinafter *Confronting Criminal Justice Debt*]).

<sup>119</sup> *Id.* at 22 (“Being unable to take advantage of [criminal record sealing] due to a defendant’s poverty has the twisted effect of making it *harder* for the defendant to get a job necessary to earn the resources to try to pay off the court debt.”).

“the *most important* thing you can do” when the original language of the legislation was still in effect.<sup>120</sup> Now, the website highlights that “your record may be eligible for sealing even if you still owe court fines and costs [but] if you owe restitution, you will still need to pay it before your record can be sealed.”<sup>121</sup> However, there are a few important things to note about this improvement, since it is still somewhat lacking. One is that for automatic sealing, this updated law does not go into effect until November 2021,<sup>122</sup> which means that many with unpaid court fines and costs will have to wait almost one year from when this updated language was passed to have their records automatically sealed. Moreover, the website notes that “it is important that you look up your record to see if you owe restitution” because restitution is ordered in almost *one out of four* cases.<sup>123</sup> While that one-quarter fraction is a seemingly high number, the importance of restitution cannot be understated, as it is how offenders are held accountable for compensating their victims.

However, this still implicates the issue that some who owe restitution may not easily be able to pay it. For example, Pennsylvania resident Tyeisha Gamble had been trying to eliminate her criminal record for seven years, but had trouble paying various court-related fees while financing her college education and student loans.<sup>124</sup> Now, Tyeisha is struggling to find a job in her field of study: “I’ve put out so many applications, and sometimes I get as far as the interview part, or I actually landed the job, and then got the job taken away from me because of my record.”<sup>125</sup>

Empirical studies have found that criminal records are “both a direct cause and consequence of poverty” in the United States;

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<sup>120</sup> Rcourtney, *5 Things To Know About Clean Slate*, CMTY. LEGAL SERVS. OF PHILA. (July 10, 2019), <https://mycleanslatepa.com/5-things-to-know-about-clean-slate/> [<https://perma.cc/5UYG-3VED>] (emphasis added).

<sup>121</sup> Rcourtney, *You Can Clear Your Record Even If You Owe Court Fines and Costs Starting Next Year*, CMTY. LEGAL SERVS. OF PHILA. (Nov. 19, 2020), <https://mycleanslatepa.com/you-can-clear-your-record-even-if-you-owe-court-fines-and-costs-starting-next-year/> [<https://perma.cc/ZH8X-F38J>].

<sup>122</sup> *Id.* For those who file a petition to have their records sealed, this new law is effective as of January 2021. *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Lisa Riordan Seville & Hannah Rappleye, *Sentenced to Debt: Some Tossed in Prison over Unpaid Fines*, NBC NEWS (May 27, 2013, 12:43 AM), <https://www.nbcnews.com/feature/us-news/sentenced-debt-some-tossed-prison-over-unpaid-fines-nvna18380470> [<https://perma.cc/7V68-LLW9>].

<sup>125</sup> *Id.* It is curious that the updated legislation did not immediately become effective in December 2020 when it passed.

the nation's poverty rate would have been twenty percent lower between 1980 and 2004 if incarceration levels were not as high and criminal records were not as commonplace.<sup>126</sup> It is estimated that employment losses for people with criminal records total as much as \$65 billion in gross domestic product each year, on top of the nation's annual expenditures on mass incarceration, which total \$80 billion.<sup>127</sup>

The Pennsylvania legislature must face the unfortunate reality that many people who go through the court system as criminal defendants are poor.<sup>128</sup> And while the legislature already has come to this realization, at least to a certain extent, as evidenced by the amended Clean Slate legislation only requiring payment of court-ordered restitution, there still are issues to resolve. For example, there are still seemingly other fees to pay, as the updated statute reads: "Upon payment of all court-ordered restitution, the person whose criminal history record information is subject to limited access under this paragraph shall also pay the fee previously authorized to carry out the limited access and clean slate limited access provisions."<sup>129</sup>

