OFF THE RECORD: PRESERVING STATISTICAL INFORMATION AFTER JUVENILE EXPUNGEMENT

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Although expungement is often defined as the destruction of an individual's record, expungement statutes vary tremendously in the extent to which they lead to records being destroyed. In some states, juvenile expungement statutes have impacted the accuracy of data on arrest rates: when the record is destroyed, the state loses access to the statistical information contained in it. Juvenile expungement laws play a critical role in rehabilitation, but completely forgetting the information contained in a record can also obscure history of criminalizing children and teens and can make it difficult to document inequities accurately.

This Article examines how to protect the benefits for youth of destroying records, while still ensuring that researchers, advocates, and decision-makers have access to accurate data. Through an original fifty-state analysis of how juvenile expungement laws handle preservation of information for research purposes and a state case study that quantifies the impact of expungement on data, this Article analyzes the impact that different state approaches to expungement have on data and research. While a handful of states include statutory exemptions for research, these carve outs vary substantially in approach. This Article represents the first time these exemptions have been systemically studied.

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A juvenile record ultimately reflects information both about an individual child and about government activity. While there is often an important interest in forgetting a specific individual's connection to a record, that interest does not extend to forgetting the statistical information about government activity contained in it, provided that the individual's identity can be adequately obscured. To that end, the Article examines ways to balance competing interests in rehabilitation and in data and provides a framework for how states can meaningfully destroy the connection between a specific individual and a record, while continuing to preserve juvenile justice data for research and advocacy.

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INTRODUCTION

A central paradox of preserving historic records is that these records can both be a tool for entrenching past injustices and a tool for learning from past errors, so that history is not doomed to repeat itself. This is particularly true for record keeping in criminal and juvenile justice systems. On the one hand, juvenile and criminal records can make it impossible for individuals to outgrow the past and to start anew. Criminal records play a central role in creating a legal system which perpetuates the idea that "there are no second acts in American lives."[1] On the other hand, the statistical information contained in records is a powerful tool for learning from the past and informing future policy. Efforts to advance racially equitable policy fundamentally rely on analysis of both historic and current systems that

1. Doris Del Tosto Brogan, *Expungement, Defamation, and False Light: Is What Happened Before What Really Happened or is There a Chance for a Second Act in America?*, 49 LOY. U. CHI. L.J. 1, 1 (2017) (citing to a discussion from the television show *The Wire* about *The Great Gatsby*).

perpetuate racial disparities.[2] Data about criminal and juvenile systems can play a powerful role in this work.

Data can help make the scale of criminalization of youth tangible.[3] It can help us better understand and begin to address stark racial disparities.[4] Data can assist in understanding long-term outcomes for youth and in gaining a clearer sense of recidivism rates.[5] If shared in accessible ways, such as public-facing data dashboards, this data can

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2. *See, e.g.*, JULIE NELSON, LAUREN SPOKANE, LAUREN ROSS & NAN DENG, GOV'T ALL. ON RACE & EQUITY, ADVANCING RACIAL EQUITY AND TRANSFORMING GOVERNMENT: A RESOURCE GUIDE TO PUT IDEAS INTO ACTION 10 (2015), https://racialequityalliance.org/wp-content/uploads/ 2015/02/GARE-Resource_Guide.pdf [https://perma.cc/P3JU-QCWB] (stressing the importance of accurately portraying the government's role through history and envisioning a new governmental role moving forward); TERRY KELEHER, RACE FORWARD, RACIAL EQUITY IMPACT ASSESSMENT 2 (2009), https://www.raceforward.org/sites/default/files/ RacialJusticeImpactAssessment_v5.pdf [https://perma.cc/E3U4-4N2S] (discussing the importance of analyzing both quantitative and qualitative data on racial inequities in policy decision-making processes).

3. CHARLES PUZZANCHERA, U.S. DEP'T OF JUST., JUVENILE ARRESTS, 2019 (2021), https://ojjdp.ojp.gov/publications/juvenile-arrests-2019.pdf [https://perma.cc/U6X4-TZ5T] (reporting almost 700,000 arrests of children in 2019); CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 2021 8 (2021) (highlighting that each day in America in 2019, 1,909 children were arrested).

4. *See, e.g.*, JOSHUA ROVNER, THE SENTENCING PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS (2016) (finding that disparities in arrest and commitment rates between Black and white youth are increasing); Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 400 (1996) (finding that white children received less severe dispositions at each successive stage of juvenile processing than their nonwhite peers); Michael J. Leiber & Jennifer H. Peck, *Race in Juvenile Justice and Sentencing Policy: An Overview of Research and Recommendations*, 31 LAW & INEQ. 331, 345–59 (2013) (highlighting racial disparities in arrests, processing, intake, detention, disposition, and waiver of juvenile court jurisdiction).

5. *See, e.g.*, David E. Barrett & Antonis Katsiyannis, *The Clemson Juvenile Delinquency Project: Major Findings from a Multi-Agency Study*, 26 J. CHILD & FAM. STUD. 2050 (2017) (analyzing data on long-term outcomes for justice-involved youth, with an emphasis on the role demographic characteristics including age, race, gender, underlying mental health conditions, and school-related disabilities play in outcomes related to referrals, prosecutions, recidivism, and incarceration); DAVID B. WILSON, IAIN BRENNAN & AJIMA OLAGHERE, THE CAMPBELL COLLABORATION, POLICE-INITIATED DIVERSION FOR YOUTH TO PREVENT FUTURE DELINQUENT BEHAVIOR: A SYSTEMATIC REVIEW (2018) (conducting a meta-analysis of recidivism studies that looked both at official and non-official measures of delinquency, and finding that diversion of low-risk youth who come into contact with juvenile justice systems is effective in reducing future contact with the justice system); Michael Caldwell, *Study Characteristics & Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 197, 198 (2010) (showing that individuals who commit sexual offenses in childhood are unlikely to commit a subsequent offense).

help empower community-based organizations, journalists, and other stakeholders to hold government actors accountable.[6] Juvenile justice system data frequently plays an important role in advocacy for legislation or policy reform aimed at building systems that are fairer and more developmentally appropriate.[7] For example, system-level data has played a pivotal role in advocacy to make sure older children are not forced to appear in adult court, to ensure younger children receive non-judicial support rather than an arrest record, and to reduce or eliminate police presence in schools.[8] Data can also play an important role in monitoring the implementation of these policy changes to ensure their efficacy.[9]

Because of the competing interests in allowing young people the opportunity to start over and in the many benefits of system-level data, the issue of what should happen to data following the destruction of a record through expungement is both a puzzling and pressing topic.

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6. *See, e.g.*, MELBA PEARSON, BRENNAN CTR. FOR JUST., THE DATA THAT CAN MAKE PROSECUTORS ENGINES OF CRIMINAL JUSTICE REFORM (2020) (discussing the role that public-facing prosecutorial data dashboards can play in improving transparency and accountability with respect to prosecutorial decision-making); THE EMERSON COLLECTIVE, CAN MORE TRANSPARENT CRIMINAL JUSTICE DATA BUILD STRONGER COMMUNITIES? (2021) (highlighting the role that data platforms can play in building transparency and accountability); *Open Data*, U.S. DEP'T. OF JUST. (Dec. 22, 2021), https://www.justice.gov/open/open-data [https://perma.cc/JR43-2X3L] (asserting that "[p]ublishing high-value data sets that increase transparency and accountability can improve public knowledge of the Department of Justice and our operations").

7. *See, e.g.*, California Senate Floor Analysis of SB-439 3–4 (Cal., Aug. 30, 2018), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB439 [https://perma.cc/Q8S4-SV4V] (citing data about arrests of children in an analysis of legislation that set a minimum age of juvenile court jurisdiction for the state of California); STEPHANIE KOLLMANN, ILL. JUV. JUST. COMM'N., RAISING THE AGE OF JUVENILE COURT JURISDICTION, 30 (2013) (using data about the impact of increasing the minimum age for transfer to adult criminal systems for misdemeanors to predict the impact of raising the age for felonies, and ultimately making the case for raising the minimum age for felony transfer); Jasmine Williams, *Lessons from Oakland's Move to Police-Free Schools*, EDSOURCE (Sept. 21, 2021), https://edsource.org/2021/lessons-from-oaklands-move-to-police-free-schools/661400 [https://perma.cc/RF94-3ABK] (discussing the importance of data on racial inequities about school policing to Oakland's community-led movement that resulted in removing law enforcement from public schools).

8. *Supra* note 7.

9. *See, e.g.*, NEW YORK STATE RAISE THE AGE IMPLEMENTATION TASK FORCE, FINAL REPORT 4–7 (2020), https://www.ny.gov/sites/default/files/atoms/files/FINAL_Report_Raise_ the_Age_Task_Force_122220.pdf [https://perma.cc/VWJ8-WHLP] (tracking data on arrests, detention admission, family court placement, case management, and racial disparities following the legislation raising the age of adult criminal responsibility from age sixteen to eighteen).

Although expungement is often thought of as the destruction of a record, not all state expungement statutes lead to records being destroyed. Black's Law Dictionary defines expungement to include both "destruction and sealing"[10] of records and, in many states, although statutes exist that nominally expunge information, records are never actually destroyed.[11] In other states, however, expungement statutes do truly mandate the destruction of criminal or juvenile record information.[12] In those states, when records are destroyed, the data contained in the record may be permanently erased.[13]

The erasure of the statistical information contained in criminal records through expungement has troubling implications for researching and documenting a range of important issues.[14] For example, information about recidivism rates may be skewed due to expungement because records that are eligible for expungement are more likely to be tied to lower-level or first-time offenses.[15] Critically, erasing data following expungement threatens to complicate efforts to document racial inequities with precision and may skew data on the racial composition of arrest rates.[16] Destruction of data through expungement may make it more difficult to track the need for supportive services.[17] For example, it may be more difficult to analyze the need for drug treatment supports because drug-related incidents are often more likely to qualify for expungement.[18] Finally, loss of data may also make it much harder to study the impact of expungement statutes themselves.[19]

Juvenile expungement plays an essential role in helping young people move forward, and the expansion of juvenile expungement laws in recent years represents an important victory for children and adolescents.[20] However, fully destroying and losing the statistical information in juvenile records can hinder government transparency and make it harder to hold justice systems accountable. Complete erasure of juvenile arrest data can also mean losing a record of unjust

10. *Expunge*, BLACK'S LAW DICTIONARY (11th ed. 2019).
11. *See infra* Section II.C.
12. *See infra* Section II.C.
13. *See infra* Section II.C.
14. *See infra* Sections III.A–B.
15. *See infra* Sections III.A.
16. *See infra* Sections III.A, III.C.
17. *See infra* Section V.A.
18. *See infra* Section V.A.
19. *See infra* Section III.A.
20. *See infra* Sections I.B. (discussing expansion of expungement laws) and I.C (discussing the importance of expungement statutes).

or racist government action and has the potential to obscure history of criminalizing children and teens. Although some theorists have raised concerns about expungement as an act of dishonesty, or about the ways in which expungement statutes limit access to meaningful information, they have, as a rule, typically not distinguished between erasure of identifiable information about a specific individual and erasure of de-identified or generalizable information used for broader research purposes.[21] But erasure of individual information does not necessarily require full erasure of system-level data. This Article explores the possibility of authorizing pseudonymized or de-identified information that is carefully secured to be preserved for research and statistical purposes, while still strongly encouraging the passage of forceful expungement statutes that support individuals in moving beyond their juvenile records.