Ultimately, disqualifying people from automatic record sealing is contrary to the objectives of the criminal justice system, as it creates a risk of increased recidivism when people cannot successfully reintegrate into society.<sup>130</sup> They will continue to face barriers in locating jobs and housing if their records cannot be sealed due to the outstanding restitution, and in turn authorization fees, they cannot pay off.<sup>131</sup> This could have the unjust effect of creating a "two-tiered system of justice—one for the rich and one for the poor," divided between those who can pay off their court-imposed fees and have their criminal records sealed, and those who cannot.<sup>132</sup>

And even though Pennsylvania has rules that require courts to consider a defendant's ability to pay court-imposed fees before

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<sup>126</sup> Vallas & Dietrich, *supra* note 89.

<sup>127</sup> *Id.*

<sup>128</sup> ACLU Brief, *supra* note 13, at 7.

<sup>129</sup> 18 PA. CONS. STAT. § 9122.2(a)(1) (2020).

<sup>130</sup> ACLU Brief, *supra* note 13, at 14.

<sup>131</sup> *Id.* at 14–15; see also Alicia Bannon et al., *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUST. 27 (2010), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf) [<https://perma.cc/YR8T-RF9V>] ("[C]riminal justice debt is a barrier to individuals seeking to rebuild their lives after a criminal conviction.")

<sup>132</sup> See ACLU Brief, *supra* note 13, at 20–21.

assigning them, studies show that this is ineffective because the Pennsylvania court system “regularly impose[s] amounts that defendants cannot meet.”<sup>133</sup> Examining data from 2013 court-ordered payments, less than forty-four percent of costs, fines, and restitution fees have been paid back.<sup>134</sup> Ultimately, only twenty-one percent of the \$130 million in restitution has been paid back.<sup>135</sup> This data confirms that many fees are improperly assigned: “The effect is that poor people are punished because of their poverty.”<sup>136</sup>

For all of these reasons, conditioning record sealing under the Clean Slate Act on people’s ability to pay their court fees, even just restitution and authorization fees, has the potential to perpetuate the poverty trap the Act was designed to eliminate.

### C. *The Clean Slate Act’s Substantive Provisions Are Too Restrictive*

Although Pennsylvania’s Clean Slate Act is a significant piece of legislation that provides millions of people with a better future, it could provide millions more with a better future if some of its time and crime qualifications were not so restrictively written.<sup>137</sup> The only people eligible to have their criminal records sealed under the Act are those who have been crime-free for at least ten years and whose crimes are no greater than second-degree misdemeanors.<sup>138</sup>

While these qualifications may have been set because “substantive constraints were politically necessary to secure automatic process” and receive widespread legislative support, as this Act evolves, legislators should broaden the qualification criteria.<sup>139</sup>

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<sup>133</sup> *Id.* at 8; *see also* PA. R. CRIM. P. 706(C) (“The court, in determining the amount and method of payment of a fine or costs shall, insofar as is just and practicable, consider the burden upon the defendant by reason of the defendant’s financial means, including the defendant’s ability to make restitution or reparations.”).

<sup>134</sup> *Collection Rates Over Time*, UNIFIED JUD. SYS. OF PA., <http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/collection-rate-of-payments-ordered-by-common-pleas-courts> (choose “Criminal” from dropdown; then choose “2013”) (last visited Feb. 17, 2021).

<sup>135</sup> ACLU Brief, *supra* note 13, at 8.

<sup>136</sup> *Id.* at 20.

<sup>137</sup> *See* Prescott & Starr, *supra* note 113, at 2553 (“Pennsylvania’s law is a watershed in terms of expungement *procedure*, but it is unfortunately quite limited in its substantive scope (that is, in terms of its eligibility rules): automatic expungement applies only to people with minor, nonviolent misdemeanors after ten crime-free years.”).

<sup>138</sup> *See* 18 PA. CONS. STAT. § 9122.2(a)(1) (2020).

<sup>139</sup> *See* Prescott & Starr, *supra* note 113, at 2553.

Moreover, according to studies, any concerns about recidivism and public safety are “unfounded”—people who have their criminal records set aside “after just five years pose a very low recidivism risk.”<sup>140</sup> Therefore, Pennsylvania’s ten-year requirement is unnecessarily restrictive.

Ultimately, given that the Clean Slate Act passed unanimously, “advocates may have been overly cautious about its crafting; there was plenty of room to spare.”<sup>141</sup> Automatic criminal record sealing in Pennsylvania, which was and continues to be a “watershed” step forward, can and should be reformed to provide an even broader array of people with this life-changing opportunity.<sup>142</sup> This would be in line with the policy rationale behind the Clean Slate Act’s purpose, which is to “help many people across the commonwealth to get a fresh start” by sealing criminal records to assist with jobs, housing, and schooling.<sup>143</sup> As the law in Pennsylvania currently stands, the only opportunity for those with felonies to have their convictions removed from their criminal record is by pardon from the Governor.<sup>144</sup> And even the informational website about Pennsylvania’s Clean Slate Act emphasizes the difficulty of receiving a pardon, noting that the process is lengthy and “pardons are difficult to get.”<sup>145</sup>

Reforming Pennsylvania’s Clean Slate Act in this way is possible: many other successful automatic record sealing laws have shorter time periods and allow for a broader variety of convictions to be cleared. For example, New Zealand’s and Utah’s laws provide for shorter time requirements, and pending legislation in Connecticut would allow for a broader variety of qualifying crimes.<sup>146</sup> If Pennsylvania truly wants to help as many people across the commonwealth as possible by automatically sealing criminal records to eliminate stigma against those who have

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<sup>140</sup> *Id.* at 2553–54.

<sup>141</sup> J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study* 55 (Mich. L., L. & Econ. Rsch. Paper Series, Working Paper No. 19-001, 2019), <http://www.law.umich.edu/centersandprograms/lawandeconomics/workshops/Pages/Fall-2019.aspx> [<https://perma.cc/2UJS-Y862>].

<sup>142</sup> See Prescott & Starr, *supra* note 113, at 2553.

<sup>143</sup> See Rcourtney, *supra* note 120; Atelsek, *supra* note 7; Press Release, *supra* note 45.

<sup>144</sup> Rcourtney, *supra* note 120.

<sup>145</sup> *Id.*

<sup>146</sup> See Criminal Records (Clean Slate) Act 2004, pt 1, s 4, pt 2, s 7; UTAH CODE ANN. § 77-40-102(5)(a)(iii) (West 2020); S. 403, 2020 Gen. Assemb., Feb. Sess. (Conn. 2020).

prior convictions, the legislature will have to broaden the Clean Slate Act and make its requirement provisions less restrictive.

### III. PROPOSED SOLUTIONS

#### A. *Pennsylvania Must Control Its Crime Data*

It would be difficult to clear all vestiges of a person’s criminal record off the Internet once it is already on there for fear of violating First Amendment rights. While other countries, like Australia, do not have freedom of speech protections that are similar to those in the United States, and therefore can enforce laws that prohibit spreading information about criminal records that have been sealed, these types of laws cannot be enforced in this country.<sup>147</sup> Here, it is unconstitutional to prohibit newspapers, media, or anyone else on the Internet from posting information about people’s convictions, just as it would be unconstitutional to force libraries to get rid of conviction information that has been subsequently expunged or sealed.<sup>148</sup> This can be analogized to how it would be unconstitutional for the government to stop people from discussing convictions that have been subsequently expunged when they received the information from “court observations” or by “word of mouth.”<sup>149</sup>

Although some contend that “criminal trials and records would need to be removed from the public view altogether if one were going to effectively limit access to criminal records,”<sup>150</sup> there are other ways to eliminate this information from the Internet. Some news reporters are “sympathetic to people who call and ask [to] remove an article” about themselves, especially if the crime is

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<sup>147</sup> See JACOBS, *supra* note 97, at 121 & n.\*. See also Segelbaum, *supra* note 107 (State Representative Sheryl Delozier, one of the co-sponsors of the Clean Slate legislation, commented on the issue: “It is kind of a catch-22 . . . . We can’t certainly take back something that has been reported.”).