Today, expungement draws more legislative interest than ever, as evidenced by dozens of new laws passing annually across the country in recent years.[22] Automatic expungement statutes, also known as clean slate laws, have seen an increasing surge in popularity.[23] While uptake rates for expungement laws that require an individual to opt in have historically been low, clean slate laws require no proactive action and

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21. *See infra* Section I.C.

22. *See, e.g.*, MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., PATHWAYS TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2019 1–2 (2020), http://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_CriminalRecord-Reforms-in-2019.pdf [https://perma.cc/5EM3-B8GC] [hereinafter *CCRC 2019*] (finding the period from 2013 on was an "extraordinarily fruitful" time for reform to expungement laws, and that "[i]n terms of the number of new laws enacted and their importance, 2019 breaks every record set in 2018"); Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 322–23 (finding that "[n]ationally, a number of states are now updating or considering new and broader sealing and expungement laws. Advocacy organizations and think tanks are calling for sealing and expungement of at least some criminal records. Public defender and civil legal aid offices are increasingly offering to help clients expunge or seal records, and there are reentry clinics handling criminal records matters and law school clinics and courses that cover expungement. Recent expungement summits around the nation draw high attendance"); Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL'Y REV. 361, 362 (2016) (finding that there has been a "recent flurry of state-level legislation relating to expungement remedies").

23. *See, e.g.*, RAM SUBRAMANIAN, REBECKA MORENO & SOPHIA GEBRESELASSIE, VERA INST. FOR JUST., RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009–2014, at 13 (2014), https://www.vera.org/downloads/publications/states-rethink-collateral-consequences-report-v4.pdf [https://perma.cc/6WRM-GEYD] (stating that between 2009 and 2014, thirty-one states and the District of Columbia have expanded the scope of expungements).

consequently often have a much broader reach, and therefore potentially a more significant impact on access to data as well.[24] Collectively, this makes concerns about the impact these laws have on data increasingly timely.

The Article focuses specifically on juvenile expungement for two main reasons. First, juvenile expungement statutes are often more comprehensive and are more likely to involve automatic expungement, resulting in potentially more significant impacts to data.[25] Second, interests in privacy and confidentiality of juvenile justice data significantly limit access to statistical information, making preservation of existing information particularly urgent.[26] Nonetheless, concerns about the impact of expungement laws on data are generally applicable to adult criminal systems, too. As states expand not only juvenile expungement, but adult expungement as well, many of the same principles apply.

This Article also focuses specifically on expungement rather than sealing statutes, although here, too, many of the same concerns apply. Sealed records are made harder to access, but are not destroyed.[27] When records are sealed rather than expunged, data may also become harder or impossible to obtain.[28] The Article focuses on expungement in particular because of concerns tied to the irreversibility of destroying records under expungement laws. Although not all expungement statutes lead to records being permanently destroyed, some do.[29] In those states, the issue of what happens to data is a uniquely pressing one. While sealed records continue to exist in some form, expunged records may truly be gone for good.

Part I of this Article examines the history of juvenile expungement, the more recent evolution of juvenile expungement laws, and the arguments made for and against destroying criminal record

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24. *See* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2463–64 (2020) (discussing low uptake rates and the potential for automatic expungement to increase uptake); *infra* Section III.A and B (discussing scale of impact on data).

25. *See infra* Section II.B.

26. *See infra* Section III.C.

27. *Seal*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "seal" as "to prevent access to"); RIYA SAHA SHAH & LAUREN A. FINE, JUV. L. CTR., JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT 23 (2014) [hereinafter SHAH & FINE, NATIONAL REVIEW] (specifying sealing means "the record is unavailable to the public, but remains accessible to select individuals or agencies").

28. *See infra* Section III.A.

29. *See infra* Sections II.C, II.D, III.B.

information. It focuses in particular on arguments that critique expungement statutes because of underlying concerns about dishonesty or loss of information and lays out responses from champions of expungement laws. Part II presents an original fifty-state survey of the state landscape of juvenile expungement legislation, looking both generally at the key distinctions between state juvenile expungement statutes, and more specifically at the extent to which records are destroyed, and at exceptions for research purposes. Part III then provides context on how these laws can impact and distort data, and on the ways in which those distortions can hinder transparency, accountability, and advocacy. Part IV examines how the relationship between sensitive personal information and research is handled in existing privacy theory and law and considers what can be learned from research provisions in a range of privacy laws. Finally, Part V makes legislation and policy recommendations that balance interests in rehabilitation and access to information.

When data is destroyed, it may be irreversibly lost, thereby impacting research for years to come. Expungement is critically important in part because of the fundamental inequities at the core of our criminal and juvenile justice systems; but maintaining the data from expunged records is important in studying and addressing these inequities. Expungement is also necessary, in part, to combat the host of barriers that can limit opportunities and that can increase recidivism rates, but data from expunged records can play a critical role in accurate analysis of recidivism rates and in addressing these barriers. As states continue to expand access to expungement, finding a cohesive way to address these underlying tensions is increasingly urgent.

I. WHY EXPUNGE?

This Part considers the evolution of juvenile expungement laws and examines how literature about expungement addresses the aims of these laws and their impact on research. It first looks at the initial motivation underlying juvenile expungement and the passage of early expungement laws. It then examines how laws on juvenile expungement have changed in more recent years, particularly as both the prevalence and availability of records have increased. Finally, it considers how concerns about expungement's impact on data fit in with the broader literature on the value of forgetting criminal and juvenile histories. Although many have theorized that expungement

laws are problematic because they constitute a lie or re-write history,[30] the literature has generally not given much attention to the impact on research specifically, nor attempted to distinguish between removing identifiable information linked to specific individuals and destroying de-identified information about government activity.[31]

A. History of Juvenile Expungement

In 1899, Illinois established the nation's first juvenile court system.[32] The Illinois Juvenile Court Act of 1899 emphasized the importance of rehabilitation and treatment over traditional punishment.[33] One of the main initial justifications for having a separate juvenile justice system was to protect the identity of individual children in conflict with the law.[34] Early advocates for the juvenile court system championed the idea of keeping records confidential and of sealing records when the young adults in question turned twenty-one.[35] As other states began to adopt juvenile court systems as part of a growing national movement, most states also adopted the idea of keeping juvenile records confidential.[36] Initially, however, juvenile records could always subsequently be unsealed if a judge determined that there was good cause to do so.[37]

Starting in the 1940s, states began exploring specialized sentencing approaches for children and adolescents.[38] These state approaches were often based on the idea that youthful misbehavior was more likely to be temporary, and that children and adolescents were easier to

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30. *See, e.g.*, Bernard Kogon & Donald Loughery, Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 378, 385–86 (1970) (arguing that both individuals and society are engaging in deceptive practices when records are expunged); Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 735 (1981) (asserting that expungement fosters dishonesty).

31. *See, e.g.*, Kogon & Loughery, *supra* note 30, at 379–80, 383, 386 (noting that expungement has a detrimental effect on research, but elaborating no further on that point, and failing to distinguish between removing identifiable information and destroying de-identifiable information); Franklin & Johnsen, *supra* note 30, at 769 (acknowledging, without elaborating, that expungement negatively impacts research).

32. JOAN GITTENS, POOR RELATIONS 3 (1994).

33. *Id.*

34. JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 114 (2015).

35. *Id.*

36. *Id.*

37. *Id.*

38. 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, 1709 (2003).

rehabilitate.[39] This approach gradually gained traction, and by the mid-1960s, several states had passed legislation allowing for juvenile records to be expunged.[40] This state-by-state approach led one author to note that "[t]he functional process of deleting the adjudication of guilt upon proof of reformation is variously designated expungement; record sealing; record destruction; obliteration; setting aside of conviction; annulment of conviction; amnesty; nullification of conviction, purging, and pardon extraordinary."[41]

The movement to reform sentencing for adolescents and young adults also gained steam at a federal level in the middle of the 20th Century.[42] In 1950, Congress passed the Federal Youth Corrections Act, which allowed individuals between the ages of eighteen and twenty-six who satisfied sentencing requirements to have their records "set aside."[43] The Act was intended to remove social stigma and to expand access to economic opportunity for young adults with records.[44] In passing the Act, Congress relied in part on findings from a committee of judges that convened in 1940 to discuss the impact of juvenile sentences and to make concrete policy recommendations.[45] Drawing heavily from the Committee's report, Congress focused on three main principles in passing the Act: first, that while adolescent development makes young people more likely to engage in misbehavior, this tends to be temporary; second, that young people are easier to rehabilitate than adults; and third, that the Act's goals would be best achieved by setting aside criminal history once youths have gone through a program of rehabilitation.[46]

The use of the phrase "set aside" in the Federal Youth Corrections Act represented a political compromise, with some advocates initially championing a model closer to full expungement, and others focused on restoration of rights without necessarily destroying the record

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39. *Id.*

40. Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 174–78 (1966).

41. *Id.* at 149–50.

42. Colgate Love, *supra* note 38, at 1709.

43. Federal Youth Corrections Act, ch. 1115, 64 Stat. 1085 (1950).

44. Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 484 (1981).

45. *See Conclusions of the Committee, in* REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME 1–2 (1942); *see also* Zacharias, *supra* note 44, at 480 n.15 (chronicling the legislative history preceding the passage of the Federal Youth Corrections Act).

46. Zacharias, *supra* note 44, at 481–84.

itself.[47] In the years following the Act's passage, interpretation of the phrase spurred some disagreement as to whether "set aside" meant something closer to expungement, to record sealing, or to something else altogether.[48] This disagreement raised further questions about whether records that had been "set aside" could be considered in making determinations about eligibility for pre-trial diversion programs, in sentencing determinations, for impeachment, and in decisions about range of civil disabilities.[49]

Congress ultimately repealed the Federal Youth Corrections Act in the mid-1980s with the Sentencing Reform Act of 1984.[50] The Sentencing Reform Act reflected the more retributivist approach to sentencing that had become increasingly popular in the era.[51] For the next two decades, reforms at a federal level primarily focused on implementing more punitive approaches and on adding barriers for individuals with convictions or juvenile records.[52]

B. Recent Evolution of Expungement Laws

In more recent years, the lifelong consequences[53] of criminal convictions have received increasing attention.[54] This led to a growing focus on addressing the barriers to employment, housing, education, and other important interests that individuals with criminal convictions and juvenile adjudications face.[55] Jenny Roberts argues that four factors underlie the growing movement to address lifelong consequences of criminal convictions: "(1) mass criminalization, (2)

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47. *Id.* at 484–85.

48. *Id.* at 477–78.

49. *Id.* at 492–513.

50. Sentencing Reform Act, 18 U.S.C. § 3551; James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 407 (2006).

51. *See* Colgate Love, *supra* note 38, at 1716 (noting the shift in ideology from forgiveness to retributivism).

52. *See id.* (referring to new developments as the "misanthropy of 'new retributivism'").