<sup>148</sup> See JACOBS, *supra* note 97, at 121; see also U.S. CONST. amend. I.

<sup>149</sup> JACOBS, *supra* note 97, at 121.

<sup>150</sup> Ambrose et al., *supra* note 88, at 142. Based on studies and data of employment and poverty rates after record expungement, some argue that it is possible for people to still benefit, regardless of what information is still available on the Internet. See Prescott & Starr, *supra* note 113, at 2541. They argue most “arrests and convictions are not . . . newsworthy” and thus, do not even end up on the Internet. *Id.* However, even those who make these counterarguments note that “it is likely that some individuals really cannot escape the digital trail of their prior [records].” *Id.* at 2542.

old and harmless.<sup>151</sup> Additionally, some websites will choose to periodically update stories when they receive updated information.<sup>152</sup> However, these platforms must balance a “person’s wish to be forgotten with the public’s right to know” to maintain credibility and transparency.<sup>153</sup> As a result, there need to be alternative solutions that do not solely rely on the media deciding these matters, but target the dissemination of this information in the first place. Ultimately, Pennsylvania must control its crime data from the outset. This can be accomplished in a few different ways.

First, Pennsylvania could create laws that would reclassify records, such as mug shots and arrest logs, as private.<sup>154</sup> This would be akin to the protections given to sexual assault victims, juvenile offenders, and grand jury targets that prohibit public exposure of their identities.<sup>155</sup> This would not be so out of the ordinary for Pennsylvania to do, as federal law enforcement already denies public access to booking photos.<sup>156</sup> In doing this, Pennsylvania would be restricting the media’s access to these mug shots and arrest logs from the outset, which would prohibit them from existing on the Internet both before and after an individual’s criminal record is sealed.

Second, Pennsylvania could create laws to regulate background check companies and other private companies that sell arrest, conviction, and mug shot information.<sup>157</sup> Whether the company is a consumer reporting agency (“CRA”) regulated by the Fair Credit Reporting Act (“FCRA”), or a non-CRA mugshot website that sells arrest photos and records, various regulations can be put in place.<sup>158</sup> Pennsylvania could impose regulations and penalties upon CRAs to ensure that they are: (1) using reli-

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<sup>151</sup> See Richter, *supra* note 11 (“People call saying they can’t get a job because this one story shows up in Google searches of their name.”).

<sup>152</sup> *Id.* For example, “Crimewatch recently introduced a feature that will automatically remove older posts after a set period” of time. See Segelbaum, *supra* note 107.

<sup>153</sup> *Id.*

<sup>154</sup> See Lageson, *supra* note 12.

<sup>155</sup> *Id.* (citing Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 755 (2005)).

<sup>156</sup> *Id.* (citing *Detroit Free Press, Inc. v. U.S. Dep’t of Just.*, 829 F.3d 478, 484 (6th Cir. 2016) (holding that “[i]ndividuals enjoy a non-trivial privacy interest in their booking photos”).

<sup>157</sup> See Roberts, *supra* note 90, at 345.