53. This Article uses "lifelong consequences" in lieu of "collateral consequences" to avoid delineating between "direct" and "collateral" consequences of convictions and adjudications. *See, e.g.*, MARSHA WEISSMAN & EMILY NAPIER, EDUCATION SUSPENDED: THE USE OF HIGH SCHOOL DISCIPLINARY RECORDS IN COLLEGE ADMISSIONS, CENTER FOR COMMUNITY ALTERNATIVES, 2 n.2 (2015), https://www.communityalternatives.org/wp-content/ uploads/2019/11/education-suspended.pdf [https://perma.cc/V8TP-2WW5], for further discussion of this distinction.

54. *See, e.g.*, Roberts, *supra* note 22, at 322 (noting that many states are updating their expungement laws); Murray, *supra* note 22, at 362 (noting many states recently passed new expungement laws).

55. Prescott & Starr, *supra* note 24, at 2462.

mass collateral consequences of criminal records, (3) technological advances that make criminal records easily accessible, and (4) a national obsession with viewing all aspects of people's pasts."[56] This growing movement has led to an increase in state legislation related to expungement, as well as to proposed federal reforms.[57]

Today, many states have recently either passed new expungement laws or passed expansions of existing expungement laws.[58] A 2016 study found that between 2009 and 2014, almost two thirds of states attempted to expand access to expungement.[59] The Collateral Consequences Resource Center reported that in 2018, twenty states passed twenty-nine different bills that expanded their ability to expunge or seal records.[60] In 2019, thirty-one states passed an additional sixty-seven laws that created or expanded record clearing or vacating provisions.[61]

These expansions represent what the Collateral Consequences Resource Center has called a "dizzying variety of approaches."[62] Common legislative changes include expanding eligibility, decreasing waiting periods, adding additional specificity in laying out the legal effects of expungements, and modifying the burden of proof for individuals seeking to expunge their records.[63] Additionally, a number of states have moved from expunging only arrest information to also expunging conviction or adjudication information.[64]

Perhaps the most notable trend in recent years has been the expansion of automatic expungement provisions, under which certain types of criminal or juvenile records are expunged after a specified

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56. Roberts, *supra* note 22, at 325.

57. Murray, *supra* note 22, at 362.

58. Prescott & Starr, *supra* note 24, at 2463.

59. Murray, *supra* note 22, at 369.

60. MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., REDUCING BARRIERS TO REINTEGRATION: FAIR CHANCE AND EXPUNGEMENT REFORMS IN 2018, at 2 (2019), https://ccresourcecenter.org/wp-content/uploads/2019/01/Fair-chance-and-expungement-reforms-in-2018-CCRC-Jan-2019.pdf [https://perma.cc/QR9M-7UYV] [hereinafter *CCRC 2018*].

61. *CCRC 2019*, *supra* note 22, at 1–2. *See also* COLLATERAL CONSEQUENCES RES. CTR., BUMPER CROP OF EXPUNGEMENT LAWS EXPECTED IN 2019, (Apr. 9, 2019), https://ccresourcecenter.org/2019/04/09/bumper-crop-of-new-expungement-laws-so-far-in-2019 [https://perma.cc/8BWC-GUHF].

62. *CCRC 2018*, *supra* note 60, at 9.

63. Murray, *supra* note 22, at 369; *see also* Prescott & Starr, *supra* note 24, at 2502–06 (listing barriers to those eligible seeking expungements); SUBRAMANIAN ET AL., *supra* note 23 (noting how the benefits of expungement have been recognized by many jurisdictions).

64. *CCRC 2018*, *supra* note 60; *CCRC 2019*, *supra* note 22.

period of time or after an individual reaches a certain age, without the need to submit a petition.[65] The movement to expunge automatically, often referred to as the "clean slate movement," is focused on addressing the concern that needing to petition proactively to have records sealed or expunged can be expensive and time-consuming, thereby leading to low uptake rates.[66] Proponents of clean slate provisions also argue that automatic expungement can help reduce unnecessary use of judicial resources.[67] Additionally, proponents have argued that automatically expunging information reduces the likelihood that individuals will be caught in a recidivism cycle where their records make it harder to access opportunities, which in turn increases likelihood of subsequent convictions or adjudications.[68]

Beyond changes at a state level, expungement has seen renewed federal interest in recent years. In 2015, Senators Cory Booker and Rand Paul first introduced the REDEEM Act, which would have allowed for expungement or sealing of records at a federal level for nonviolent juvenile offenses.[69] Although the REDEEM Act would not fully destroy records through expungement, it would make information contained in records harder to access through sealing provisions and would allow records to be treated as if they were never created.[70] More recently, language from the REDEEM Act has been included in the comprehensive Next Step Act of 2019, as well as re-introduced on its own.[71] Outside of juvenile spaces, the Fresh Start Act of 2018, introduced by Representative Steve Cohen, would allow for expungement of some nonviolent offenses.[72] The Clean Slate Act introduced by Representative Lisa Blunt Rochester in 2019 would require automatic sealing of marijuana-related offenses and other minor drug offenses one year after a sentence is completed.[73] The

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65. Prescott & Starr, *supra* note 24, at 2473; *see also CCRC 2019*, *supra* note 22, at 2 (describing how automatic expungement closes the divide between those who are eligible for expungement and those who effectively apply for expungement).

66. CLEAN SLATE TOOLKIT: UNLOCKING OPPORTUNITY THROUGH AUTOMATED-RECORD CLEARING, CLEAN SLATE CAMPAIGN 6 (2018), https://cdn.cleanslatecampaign.org/content/uploads/2018/11/CleanSlate-toolkit.pdf (last visited Nov. 18, 2022).

67. Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403, 437 (2015).

68. *Id.* at 437–38.

69. REDEEM Act, S. 675, 114th Cong.

70. *Id.*

71. Next Step Act of 2019, S. 697, 116th Cong; REDEEM Act, H.R. 2410, 116th Cong.

72. Fresh Start Act of 2018, H.R. 5043, 115th Cong.

73. Clean Slate Act of 2019, H.R. 2348, 116th Cong.

passage of the Fair Chance to Compete Act, which restricts federal agencies from asking about arrest and conviction information until after a conditional job offer has been made, and the FIRST STEP Act, which requires a series of correctional, sentencing, and recidivism reduction reforms, suggest the potential for continued momentum at a federal level for reforms designed to address lifelong consequences of convictions and adjudications.[74]

C. The Case For and Against Forgetting

Remedies designed to address the lifelong consequences of criminal convictions or juvenile adjudications are often sorted into two categories: those focused on forgiving and those focused on forgetting.[75] Expungement represents the quintessential example of a remedy focused on forgetting.[76] Responses focused on forgiveness include policies such as creating certificates of good behavior or granting automatic restoration of rights.[77] While the two approaches are not mutually exclusive—one can, of course, "forgive and forget"—many theorists have argued for a preference for one approach over the

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74. Fair Chance to Compete for Jobs Act of 2019, S. 387, 116th Cong; FIRST STEP Act, H.R. 5682, 115th Cong. (2018).

75. *See, e.g.*, Doe v. United States, 168 F. Supp. 3d 427, 442 (E.D.N.Y. 2016) (finding that "[t]here are two general approaches to limiting the collateral consequences of convictions: (1) the 'forgetting' model, in which a criminal record is deleted or expunged so that society may forget that the conviction ever happened; and (2) the 'forgiveness' model, which acknowledges the conviction but uses a certificate of rehabilitation or a pardon to symbolize society's forgiveness of the underlying offense conduct"); David J. Norman, Note, *Stymied by the Stigma of a Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences*, 31 QUINNIPIAC L. REV. 985, 1006 (2013) (finding that "[p]ardon regimes generally take one of two general approaches: (1) a 'forgetting' model in which the record of the criminal conviction is expunged or erased, effectively forgetting that the conviction ever occurred; or (2) a 'forgiveness' model which acknowledges the continued existence of the conviction but utilizes a pardon to showcase the state's official act of forgiveness"); Murray, *supra* note 22, at 369 (2016) (finding that "[r]ecent reforms at the state level are sometimes divided into two camps that capture the broad objectives of the particular law: (1) 'forgetting' statutes, which aim to expunge or seal various forms of criminal records; and (2) 'forgiving' statutes, which are focused less on expungement and more on how to alleviate the effect of a criminal record").

76. *See, e.g.*, Murray, *supra* note 22, at 369 (describing the two categories of reform as "forgiving" and "forgetting," with expungement being the prime example of "forgetting").

77. Meg Leta Ambrose, Nicole Friess & Jill Van Matre, *Seeking Digital Redemption: The Future of Forgiveness in the Internet Age*, 29 SANTA CLARA COMPUT. & HIGH TECH. L.J. 99, 131 (2012).

other.[78] This Section looks first at arguments made against forgetting records and focuses in particular on two main concerns—dishonesty and limiting the free flow of information—that connect directly to questions about what happens to data after expungement. It then considers the ways in which arguments made in defense of forgetting criminal and juvenile records address these concerns.

1. The case against forgetting

As expungement laws grew in popularity during the mid-20th Century, the movement began to receive a degree of pushback, often as part of the more punitive trends of the 1970s, 80s, and 90s.[79] Over the years, critics have raised a number of concerns about expungement, including pragmatic arguments about the difficulty of fully forgetting records, retributive arguments about records playing an important role in a system of punishment, and arguments which raise concerns about dishonesty and limiting information flow.[80] This Section looks specifically at this latter category, focusing first on concerns about expungement and honesty, and then on a closely-related set of concerns about expungement and restricting information access.

a. Literature about expungement and dishonesty

Some critics of expungement argue that to expunge a record is to condone lying or to re-write history. For some authors, these concerns are based on broad ethical belief systems and an overarching belief in the immorality of lying.[81] For others, the concerns stem from a set of considerations related to eroding trust in democratic systems, or from apprehension about the consequences that dishonesty could have on the lives of specific individuals with expunged records.[82]

In 1970, Bernard Kogon and Donald Loughery, both probation officers, published an article critiquing expungement statutes for the underlying dishonesty.[83] Kogon and Loughery's concern is fundamentally grounded in the idea that expungement

78. *See infra* Section I.C.
79. *Id.*
80. *Id.*
81. *See, e.g.*, Kogon & Loughery, *supra* note 30, at 385.
82. *See, e.g.*, Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 777–78 (2011).
83. Kogon & Loughery, *supra* note 30, at 378.

"institutionalizes a lie."[84] They argue that "[i]n trying to conceal a record we seek to falsify history—to legislate an untruth. Such suppression of truth ill befits a democratic society. Good intentions are no defense."[85]

A decade after Kogon and Loughery's article, Marc Franklin and Diane Johnsen picked up a closely-related thread.[86] Franklin and Johnsen raised a range of concerns about expungement statutes, again elevating concerns with dishonesty, arguing that "[t]he expungement model attempts to rewrite history: it denies reality. This deliberate deception of the public violates our longstanding and generally unquestioned preference for truth over falsity."[87]

More recent authors have periodically continued to advance similar arguments. For example, James B. Jacobs has argued that expungement "seeks to rewrite history, establishing that something did not happen although it really did."[88] Jacobs also argues that the concerns about expungement and dishonesty are amplified in cases where policies sanction lying, such as in states that have defense to perjury statutes that authorize individuals with expunged records to say "no" when asked if they have ever been convicted.[89] He stresses that it is in part because of these concerns related to honesty that expungement has often been viewed as a narrow remedy.[90] Similarly, Margaret Colgate Love has stressed that there may be "understandable anxiety in the community about a remedy many see as premised on a lie."[91]

b. Literature about limiting the free flow of information

Concerns about dishonesty and the expungement process are closely linked to arguments about limiting the free flow of information. This concern has typically focused on specific information about an individual case, although some authors have noted briefly that expungement could impact access to statistical information as well. These arguments have often not drawn a clear distinction between limiting access to *identifiable* information about a specific case and

84. *Id.* at 385.
85. *Id.*
86. Franklin & Johnsen, *supra* note 30, at 734.
87. *Id.* at 749.
88. Jacobs, *supra* note 50, at 411.
89. *Id.*
90. *Id.*
91. Colgate Love, *supra* note 82, at 777.

limiting access to *generalizable* information to be used for research or statistical purposes.[92]

For both Kogon and Loughery, and Franklin and Johnsen, concerns about limiting the free flow of information are primarily tied to the ability of individuals and societies to confront their own attitudes about misconduct.[93] Kogon and Loughery argue that while expungement is promoted as a remedy designed to help individuals with records, expungement can present surprising barriers for those individuals as well, both by making it easier for communities to fail to confront prejudices about individuals with records, and by hindering individual rehabilitative work.[94] They worry in particular that expungement enables individuals to deny past justice involvement rather than to confront that past directly, finding that

> [i]n encouraging him to lie, the society communicates to him that his former offender status is too degrading to acknowledge, and that it is best forgotten or repressed, as if it had never existed at all. Such self-delusion and hypocrisy is the very model of mental ill health – the reverse of everything correctional philosophy stands for.[95]

They also worry that when presented with incomplete record information, employers or other decision-makers may be more likely to assume that an individual has a record, by "filling in the blanks with imaginations far more lurid perhaps than the facts themselves."[96]

Similarly, Franklin and Johnsen find that expungement can make it more difficult for societies to confront attitudes about individuals with records and reentry. Specifically, they argue that "[w]hen the public is deceived by the concealment of criminal records or by lies about their existence, it is deprived of the opportunity to learn to accept convicts, particularly those who have rehabilitated themselves."[97] They also hold that expunging records makes it difficult to learn about key players in the criminal justice system including specific prosecutors, police officers, and judges.[98]

Other authors have expressed more direct concerns about expungement making it difficult to hold individuals accountable and to investigate specific cases. For some, such as T. Markus Funk,

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92. Franklin & Johnsen, *supra* note 30, at 769.

93. Kogon & Loughery, *supra* note 30, at 385; Franklin & Johnsen, *supra* note 30, at 753.

94. Kogon & Loughery, *supra* note 30, at 385.

95. *Id.*

96. *Id.*

97. Franklin & Johnsen, *supra* note 30, at 753.

98. *Id.* at 754.

concerns about expungement are driven by a belief that records may be necessary to hold individuals accountable for serious offenses, and that expungement "effaces the distinction between good and bad behaviors."[99] For others, such as James B. Jacobs, these concerns are tied instead to the value of records in investigating subsequent crimes or in overturning unjust convictions of other individuals.[100]

Some theorists have noted that expungement might impact research and access to statistical information more broadly, but these arguments have generally been limited to brief mentions. For example, Kogon and Loughery note that records have value for research purposes, and that it is important to maximize the ability of researchers to study data contained in records.[101] They stress that "[t]he correctional system is notorious for its paucity of complete and reliable information, so that we can ill afford to deny students of the system access to criminal and delinquency records."[102] Franklin and Johnsen also worry that when records are expunged, the information contained in those records may no longer be available for research purposes, which in turn limits the public's knowledge about the criminal justice system.[103] They argue that this means that "[n]ot only is the public then less able to evaluate the criminal-justice system, but sociologists and criminologists are less able to study the origin and correction of criminal behavior."[104]

2. The case for forgetting

Franklin and Johnsen stress that "it is legitimate to ask whether the benefits of mandatory dishonesty in the expungement context justify the loss of public confidence in government such dishonesty fosters."[105] They also argue that "[a]dvocates of expungement must shoulder a heavy burden of proof before honest ways of achieving the same goals are disregarded in favor of expungement."[106] Champions of expungement respond to these concerns by arguing that the barriers caused by criminal and juvenile records do indeed justify altering those

99. T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287, 289 (1998).
100. Jacobs, *supra* note 50, at 124–25.
101. Kogon & Loughery, *supra* note 30, at 386.
102. *Id.*
103. Franklin & Johnsen, *supra* note 30, at 769.
104. *Id.*
105. *Id.* at 751.
106. *Id.* at 750–51.

records, despite the concerns tied to honesty and to restricting information.[107]

Advocates for expungement laws have argued that forgetting, rather than only forgiving, has both theoretical and pragmatic advantages. On the theoretical side, Jenny Roberts has argued that forgiving may not be the right term to use when referring to arrests that did not lead to convictions and in dealing with criminal and juvenile justice systems that face fundamental issues of unfairness and inequity, because "to seek forgiveness, one must have committed a wrong"[108] and that "in a society in which occupying more than one seat on a subway or sleeping in a cardboard box are criminal offenses, the criminal justice system has become untethered from notions of forgiveness."[109] Roberts also points out that the need to seek forgiveness may be problematic given the vast racial inequity in the criminal and juvenile justice systems.[110] Michael Pinard has argued that, given the pervasive stigma associated with records, particularly for low-income people of color, "[d]espite substantial criticism, expungement and sealing are perhaps the most viable measures—short of a gubernatorial pardon, which is essentially impossible to obtain—to ensure that a person will not be judged forever by his or her record."[111]

Records present overwhelming barriers for millions of individuals. Today more than 77 million adults in the United States have arrest records.[112] The FBI reported more than 10 million new arrests for the 2019 calendar year.[113] Although juvenile arrest rates have been decreasing, the FBI reported almost 700,000 juvenile arrests in 2019.[114] Racial disparities exist at every stage in criminal and juvenile systems, and the burden of criminal convictions and juvenile adjudications is

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107. *See infra* notes 109–112 and accompanying text.

108. Roberts, *supra* note 22, at 338.

109. *Id.* at 339.

110. *Id.* at 340.

111. Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 990 (2013).

112. Gary Fields & John R. Ermshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402 [https://perma.cc/54A5-2EA8].

113. *2019 Crime in the United States: Persons Arrested*, FEDERAL BUREAU OF INVESTIGATIONS, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested [https://perma.cc/F82Y-62XU].

114. *See Estimated Number of Arrests by Offense and Age Group, 2019*, U.S. DEP'T JUST. OFF. JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=1 [https://perma.cc/LH3P-PNKJ].

carried overwhelmingly by Black and Latinx populations.[115] Today, criminal and juvenile records lead to barriers at all stages of life, and can mean that individuals are held back by records created at a young age for years to come.[116] Despite the popular perception that juvenile records remain confidential, questions that ask individuals to disclose juvenile records are common and can create barriers in a broad range of areas including college admissions, access to employment, ability to qualify for professional licensing requirements, and housing access.[117]

Although advocates have made ongoing attempts to address these barriers through forgiveness-based models, evidence suggests that it can be difficult for stakeholders to forgive, and that these approaches may be limited by individual and institutional bias.[118] For example, in the employment context, the U.S. Department of Labor has found that bias and stigma create barriers to employment for individuals with records, and that many employers are wary of hiring individuals who

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115. *See, e.g.*, Pinard, *supra* note 111, at 967–70 (2013) (noting that "[t]he criminal justice system is made up largely and disproportionately of poor African-American and Latino men and women"); JOSHUA ROVNER, THE SENT'G PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS (2016) (stating that as of 2013 Black children and adolescents were more than four times as likely to be committed as white children and adolescents, and that Hispanic children and adolescents were sixty-one percent more likely to be committed than their white peers).

116. *See, e.g.*, Joy Radice, *The Juvenile Record Myth*, 106 GEO. L. J. 365, 386–88 (2018) (listing some collateral consequences of juvenile adjudications including school suspension or expulsion, difficulties applying to college, or challenges finding employment); RIYA SAHA SHAH & JEAN STROUT, JUV. L. CTR., FUTURE INTERRUPTED: THE COLLATERAL DAMAGE CAUSED BY PROLIFERATION OF JUVENILE RECORDS 2 (2016), https://juvenilerecords.jlc.org/juvenilerecords/documents/publications/future-interrupted.pdf [https://perma.cc/NHD7-ZFL5] (arguing that juvenile records "interfere with children's opportunities to move ahead in life and demonstrate their ability to make better choices").

117. *See, e.g.*, Radice, *supra* note 116, at 386–88 (2018) (discussing job applications, college admissions, immigration consequences, and public housing consequences); Eve Rips, *A Fresh Start: The Evolving Use of Juvenile Records in College Admissions*, 54 UNIV. MICH. J. L. REFORM 217, 219 (2020) (discussing prevalence of questions about juvenile records in college applications); SHAH & STROUT, *supra* note 116, at 8–11 (discussing job applications, college admissions, public housing access, and military enlistment); *Understanding Juvenile Collateral Consequences*, http://www.beforeyouplea.com [https://perma.cc/AMX5-S9AC] (discussing education, employment, public housing, public benefits, and voting rights).

118. *See, e.g.*, DEBBIE MUKAMAL, U.S. DEP'T OF LABOR, FROM HARD TIME TO FULL TIME: STRATEGIES TO HELP MOVE EX-OFFENDERS FROM WELFARE TO WORK (2001); Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009) (finding a significant negative effect of a criminal record on employment outcomes, particularly for Black Americans).

report convictions.[119] Similarly, the National Employment Law Project reports that many employers deliberately avoid hiring individuals with records.[120]

It is unsurprising, then, that the limited existing empirical research on the impact of expungement laws demonstrates a positive impact on recidivism rates and on access to employment. Empirical research from J. J. Prescott and Sonja B. Starr, which examines adult expungement in Michigan, finds low uptake rates but strong positive outcomes for the state's expungement statute.[121] Their findings show that while only a small percentage of individuals who were eligible for expungement went on to have their records expunged within five years, individuals with expunged records had a lower likelihood of being subsequently arrested or convicted than the general population of the state overall.[122] Their study also found that individuals whose records were expunged saw significantly improved employment outcomes following expungement, both in employment rate and in overall earnings.[123]

Expungement thus creates a tension between concerns about dishonesty and erasure of information and concerns about addressing the inequitable barriers that criminal convictions and juvenile adjudications erect. This makes it particularly critical to gain a clearer understanding of the different ways in which states have approached maintaining information following expungement, and to consider ways in which the most important forms of information about government action might be preserved, while continuing to directly

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119. MUKAMAL, *supra* note 118.

120. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP. L. PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 (2011), https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf [https://perma.cc/73YA-95HL]. *See also Employment Discrimination Faced by Individuals with Arrest and Conviction Records: Meeting of the U.S. Equal Emp. Opportunity Comm'n*, at 2 (2008) (statement of Naomi C. Earp, Chair, U.S. Equal Emp. Opportunity Comm'n) (asserting that "[f]ears, myths and such stereotypes and biases against those with criminal records continue to be part of the . . . decision making for many employers").

121. Prescott & Starr, *supra* note 24. The study relied on data obtained through a multi-agency data-sharing agreement. *Id.* at 2483. Michigan's adult expungement statute does not completely destroy records, but is in effect much closer to sealing—it allows records to be used by police for limited purposes once expunged. *Id.* at 2481. Adult expungements in Michigan are not automatic. *Id.* at 2483.