<sup>158</sup> *Id.*

able sources; (2) removing sealed records from their databases;<sup>159</sup> and (3) banning the sale of criminal records.<sup>160</sup> Ultimately, for both CRAs and non-CRAs, Pennsylvania could require these companies to prove they are updating their websites by removing expunged and sealed records before allowing them to continue retrieving data from the state’s official databases.<sup>161</sup>

Some states already have similar practices in place. For example, Utah and Colorado require mug shot requesters to promise not to post the photographs on a commercial website and sign a statement about their intentions.<sup>162</sup> If a requester falsely states its intentions, it is considered a misdemeanor.<sup>163</sup> Furthermore, Pennsylvania could pass a law similar to those of Wyoming, Oregon, and Illinois that require online publishers of arrest information and mug shots to remove them upon request without any fee for those who: (1) were not formally charged; (2) had their cases dismissed; (3) were acquitted; or (4) had their criminal records sealed or expunged.<sup>164</sup>

Another option would be for Pennsylvania to pass laws that would require commercial information vendors to update their criminal background reports by adding in a note to a reported conviction’s file if it has been expunged or sealed.<sup>165</sup> Ultimately, sealing criminal records combined with one or more of these solutions would enhance the Clean Slate Act and further its purpose. This would be the best response to regulating criminal record information in the current digital era.

*B. Do Not Impose Conditional Financial Obligations, at Least Not on Every Eligible Individual*

The requirement that any individual who is eligible to have her criminal record sealed by Pennsylvania’s Clean Slate Act must also pay off “all court-ordered restitution,” and in turn, “the fee previously authorized to carry out the limited access and clean slate limited access provisions” is unreasonable: many individuals with criminal records face financial hardships.<sup>166</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 346 (“[I]t was only a matter of time before the Internet found a way to monetize the humiliation that came with an arrest.” (alteration in original)).

<sup>161</sup> *Id.*

<sup>162</sup> See JACOBS, *supra* note 97, at 84.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 122–23.

<sup>166</sup> 18 PA. CONS. STAT. § 9122.2(a) (2020).



There are a few approaches Pennsylvania can take to remedy this. First, Pennsylvania could remove this provision from the Clean Slate Act entirely, thus eliminating the requirement that a person must pay before having her record sealed.<sup>167</sup> If after ten years an individual still has not paid the above-listed fees, it may well be that she has not had the means to do so. Moreover, removing this provision would only eliminate the requirement that an individual pay the court-ordered fee before having her criminal record sealed; an individual would still owe this money to the courts. However, removing this provision entirely could also cause different issues—it could lead to problems for victims owed restitution from their offenders, as there would be lessened incentive for offenders to pay their court-ordered restitution once their record has been sealed.

Another slightly better option is the following: If sealing of criminal records is going to be conditioned on payment of a court debt, this should only happen “when a robust ability to pay determination demonstrates that non-payment is willful.”<sup>168</sup> This is another alternative for Pennsylvania, although the same issue detailed in the above paragraph about future incentives to pay back court-ordered restitution could still persist. But as mentioned earlier, the Clean Slate Act has a significant impact on employment and housing opportunities, and “it is unfair and counterproductive to link those outcomes to wealth.”<sup>169</sup> Thus, if the Pennsylvania legislature chooses this option, the hope would be that those who were previously indigent would have more job opportunities once their records become sealed, which in turn would lead to more people finally having the money to pay the court-ordered restitution. To further ensure this, the legislature could ask those individuals to sign a certified statement agreeing to begin paying the restitution once they are employed or making a certain amount of money.

Further, Pennsylvania could create a few different processes to remove this requirement for indigent individuals. First, the commonwealth could build a rebuttable presumption into the Clean Slate statute that persons who are indigent—those whose income is below a predetermined level or those who receive welfare benefits—do not have to pay the court-ordered fees to be

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<sup>167</sup> *Confronting Criminal Justice Debt*, *supra* note 118, at 22.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 22–23.

eligible for record sealing.<sup>170</sup> Alternatively, Pennsylvania could develop a system to address an individual’s financial situation at the “front end” of the sealing procedures.<sup>171</sup> When identifying individuals who are eligible for record sealing by the Clean Slate Act, those who qualify in all other aspects, but have not yet paid their court-ordered fees, can be separately identified. Then, these individuals can be notified and asked to fill out “a basic financial information sheet” to determine their current ability to pay court-ordered restitution.<sup>172</sup> After an individual fills out her “income, expenses, and relevant work history,” and submits the information sheet, the court then will determine whether or not the individual can be exempted because of her inability to pay the remaining court-ordered fees.<sup>173</sup>