122. *Id.* at 2488–92, 2510–17 (discussing uptake and recidivism rates).

123. *Id.* at 2528 (finding that in the year following expungement earnings increased by an average of $4,444 per year, representing a 23% improvement on earnings averages pre-expungement).

address the overwhelming barriers that linking records to specific individuals can create.

II. STATE LANDSCAPE

In *Dickerson v. New Banner Institute*,[124] the Supreme Court found that, although many states have expungement provisions:

> [t]hese statutes differ . . . in almost every particular. Some are applicable only to young offenders . . . . Some are discretionary, . . . while others provide for automatic expunction under certain circumstances . . . . The statutes vary in the language employed to describe what they do . . . The statutes also differ in their actual effect. Some are absolute; others are limited.[125]

This continues to hold true today: the state legislative landscape of expungement and sealing laws is a patchwork quilt of different approaches that continue to vary tremendously in terminology used, in which offenses are eligible, and in long-term impact.[126]

This Section first looks at the components that collectively comprise a juvenile record, and then provides an overview of the state legislative landscape broadly, as well as a fifty-state survey about the extent to which records are physically destroyed following expungement. Finally, it examines the limited statutory exceptions that currently exist for preserving information for research or statistical purposes. Cumulatively, this complex landscape of state laws has left remarkably little clarity on the impact that juvenile expungements have had across the country on access to accurate juvenile justice data.

A. What Is a Juvenile Record?

Expunging juvenile records is complicated in part because of the range of components that collectively make up juvenile records. While juvenile records and criminal records are commonly conflated with rap sheets, records go far beyond rap sheets themselves, and are contained in a range of different databases, often across multiple

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124. 460 U.S. 103 (1983).

125. *Id.* at 121 (internal citations omitted).

126. *See infra* Section III.B; *see also* Radice, *supra* note 116, at 369 (noting that states vary in the permanency and availability of juvenile records; SHAH & FINE, NATIONAL REVIEW, *supra* note 27, at 23 (conducting a national review of the confidentiality of juvenile records and sealing and expungements processes); *Restoration of Rights Project*, COLLATERAL CONSEQUENCES RES. CTR., https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside [https://perma.cc/6HS7-883Y] (last updated 2021) (conducting a fifty-state comparison of expungement, sealing, and other record relief).

agencies.[127] Although expungement is frequently discussed as the destruction of a record, aspects of a record are likely to be held in different places and to require a coordinated approach across multiple agencies to destroy fully the different components that collectively make up the record. As James B. Jacobs points out, "[i]t is essential to recognize the full range of criminal records in order to appreciate the depth and complexity of the challenge facing those who would seek to improve opportunities for ex-cons by restricting access to or use of individual criminal history information."[128]

Rap sheets are the quintessential form of criminal record information.[129] Rap sheets are law enforcement records that reflect a timeline of involvement with criminal or juvenile justice systems for a specific individual, and typically include information about arrests, indictments, judgments, and sentencing.[130] Arrestee information that is often documented as part of creating a rap sheet includes name, birthdate, and fingerprints.[131] The information contained in rap sheets is generally entered into centralized state criminal history databases.[132]

In addition to rap sheets, juvenile history information is often contained in court records.[133] Juvenile court records can include information tied to arrests, indictments, trials, adjudications, and detention.[134] Court records may be particularly sensitive as they can also include medical, psychological, and behavioral records.[135] The amount of information included in court records varies significantly by jurisdiction.[136]

Beyond rap sheets and court records, other forms of juvenile records include pre-sentence reports, which are typically written up by probation officers and, particularly in juvenile cases, often include detailed and personal biographical information; probation reports, which can include information such as psychological evaluations, risk assessments, and information about drug testing; and corrections and

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127. Jacobs, *supra* note 50, at 391–92.
128. *Id.* at 392.
129. *Id.*; Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195, 218 (2015).
130. Jacobs, *supra* note 50, at 392; Lapp, *supra* note 129, at 218.
131. Jacobs, *supra* note 50, at 392; Lapp, *supra* note 129, at 217.
132. Jacobs, *supra* note 50, at 393.
133. Lapp, *supra* note 129, at 219–20.
134. *Id.*; RIYA SAHA SHAH & LAUREN A. FINE, JUV. L. CTR., FAILED POLICIES, FORFEITED FUTURES: A NATIONWIDE SCORECARD ON JUVENILE RECORDS 3 (2014) [hereinafter SHAH & FINE, NATIONWIDE SCORECARD] https://juvenilerecords.jlc.org/juvenilerecords/documents/publications/scorecard.pdf [https://perma.cc/DWZ5-KRAS].
135. Lapp, *supra* note 129, at 219.
136. SHAH & FINE, NATIONWIDE SCORECARD, *supra* note 134.

detention records.[137] In juvenile systems, records may also be kept by schools, which are often granted the ability to access otherwise confidential juvenile record information.[138] Juvenile history disclosed to schools can end up in school records, can lead to school disciplinary proceedings, and may sometimes end up being disclosed by school counselors in the college admissions process.[139]

B. Juvenile Expungement Law and Policy Overview

State approaches to juvenile expungement vary in scope, eligibility criteria, effect, process, and more. In his survey of the recent evolution of state expungement laws, Brian Murray notes that legislative changes

> involve various intersecting objectives: extending eligibility for expungement, including by shortening waiting periods; clarifying the legal effect of an expungement, including in statements made by ex-offenders and with respect to the restoration of rights; authorizing private remedies; and modifying the burden of proof for petitioners seeking expungement. Most significantly, many of these statutes have authorized expungement of conviction information.[140]

This Section provides a broad overview of some of the key ways in which juvenile expungement statutes differ from state to state, with an eye to ultimately considering how these variations impact access to data.

1. Types of records included

State juvenile expungement statutes vary significantly in the specific types of records that are eligible for expungement. While some state approaches apply only to arrest records, others include a broader array of information and may include records of delinquency adjudications as well.[141] States also differ in which components of a record are eligible

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137. Jacobs, *supra* note 50, at 404.

138. SHAH & FINE, NATIONAL REVIEW, *supra* note 27, at 16.

139. *See* Radice, *supra* note 116, at 384, 386–87 (discussing requirements about sharing juvenile records with schools); SHAH & FINE, NATIONAL REVIEW, *supra* note 27, at 16–17 (discussing disclosure of juvenile record information to schools); WEISSMAN & NAPIER, *supra* note 53, at I (discussing the use of school disciplinary information in the college admissions process).

140. Murray, *supra* note 22, at 369.

141. *Compare* HAW. REV. STAT. ANN. § 571-88 (West 2022) (allowing only juvenile arrest records to be expunged), *and* MO. ANN. STAT. § 211.151.3 (West 2022) (same), *with* ARK. CODE ANN. § 9-27-309(b) (West 2022) (destroying arrest records and records of delinquency adjudications), *and* N.J. STAT. ANN. § 2C:52-15 (West 2022) (expunging records of arrest and records of conviction).

for expungement. For example, although the majority of states with juvenile expungement laws allow both law enforcement and court records to be expunged, some states allow only expungement of juvenile court records, while at least one state allows only arrest records to be expunged.[142] Finally, some states attempt to include information beyond law enforcement or court records. In some state statutes, this has meant providing comprehensive definitions of "juvenile record," while in others it has meant specifying broadly that all agencies in possession of juvenile records are responsible for their destruction.[143]

2. Eligibility

Juvenile expungement laws also vary tremendously with respect to who qualifies. This includes variations in which underlying offenses are eligible for expungement[144], the impact that subsequent offenses have on eligibility[145], and when an individual becomes eligible for expungement.[146] Felony offenses and sex offenses are frequently excluded from juvenile expungement statutes, and many states

142. SHAH & FINE, NATIONAL REVIEW, *supra* note 27, at 26 (stating that 25 states and the District of Columbia allow both law enforcement and court records to be expunged); *see also, e.g.*, WIS. STAT. § 938.355(4m) (allowing for expungement of juvenile records alone); HAW. REV. CODE ANN. § 571-88 (allowing for expungement of arrest records alone).

143. *Compare* LA. CHILD. CODE ANN. art. 920 (2022) (defining "juvenile court records" as including "pleadings, exhibits, reports, minute entries, correspondence, and all other documents"), *and* N.J. STAT. ANN. § 2C:52-1(b) (West 2022) (explaining that expunged records "shall include complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, 'rap sheets,' and judicial docket records"), *with* KAN. STAT. ANN. § 38-2312(g) (West 2022) (requiring all juvenile or criminal justice agencies in possession of a record to comply with an order of expungement), *and* OR. REV. STAT. ANN. § 419A.262(19)(a) (West 2022) (explaining that each agency subject to an expunction judgement has 21 days to comply with the notice of expunction).

144. *Compare* KY. REV. STAT. ANN. § 610.330(1)(c) (West 2022) (forbidding expungement of sex crimes or crimes that classify the individual as a violent offender), *with* N.C. GEN. STAT. ANN. §§ 15A–145, 145.4 (2022) (allowing expungement for misdemeanors and nonviolent felonies).

145. *Compare* TENN. CODE ANN. § 40-32-101(a)(1)(E) (2022) (explaining that a person is not entitled to expunction if they are charged with multiple offenses and convicted of at least one of the charged offenses), *with* N.J. STAT. ANN. § 2C:52-13 (West 2022) (explaining that a person's expungement petition will not be heard if they have charges pending against them).

146. *Compare* IND. CODE ANN. § 31-39-8-2 (West 2022) (allowing individuals to petition for expungement at any time), *with* ARIZ. REV. STAT. ANN. § 8-349(A) (2022) (requiring an individual to be at least eighteen years old before applying for expungement).

exclude specific additional misdemeanors as well.[147] Additionally, some states exclude individuals, regardless of underlying offense, if they have been subsequently arrested or are facing pending charges.[148] In some states, individuals are eligible for expungement at any age, while other states require an individual to have reached a specific age in order to qualify.[149] Many states require some form of waiting period between when an arrest was made or an individual was adjudicated delinquent before allowing the individual in question to qualify for expungement.[150]

Another key source of variation between state juvenile expungement laws is the effect an expungement has for individuals with expunged records. In many states, juvenile expungement laws include defense to perjury provisions, which enable individuals to deny that they were ever convicted of, or adjudicated delinquent for, the offense in question without it constituting an act of perjury.[151] Some defense to perjury statutes are narrow and relate only to perjury claims specifically, while other state statutes permit individuals whose records have been expunged to answer "no" when asked about criminal history in any context.[152]

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147. Radice, *supra* note 116, at 411.

148. *See, e.g.*, OR. REV. STAT. § 419A.262 (2022) (restricting eligibility for expungement when law enforcement investigations are pending or when proceedings are pending in a criminal or juvenile court case).

149. *Compare* ARIZ. REV. STAT. ANN. § 8-349(A) (2021) (requiring an individual to be at least eighteen years old before applying for expungement), *and* WIS. STAT. ANN. § 938.355(4m) (2021) (allowing juveniles to petition for expungement once they turn seventeen), *with* CONN. GEN. STAT. § 46b-146 (2021) (allowing juveniles to petition for erasure after they have been discharged from court supervision), *and* IND. CODE § 31-39-8-2 (2017) (allowing individuals to petition for expungement at any time).