Finally, rather than exempting individuals from having to pay, the court that ordered the restitution could place people on payment plans to help put them on track to pay off the fees over time.<sup>174</sup> These payments could also be structured to be interest- and penalty-free, with the resultant sealing not being effectuated until the final payment is made.<sup>175</sup>

Ultimately, Pennsylvania can choose from a wide variety of options to continue to resolve the conditional payment provision of the Clean Slate Act. While some suggestions may be more efficient or realistic than others, any of these proposed solutions would at least somewhat fix the current poverty trap.

### C. *Shorten the Time Requirement and Add a Variety of Eligible Convictions*

The Clean Slate Act’s requirements that the conviction must be at least ten years old and that only certain convictions are eligible to be sealed may be the simplest issues to resolve. As mentioned earlier, the recidivism rate for those with a prior criminal record is low.<sup>176</sup> Statistics show that those with prior criminal records have an even lower risk of arrest than the general population after refraining from crime for just “four to

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<sup>170</sup> *Id.* at 28.

<sup>171</sup> See ACLU Brief, *supra* note 13, at 19.

<sup>172</sup> *Id.* at 27.

<sup>173</sup> *Id.*

<sup>174</sup> See Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [<https://perma.cc/6H74-MWTR>].

<sup>175</sup> See *id.*

<sup>176</sup> Prescott & Starr, *supra* note 113, at 2554.

seven years . . . for violent offenders, four years for drug offenders, and three to four years for property offenders.”<sup>177</sup> Thus, there is no reason for Pennsylvania’s Clean Slate Act to make potentially eligible individuals wait ten years before their record can be sealed.

This restrictive requirement can be resolved by shortening the ten-year requirement. Pennsylvania could achieve this by either following New Zealand’s example or Utah’s example. New Zealand’s Clean Slate Act provides for a strict seven-year time span, in which a person must have no convictions for her to be eligible.<sup>178</sup> Pennsylvania could adopt the same time frame of seven years, a lesser time frame of five or six years, or even a higher time frame of eight to nine years. While all of these options are better than the current ten-year requirement, the shorter the time requirement the better.

However, Utah’s Clean Slate Act is structured differently. Utah imposes its time requirements based on the crime: “five years for a class C misdemeanor or an infraction,” “six years for a class B misdemeanor,” and “seven years for a class A conviction for possession of a controlled substance.”<sup>179</sup> Pennsylvania could choose to follow Utah’s sliding scale approach, in which the time a person must wait before her criminal record is automatically sealed would depend on the severity of the conviction in question. For example, a person with just a summary offense would only have to wait five years before her conviction is automatically sealed, a person with a third-degree misdemeanor would wait six years, and a person with a second-degree misdemeanor would wait seven years. Ultimately, under any approach, if Pennsylvania shortened its overly restrictive ten-year time requirement, it would improve this issue.<sup>180</sup>

Moreover, Pennsylvania’s Clean Slate Act only applies to those who have convictions of second-degree misdemeanors or less serious crimes.<sup>181</sup> Those who have first-degree misdemeanors are not even eligible to have their criminal records sealed

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<sup>177</sup> See Dietrich, *supra* note 14, at 41.

<sup>178</sup> Criminal Records (Clean Slate) Act 2004, pt 1, s 4, pt 2, s 7.

<sup>179</sup> UTAH CODE ANN. § 77-40-102(5)(a)(iii) (West 2020).

<sup>180</sup> Even the federal government’s proposed Clean Slate Act provides for the automatic sealing of criminal records just one year after a person has completed each requirement of her sentence. Clean Slate Act of 2019, H.R. 2348, 116th Cong. § 3560(b)(1) (2019).

<sup>181</sup> 18 PA. CONS. STAT. § 9122.2(a)(1) (2020).

under this Act.<sup>182</sup> Neither are people who have been convicted of felonies.<sup>183</sup> This stands in stark contrast to proposed legislation in Connecticut, which is not as restrictive. Connecticut’s proposed Clean Slate legislation provides for people with either class C, D, or E felonies, or unclassified felony offenses that carry a term of imprisonment for no more than ten years, to have their criminal records automatically sealed.<sup>184</sup> Furthermore, Michigan recently became the first state to include low-level felonies in its automatic sealing process under enacted Clean Slate legislation.<sup>185</sup> Ultimately, it will be up to the Pennsylvania legislature to determine whether they want to amend the Clean Slate Act to cover more individuals with higher-rated crimes. However, Pennsylvania’s Clean Slate Act could at least broaden its eligibility criteria to allow those with first-degree misdemeanors to have their criminal records sealed. This demarcation in the Act, of which levels of crimes are eligible, appears to be arbitrary. Moreover, this addition would further the purpose of the Clean Slate Act by allowing even more people to have a chance at leaving their criminal records behind and beginning a new life without judgment.

The Pennsylvania legislators will have to determine what the time requirement should be shortened to, and what higher-level crime convictions, if any, should meet the eligibility requirement. They should make their decision based on other Clean Slate acts, similar to Pennsylvania’s, and should consider how to revise the existing provisions to make them less arbitrary and restrictive.

#### CONCLUSION

Pennsylvania’s Clean Slate Act is a groundbreaking piece of legislation that has already impacted millions of peoples’ lives for the better. This Act gives people a second chance at a future without judgment, which in turn, will open up new employment, housing, and schooling opportunities. That being said, it does

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<sup>182</sup> Dietrich, *supra* note 14, at 48.

<sup>183</sup> *Id.* Even Representative Jordan Harris has noted that “[w]e must also deal with felony drug charges. It’s one of the biggest impediments to getting employed, but I know not all of us are there yet.” Smith, *supra* note 8.

<sup>184</sup> S. 403, 2020 Gen. Assemb., Feb. Sess. (Conn. 2020).

<sup>185</sup> Beggin, *supra* note 87; MICH. COMP. LAWS §§ 780.621, 780.621b (2020).

not come without its issues.<sup>186</sup> Pennsylvania lawmakers need to address the problems with public Internet access to sealed information, the continued inability for some to pay their court-imposed restitution and authorization fees, and restrictive eligibility requirements before the Clean Slate Act can achieve its fullest impact and maximum potential. While these issues are not simple ones, there are a variety of solutions for legislators to reform the Act. Therefore, because of the significance of the Clean Slate Act, this Note urges the Pennsylvania legislature to amend the Act further so it can better serve as a model for future legislation.<sup>187</sup>

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<sup>186</sup> See Elizabeth Hardison, *A Landmark Criminal Justice Bill Helped 1 Million People Get Jobs and Housing Last Year. But Advocates Say There's More To Be Done*, PA. CAP.-STAR (June 30, 2020), <https://www.penncapital-star.com/criminal-justice/a-landmark-criminal-justice-bill-helped-1-million-people-get-jobs-and-housing-last-year-but-advocates-say-theres-more-to-be-done/> [<https://perma.cc/6X5R-MX2L>] (Notably, Representative Harris commented that “[Clean Slate] is a great first step . . . . It moves us in the right direction . . . but we have a lot more work to do.” (first and third alterations in original)).

<sup>187</sup> As Professor Sonja Starr has also noted in a recent article, “California and Michigan, with more ambitious approaches, offer better models than the very cautious Pennsylvania and Utah bills (even though those states deserve credit for being Clean Slate's pioneers), and future states could readily go farther.” Sonja B. Starr, *Expungement Reform in Arizona: The Empirical Case for a Clean Slate*, 52 ARIZ. ST. L.J. 1059, 1085–86 (2020).