150. *See, e.g.*, KY. REV. STAT. ANN. § 610.330(3) (West 2017) (requiring individuals to wait at least two years after the termination of court supervision); OR. REV. STAT. § 419A.262(3)(a) (2022) (requiring individuals to wait at least five years after they were released from court supervision or custody); TENN. CODE ANN. § 37-1-153(f)(1)(A)(ii) (2022) (requiring individuals to wait at least one year since their most recent delinquency or unruly adjudication).

151. SHAH & FINE, NATIONAL REVIEW, *supra* note 27, at 23.

152. *Compare* N.C. GEN. STAT. § 15A-145(b1) (2022) (explaining that someone whose record has been expunged will not be found guilty of perjury for failing to disclose or acknowledge the expunged record), *and* TENN. CODE ANN. § 37-1-153(9) (2022) (same), *with* 705 ILL. COMP. STAT. 405 / 5-915(2.6) (2022) (explaining that once a case is expunged, the individual does not have to disclose that the juvenile record existed), *and* KY. REV. STAT. ANN. § 431.078(6) (West 2016) (explaining that a person whose record has been expunged can "properly reply that no record exists" when asked about the record in any context).

Some state laws also include prohibition on inquiry provisions under which employers, educational institutions, licensing boards, and other actors are restricted in their ability to ask about criminal or juvenile records that have been expunged. For example, New Hampshire requires that

> In any application for employment, license or other civil right or privilege, or in any appearance as a witness in any proceeding or hearing, a person may be questioned about a previous criminal record only in terms such as "Have you ever been arrested for or convicted of a crime that has not been annulled by a court?"[153]

At least four other states include similar restrictions.[154]

3. Process

Finally, expungement laws are increasingly varied in the steps that an individual must take to have a record expunged. Most juvenile expungement statutes still require a petition to be filed for an individual to qualify for expungement.[155] Many of these states require courts to provide notice to individuals whose records are eligible for expungement, although the timing of the notice and requirements for what a notice must include vary significantly between jurisdictions.[156] As an increasing number of states pass clean slate laws, more

153. N.H. REV. STAT. ANN. § 651:5 (X)(f) (2020).

154. *See, e.g.*, 705 ILL. COMP. STAT. 405 / 5-923(c) (2018) (prohibiting employers from asking about whether an applicant has had a juvenile record expunged); KY. REV. STAT. ANN. § 431.078(6) (West 2016) (explaining that a person whose record has been expunged does not have to disclose the record "on an application for employment, credit, or other type of application"); N.C. GEN. STAT. § 15A-153(c), (d) (2021) (preventing employers and educational institutions from requiring applicants to disclose information about expungements and requiring government agencies to notify applicants that they are not required to refer to expungements); OHIO REV. CODE ANN. § 2151.357(G) (West 2014) (barring employers or licensors from asking about a sealed arrest record and allowing people to respond to an inquiry as if the sealed arrest did not occur).

155. *See, e.g.*, ALA. CODE § 12-15-136(a) (2021); DEL CODE ANN. tit. 10, § 1017(a) (2022); IDAHO CODE § 20-525A(1) (2022); 705 ILL. COMP. STAT. 405 / 5-915(1), (2), (2.6) (2022); IND. CODE § 31-39-8-3(a) (2020); KY. REV. STAT. ANN. § 610.330(1)(a) (West 2017); LA. CHILD. CODE ANN. art. 919 (2017); MISS. CODE ANN. § 43-21-159(1) (2019); N.J. STAT. ANN. §§ 2C:52-4.1–5.1 (West 2022); N.M. STAT. ANN. § 32A-3B-21(A) (2022); N.D. R. JUV. P. RULE 19(d) (2022); OKLA. STAT. tit. 10A, § 2-6-109(A) (2021); OR. REV. STAT. § 419A.262(2) (2022); 18 PA. CONS. STAT. § 9123 (2014); S.C. CODE ANN. § 63-19-2050(A)(1) (2019); UTAH CODE ANN. § 80-6-1004(1)(a) (West 2022); VA. CODE ANN. § 16.1-306(C) (2014); WIS. STAT. § 938.355(4m)(a) (2021); WYO. STAT. ANN. § 14-6-241(a) (2019).

156. SHAH & FINE, NATIONAL REVIEW, *supra* note 27, at 28.

individuals have become eligible for automatic expungement.[157] In some states, only limited types of records are eligible for automatic expungement. For example, in Washington, after an individual turns eighteen, records of successfully completed diversion agreements and counsel and release agreements are automatically expunged within ninety days, provided no restitution is owed.[158] In other states, records of conviction or adjudication may also be eligible for automatic expungement. For example, Illinois and Florida have passed more expansive automatic expungement regimes.[159] In Illinois, most juvenile misdemeanor arrests are automatically expunged after one year.[160] Many juvenile delinquency adjudications can be automatically expunged two years after a case is closed if there are no subsequent pending delinquency or criminal proceedings, and if the individual in question received no subsequent adjudications or convictions.[161] In Florida, minors who are not classified as "serious or habitual juvenile offender[s]" can have less serious charges expunged from their records two years after turning nineteen.[162] For individuals classified as "serious or habitual juvenile offender[s]," many records are automatically expunged five years after an individual's twenty-first birthday.[163]

C. Fifty-State Survey: What Happens to Records?

States also take a wide range of approaches with respect to what happens to records themselves following expungement. In some states, records remain largely intact but are made harder to access, while in others, information is truly destroyed. See Figure 1, below. Although both approaches can impact access to data and statistical information, the consequences are irreversible and are likely to be more significant in states in which information is partially or fully destroyed.[164]

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157. *See* Prescott & Starr, *supra* note 24, at 2473–74.
158. WASH. REV. CODE § 13.50.270(1)(a) (2018).
159. 705 ILL. COMP. STAT. 405/5-915.1; FLA. STAT. § 943.0515(1)(b) (2016).
160. 705 ILL. COMP. STAT. 405/5-915.1 (discussing expungement of arrest records).
161. 705 ILL. COMP. STAT. 405/5-915.3 (discussing expungement of information following an adjudication of delinquency).
162. FLA. STAT. § 943.0515(1)(b).
163. FLA. STAT. § 943.0515(1)(a).
164. *See infra* Section III.

Figure 1: Destruction of Records under Juvenile Expungement Laws

Juvenile records can, in some cases, be destroyed[165]	State law references expungement, but records are not destroyed[166]	State law does not expunge juvenile records[167]	Not clearly specified in statute[168]
AL, AZ, AR, CA, CT, FL, IL, IN, MO, MS, MT, NM, NC, ND, OH, PA, SC, VA, WA, WY	CO, DE, ID, KS, KY, LA, MI[169], MN, NJ, OK, TN, UT	AK, GA, IA, ME, MA, NE, NV, NH, RI, SD, TX, VT, WV	HI, MD, NY, OR, WI

Thirteen states do not expunge juvenile records in any way, although these states do all include some form of sealing protections for juvenile

165. ALA. CODE § 12-15-137 (2022); ARIZ. REV. STAT. ANN. § 8-349 (2021); ARK. CODE ANN. § 9-27-309(b) (2022); CAL. WELF. & INST. CODE § 781(d) (West 1994); CONN. GEN. STAT. § 46b-146 (2021); FLA. STAT. §§ 943.0515(2)(a), (3) (2016); 705 ILL. COMP. STAT. 405 / 5-915(0.4) (2022); IND. CODE § 31-39-8-6(a) (2021); KY. REV. STAT. ANN. § 610.330(6) (West 2017); MISS. CODE ANN. § 43-21-265 (2022); MONT. CODE ANN. §§ 41-5-216(2), (3) (2022); N.M. STAT. ANN. § 32A-3B-21(C) (2022); N.C. GEN. STAT. §§ 15a-145–53 (2021); N.D.R. JUV. P. RULE 19(d) (2021); OHIO REV. CODE ANN. § 2151.358 (West 2012); 18 PA. CONS. STAT. § 9123 (2014); S.C. CODE ANN. § 63-19-2050(D) (2019); VA. CODE ANN. § 16.1-306(A) (2022); WASH. REV. CODE § 13.50.270 (2018); WYO. STAT. ANN. § 14-6-241(f) (2019).

166. COLO. REV. STAT. § 19-1-306(1) (2022); DEL. CODE ANN. tit. 10, § 1015 (2012); IDAHO CODE § 20-525A (2022); KAN. STAT. ANN. § 38-2312 (2019); LA. CHILD. CODE ANN. art. 922 (2017); MICH. COMP. LAWS § 712A.18e (2021); MINN. STAT. § 260B.198(6) (2020); N.J. STAT. ANN. § 2C:52-4.1 (West 2018); OKLA. STAT. tit. 10a, § 2-6-109(D) (2021); TENN. CODE ANN. § 37-1-153 (2020); UTAH CODE ANN. § 80-6-1001(3) (West 2021).

167. ALASKA STAT. § 47.12.300(d) (2022); GA. CODE ANN. § 15-11-701 (2021); Iowa Code § 232.150 (2019); Me. Stat. tit. 15, § 3308-C (2022); MASS GEN. LAWS ch. 276, § 100B (2022); NEB. REV. STAT. § 43-2, 108.02 (2019); NEV. REV. STAT. § 62H.170 (2015); N.H. REV. STAT. ANN. § 169-B:35(II) (2015); 14 R.I. GEN. LAWS § 14-1-64 (2022); S.D. CODIFIED LAWS §§ 26-7a-114, -115 (2022); TEX. FAM. CODE ANN. § 58.265 (West 2017); VT. STAT. ANN. tit. 33, § 5119 (2021); W. VA. R. JUB. P., RULE 50 (2022).

168. HAW. REV. STAT. § 571-88 (2022); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-27.1(a)(2) (West 2014); MO. REV. STAT. § 211.321 (2021); N.Y. FAM. CT. ACT § 375.3 (McKinney 1983); OR. REV. STAT. § 419A.269(4) (2022); WIS. STAT. § 938.355(4m) (2021).

169. Michigan's statute references adjudications being "set aside" rather than expunged. MICH. COMP. LAWS § 712A.18e(13).

records.[170] Of the states that have enacted juvenile expungement statutes, twenty directly mandate the destruction of at least some portion of a juvenile record in at least some cases.[171] States vary significantly in the wording they use to describe the process of destroying records. Some states explicitly refer to "destruction" or to "deletion" in defining the term "expungement."[172] Others make it clear in spelling out the procedural steps that need to be taken following an order of expungement that records must be destroyed.[173]

Twelve states take the opposite approach, and have laws that expunge juvenile records in name, but that functionally operate more like sealing statutes, and do not actually lead to information being destroyed.[174] Some states directly specify that records are not to be destroyed as part of the expungement process.[175] Others specifically refer to sealing, either as part of the definition of expungement or in explaining the procedural steps to be taken following an order of expungement.[176] Finally, some state laws do not directly state that

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170. *See supra* Figure 1 (showing states that do not have juvenile expungement laws); Radice, *supra* note 116, at 410 (showing that those thirteen states listed in Figure 1 have sealing laws).

171. *Supra* Figure 1.

172. *See, e.g.*, OHIO REV. CODE ANN. § 2151.355(A) (West 2022) (defining "expunge" as "to destroy, delete, and erase a record, as appropriate for the record's physical or electronic form or characteristic, so that the record is permanently irretrievable"); WYO. STAT. ANN. § 14-6-241(f) (2022) (defining expungement as "to permanently destroy or delete all records, including physical and electronic records, documents and images of documents").

173. *See, e.g.*, ALA. CODE § 12-15-137(b) (2022) (mandating that "[u]pon the entry of a destruction order, all references including arrest, complaints, referrals, petitions, reports, and orders shall be removed from all department or agency official and institutional files and destroyed"); MISS. CODE ANN. § 43-21-265 (2022) (specifying that an expungement order "shall be directed to all persons maintaining the records, shall order their physical destruction by an appropriate means specified by the youth court").

174. *See supra* Figure 1 (referring to Colorado, Delaware, Idaho, Kansas, Louisiana, Michigan, Minnesota, New Jersey, Oklahoma, Tennessee, Utah).

175. *See, e.g.*, DEL. CODE ANN. tit. 10, § 1019(f) (2022) (specifying that "[n]othing contained in this section shall require the destruction of photographs or fingerprints taken in connection with any arrest and which are utilized solely by law-enforcement officers in the lawful performance of their duties in investigating criminal activity").

176. *See, e.g.*, UTAH CODE ANN. § 80-6-1001(3) (West 2022) (defining "expunge" as "to seal or otherwise restrict access to an individual's record held by a court or an agency when the record relates to a nonjudicial adjustment or an adjudication of an offense in the juvenile court"); IDAHO CODE § 20-525A(5) (2022) (specifying that when approved, the court is to order that all such records in the custody of any agency or officially sealed, are removed and not made available to the public); LA. CHILD. CODE

records are sealed, but imply that this is the case by spelling out potential future uses of information about an individual that is contained in expunged records.[177]

An additional five states have statutes that do not clearly specify whether information is literally destroyed.[178] Of these states, some statutes suggest that, following an order of expungement, either destruction or sealing may be possible, leaving the determination to agency decision-making through implicit or explicit delegation.[179] Others do not directly address what happens to records following an order of expungement.[180]

D. Research Exemptions

States that destroy records or portions of records as part of the expungement process may include statutory carve-outs under which

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ANN. arts. 917-26 (2022) (referring to agencies' records being "expunged and sealed" throughout the statute).

177. *See, e.g.*, KY. REV. STAT. ANN. § 610.330(9) (West 2022) (specifying that "[i]nspection of the records included in the order may thereafter be permitted by the court only upon petition by the person who is the subject of such records, and only to those persons named in such petition").

178. *See supra* Figure 1 (referring to Hawaii, Maryland, Missouri, New York, Oregon, and Wisconsin).

179. *See* HAW. REV. STAT. § 571-88(e) (2022) (defining "expunge" as "a process defined by agency policy in which records are segregated and kept confidential, or destroyed"); MD. CODE ANN. CTS & JUD. PROC. § 3-8A-27.1(2) (West 2022) (specifying that "expungement" has the same meaning in juvenile court as it has under the criminal procedure code); MD. CODE ANN. CRIM. PROC. § 10-101(e) (West 2022) (specifying that "'expungement' with respect to a court record or a police record means removal from public inspection: (1) by obliteration [or] (2) by removal to a separate secure area to which persons who do not have a legitimate reason for access are denied access"); OR. REV. STAT. §§ 419A.260(1)(b)(A), (B) (2022) (defining expungement to include the removal by destruction or sealing of a judgment or order related to a contact and all records and references); OR. REV. STAT. § 419A.269(4) (2022) (allowing for destruction of juvenile records on court order but specifying that "destruction of records under this subsection does not constitute expunction").

180. *See* WIS. STAT. § 938.355(4m) (2022) (specifying that a court "may expunge the record if the court determines that the juvenile has satisfactorily complied with the conditions of his or her dispositional order and that the juvenile will benefit from, and society will not be harmed by, the expungement," but not providing additional detail on whether the record is destroyed). New York only provides for juvenile expungement in statute for very limited forms of records, but case law has directly allowed expungement of court records in additional circumstances. *See* N.Y. FAM. CT. ACT § 354.1 (McKinney 2022) (allowing for destruction of fingerprint information); *in re* Daniel PP., 638 N.Y.S.2d 797 (N.Y. App. Div. 1996) (addressing the ability of Family Court to expunge its own records).

some forms of information can be preserved.[181] Examples of carve-outs include information preserved for financial auditing, for assisting with ongoing investigations, and for allowing courts to determine whether an individual has previously been granted an expungement.[182] Several states also include limited exceptions for research or statistical purposes. See Figure 2, below. The fact that states include an exception for research purposes does not mean that states always use the exception: in some states data may still be destroyed even though statutory language provides the discretion to preserve information for research purposes.[183]

181. States that seal information but do not destroy records may also include research or statistical exceptions. *See, e.g.*, MD. CODE ANN. CTS. & JUD. PROC. § 3-8A-27(f) (West 2022) (providing that sealed juvenile justice records may be used for criminal justice research purposes). This Section examines only exceptions in states that destroy records because of the permanent impact that destruction may have.

182. *See, e.g.*, IND. CODE 31-39-8-6(c) (2022) (referencing maintaining information for financial auditing purposes); 705 ILL. COMP. STAT. 405/5-915(0.3)(b) (2022) (discussing ongoing investigations); N.C. GEN. STAT. § 7B-3200(i) (2022) (specifying that the Administrative Office of the Courts may maintain a list of names of individuals whose records were expunged "in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expunction").

183. *See infra* Section III.B (discussing erasure of data in Illinois).

Figure 2: Exceptions for Research or Statistical Purposes

Research exception for identifiable data[184]	Research exception for de-identified data[185]	Exception that might indirectly impact research[186]	No research exception[187]
AZ, IN, PA, SC	AR, IL, OH, MT, WV	MS, WY	AL, CA, CT, FL, MO, NC, NM, VA, WA

Of the twenty states that directly reference destroying or deleting records, eleven include some form of research or statistical exemption, while the other nine have no statutory provision authorizing preservation of information for research.[188] Of the states with research exceptions, four states allow identifiable data to be stored.[189] For example, Arizona specifies that "[t]he juvenile court and the department of juvenile corrections may store any records for research purposes."[190]

184. ARIZ. REV. STAT. ANN. § 8-349(F) (2022); IND. CODE § 31-39-8-6(c) (2022); 18 PA. CONS. STAT. § 9122.5(d)(1) (2022); S.C. CODE ANN. § 17-1-40(C)(2) (2022) (but specifying that data must be further deidentified before it may be shared with external researchers).

185. ARK. CODE ANN. § 9-27-309(e) (2021); 705 ILL. COMP. STAT. ANN. 405 / 5-923(d) (2022); MONT. CODE ANN. §§ 41-5-216(6), (7) (2022); OHIO REV. CODE ANN. § 2151.357(B) (West 2022); W. VA. CODE § 49-5-103(d)(5)(E) (2022).

186. MISS. CODE ANN. § 43-21-265 (2022) (only allowing the destruction of records with the approval of the director of the department of archives and history); WYO. STAT. ANN. § 14-6-241(g)(i) (2022) (allowing an agency to retain records to comply with federal reporting requirements).

187. ALA. CODE § 12-15-137 (2022); CAL. WELF. & INST. CODE § 781(d) (West 2022); CONN. GEN. STAT. § 46b-146 (2022); FLA. STAT. § 943.0515 (2022); MO. REV. STAT. § 211.151(3) (2022); N.C. GEN. STAT. § 15A-153 (2022); N.M. STAT. ANN. § 32A-3B-21 (2022); VA. CODE ANN. § 16.1-306 (2022); WASH. REV. CODE § 13.50.270 (2022).

188. *See supra* Figure 2 (explaining that the states without a statutory provision authorizing preserving information for research are Alabama, California, Connecticut, Florida, Missouri, North Carolina, New Mexico, Virginia, and Washington while the ones containing some form of research exception include Arizona, Indiana, Pennsylvania, South Carolina, Arkansas, Illinois, Ohio, Montana, Mississippi, West Virginia, and Wyoming).

189. *See supra* Figure 2 (noting that Arizona, Indiana, and Pennsylvania allow identifiable data to be stored).

190. ARIZ. REV. STAT. ANN. § 8-349(F) (2022).

Five states allow for information to be preserved but specify that it must be in some way de-identified prior to storage.[191] These exceptions refer to removing names of individuals from a record but do not require additional concrete steps to be taken to ensure that information cannot be reidentified. For example, Ohio specifies that "a public office or agency shall expunge its record relating to the case, except a record of the adjudication or arrest or taking into custody that is maintained for compiling statistical data and that does not contain any reference to the person who is the subject of the order."[192] Arkansas specifies that:

> [The destruction of records] does not apply to nor restrict the use of publications of statistics, data, or other materials that summarize or refer to any records, reports, statements, notes, or other information in the aggregate and that do not refer to or disclose the identity of any juvenile defendant in any proceeding when used only for the purpose of research and study.[193]

The statute includes no additional details on what it means to disclose the identity of an individual defendant.

An additional two states have limited exemptions that might impact research. Wyoming specifies that "[a]n agency may retain records to comply with federal reporting requirements" but provides no details as to what information may be preserved or for how long.[194] Mississippi requires that "[n]o records, however, may be destroyed without the approval of the director of the department of archives and history," but includes no further requirements as to when the department's director might decide not to grant approval.[195]

III. THE IMPACT OF EXPUNGEMENT ON DATA

The patchwork of state laws governing what happens to data following juvenile expungement has left a perplexing landscape. In some states—particularly those with comprehensive automatic expungement laws—the effect of expungement on data is dramatic. When information is destroyed through expungement it can distort research on criminal and juvenile systems in several concerning ways. This Part looks first at the ways in which expungement without preserving information can distort data: it can impact ability to

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191. *See supra* Figure 2 (referring to Arkansas, Illinois, Ohio, Montana, South Carolina, and West Virginia).

192. OHIO REV. CODE ANN. § 2151.357(B) (West 2022).

193. ARK. CODE ANN. § 9-27-309(e) (2021).

194. WYO. STAT. ANN. § 14-6-241(g)(i) (2022).

195. MISS. CODE ANN. § 43-21-265 (2022).

research recidivism rates, to document racial disparities in arrest rates, to assess the need for services, and to study expungement itself. It then uses data from Illinois as a case study for the impact of automatic expungement laws. Finally, it looks at how these limitations intertwine with existing barriers to research related to juvenile justice data.

A. Distortions of Data

When information about records that are expunged is removed from a database, the data that remains is altered. The effects of removing records may look significantly different in states with opt-in expungement statutes than in states with automatic expungement. In opt-in states, fewer records are likely to be removed, but the risk of a strong self-selection bias may be higher. In states that have automatic expungement laws, the number of records removed from a data set is likely to be larger, but the self-selection bias is likely to be lower. This Section looks at four spaces in which data sets are impacted by expungement: research on recidivism rates, research on racial demographics, research on the need for services, and research on the impact of expungement itself.

1. Recidivism

Accurate data is critical to analyzing recidivism rates and longitudinal outcomes, and expungement without preserving statistical information has the potential to skew this research. For example, expunging lower-level offenses without preserving statistical information may bias data on recidivism rates by excluding populations who are already less likely to recidivate in the first place. This effect has been demonstrated in a study of the impact of New York's youthful offender record sealing law.[196] In a study conducted by the Research Foundation for the State University of New York (SUNY), using funding provided by the Bureau of Justice Statistics, researchers examined the impact of sealing on estimates of the demographics of

196. *See generally* MEGAN KURLYCHEK, KIMBERLY MARTIN & MATTHEW DUROSE, BUREAU OF JUST. STAT., DOC. NO. 250561, IMPACT OF CRIMINAL RECORD SEALING ON STATE AND NATIONAL ESTIMATES OF OFFENDERS AND THEIR OFFENDING CAREERS 13–14 (2019) https://www.ncjrs.gov/pdffiles1/bjs/grants/250561.pdf [https://perma.cc/GVE6-JYE4] (finding that misdemeanors accounted for over twice as many sealed records as felonies did). New York's statute focuses on sealing rather than expungement but takes a particularly forceful and comprehensive approach to sealing, under which researchers are generally not able to access sealed records. *Id.* at 1, 3–5 (providing background on the complexities of New York sealing statutes).

justice-involved populations, and on estimates of recidivism rates.[197] The study relied on the fact that the New York State Division of Criminal Justice Services (NYSDCJS) maintains sealed records in a statewide file, which allowed for comparing all arrests and convictions of sixteen and seventeen-year-olds to the more limited data set that would be available to most researchers.[198] Through a partnership with NYSDCJS, researchers were able to obtain information typically not included in research requests.[199] The study found that recidivism rates were higher for individuals whose records remained broadly available to researchers in the system than for populations whose records were made generally inaccessible through sealing.[200] The authors theorized that one reason for this outcome was that "by eliminating many first-time and minor offenders from the population in the study, sealing may reduce the ability to measure system 'successes.'"[201]

2. Race

Accurate information is also critical in tracking inequities, particularly racial inequities. Expungement without preserving data could partially obscure information that speaks to over-criminalization of Black and brown individuals. For example, automatic expungement of juvenile cannabis-related arrests without continuing to track some form of associated data might have an impact on the ability to document harms to Black youth from over-criminalization and inequitable policing in that space.

In the New York sealing study, researchers found that 36.2% of sixteen and seventeen-year-olds who were arrested and whose records remained widely available to researchers in the system were Black youth.[202] They found that 39.9% of individuals who were arrested, including those whose records were sealed and made less accessible to researchers, were Black youth.[203] The data that remained available to researchers in the system after sealed records were removed therefore underrepresents the over-criminalization of Black adolescents.

Research out of the Maryland Data Analysis Center at the University of Maryland found similar results when looking at the impact of the

197. KURLYCHEK ET AL., *supra* note 196, at 1.
198. *Id.* at 5.
199. *Id.* at 3, 5–6.
200. *Id.* at 15.
201. *Id.* at 16.
202. *Id.* at 12.
203. *Id.*

state's adult expungement law.[204] Their research found that Black individuals represented a larger percentage of those who qualified for expungement than of those who were originally arrested.[205] While Black individuals made up 79% of the sample of all arrests, 82% of arrests that were ultimately expunged and removed from the more widely accessible data set were of Black individuals.[206] As with the New York study, the remaining data after expunged records were removed underrepresents the over-criminalization of Black populations.

3. Need for services

Accurate information is also important in determining the need for services. For example, expunging drug arrest records without preserving data has the potential to make assessment of the need for drug treatment services even more difficult. The Maryland Data Analysis Center's research found that in comparing offenses that were expunged with offenses remaining in Maryland's adult criminal record system, drug charges were more likely than most offenses to be expunged from the system.[207] In contrast, weapons and property charges were less likely to be expunged and therefore more likely to remain in the system.[208] These inaccuracies in reported data could lead to underestimates in funding needed for drug treatment services or inaccurate projections of where services are needed.

4. Understanding the impact of expungement laws

Finally, accurate information is important in researching the impact of expungement itself. J.J. Prescott and Sonja Starr's study of expungement in Michigan is the first rigorous evaluation of outcomes for individuals with expunged records and rests on Michigan's approach being more like sealing than destroying records.[209] Prescott and Starr note that

> Empirical studies in this area have been difficult to carry out. Expunged criminal records are, obviously, not typically available to study—and other relevant outcome data, such as wage information

204. Jinney Smith, The Impact of Expungement on the Research Utility of Criminal History Record Data, Presentation at the 2019 Association of State Uniform Crime Reporting Programs / Justice Research and Statistics Association (ASUCRP/JRSA) Conference (slides on file with the Author).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. PRESCOTT & STARR, *supra* note 159, at 2481–82.

> or employment status, are also protected by privacy laws. . . . It leaves policymakers almost entirely in the dark.[210]

They also observe that questions about recidivism and employment outcomes "really *cannot* be answered effectively absent comprehensive access to individual-level data on people whose records have been expunged, and because those records are generally unavailable, research has been stymied."[211] In states where expungement involves full destruction of records, it may be difficult or impossible to demonstrate empirically the impact of the laws themselves. The findings presented in Prescott and Starr's study about reduced recidivism rates and improved employment outcomes following expungement are precisely the sorts of data that legislators and other decision-makers often find politically persuasive, and limitations on ability to engage in similar inquiries in other states may well hinder efforts to pass comprehensive expungement laws.

B. Case Study: Illinois

In some states, the impact of juvenile expungement on system-level data can be measured by comparing published research about juvenile arrests in a specific year from before an expungement law went into effect with the data that remains in the system for that same year after implementation. To better understand the impact of Illinois's automatic juvenile expungement law on research, this Section compares two sets of information about arrests of children in the year 2014. The first is a report about arrests of children in 2014 that the Illinois Criminal Justice Information Authority (ICJIA) published in 2016 before the automatic expungement law went into effect.[212] The second is the data about arrests in 2014 that remained in ICJIA's system in 2019, following the implementation of the new law. [213]

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210. *Id.* at 2465.

211. *Id.* at 2476–77.

212. ERICA HUGHES, ILL. CRIM. JUST. INFO. AUTH., JUVENILE JUSTICE IN ILLINOIS, 2014 8 (2016), https://researchhub.icjia-api.cloud/uploads/JJ_Statewide_Snapshot_2014_final_09132016-191011T20090709.pdf [https://perma.cc/B6NY-ZPJP]. The existence of reports such as this one does not negate the need for continuing to preserve accurate data in the system. For one, these sorts of reports are often not available for specific states or specific years. Additionally, even when helpful reports do exist, the types of information included can be limited. Many research questions will remain unanswered and will require a full data set rather than purely aggregated information to answer.

213. ANALYSIS OF 2014 ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY DATA, provided to the author in Sept. 2019 [hereinafter ICJIA 2019]

Illinois provides for automatic expungement of juvenile records on an unusually large scale. ICJIA's 2016 report listed 36,196 total juvenile arrests during the 2014 calendar year.[214] In 2019, ICJIA was able to provide data on only 13,133 arrests of youth for 2014.[215] In states without automatic expungement, data may still be impacted by expungement laws, but it would likely be on a significantly smaller scale.

In 2016, ICJIA reported that 61% of arrests of individuals ages ten to seventeen were of Black youth.[216] Of the data left in their system for the same calendar year following the passage of Illinois's automatic expungement statute, 55% of arrests of individuals ages ten to seventeen were of Black children and teens, again leaving a data set that underrepresents over-criminalization.[217] A researcher or advocate requesting the data after the passage of the expungement law would see only the 55% number for that calendar year.

This distortion of race data tells a critical story about the vital importance of expungement laws in addressing the inequities in who bears the burdens of lifelong consequences of convictions and adjudications. But it also raises significant concerns about the ability to document racial disproportionality in states where expungement leads to complete destruction of data. Of course, even if the data set showing that 55% of children arrested in Illinois were Black was accurate, it would still represent extreme over-criminalization of Black youth.[218] But by deleting data, it becomes harder to document the full scope of the disparity. This, in turn, can create impediments to policy work aimed at confronting and addressing these disparities.

Finally, the comparison of data in Illinois shows an impact on the types and severity of offenses that remain in the system. Data published before Illinois's automatic expungement law went into effect shows a higher percentage of arrests for drug-related charges and for misdemeanors than the data that remained in their system for the same calendar year following start of automatic expungement.[219] A

214. HUGHES, *supra* note 212, at 8.
215. ICJIA 2019, *supra* note 213.
216. HUGHES, *supra* note 212, at 9.
217. *See* ICJIA 2019, *supra* note 213.
218. For information regarding racial demographics in Illinois, see U.S. CENSUS BUREAU, B01001B, AMERICAN COMMUNITY SURVEY 2019 1-YEAR ESTIMATES, (2019), https://data.census.gov/cedsci/table?q=Illinois%20Race%20and%20Ethnicity&t=Black%20or%20African%20American&tid=ACSDT5Y2020.B01001B (last visited Dec. 19, 2022) (finding that Black children age seventeen and under in Illinois represent 15% of the general population).
219. *Compare* HUGHES, *supra* note 212, at 31, *with* ICJIA 2019, *supra* note 213.

researcher or advocate requesting data today would see a higher percentage of felony arrests for 2014 than actually occurred during that calendar year. If not used carefully, this could lead to barriers in providing needed services and to more punitive policy responses.

C. Connections with Other Laws and Policies that Impact Data Access

Even if expungement statutes perfectly preserved information for research purposes, access to juvenile justice data would continue to be imperfect. States today vary significantly in how they approach sharing justice-system data with external researchers, and access to juvenile data is generally more limited.[220] While some states have clear protocols for how researchers or advocates can request data on juvenile systems, other states do not, or they have protocols in place that make accessing information about juvenile systems particularly difficult.[221]

In addition to barriers to how information is currently shared, there are also a range of barriers that impact what information is tracked originally. State criminal history data systems have several limitations, including that not all arrests are required to be reported to state repositories.[222] While felonies must be reported, the standard on misdemeanors varies by state.[223] Other limitations on how data is tracked at a state level include removal of information once a subject is deceased in some states, and a variety of errors made in entering information that can lead to duplication of arrest records or to mistakenly counting fingerprints submitted for a background check as a record of arrest.[224] These challenges are heightened when dealing with juvenile justice data because states often track a narrower set of data for juvenile systems.[225]

These shortcomings make preserving data following expungement even more important. These hurdles already pose significant barriers to research on criminal and juvenile systems. Because data is already often limited or difficult to access, ensuring that policies protect

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220. *See* MARK MYRENT, JUST. RSCH. & STAT. ASS'N, USING STATE CRIMINAL HISTORY RECORDS FOR RESEARCH AND EVALUATION 4 (2019), https://www.jrsa.org/pubs/factsheets/jrsa-factsheet-chri.pdf [https://perma.cc/W7ZW-L7E3] (expounding upon some of the variations in state practices and the limitations on juvenile data).

221. *See id.* at 2–4 (explaining the different requirements for information accessibility).

222. *See id.* at 4.

223. *Id.*

224. *Id.*

225. *See id.* (explaining that juvenile data and access to juvenile data are limited).

remaining data is particularly critical to avoid amplifying existing challenges.

IV. EXAMPLES FROM OTHER FIELDS

Although research on what should happen with data following expungement is limited, the tension between data privacy or security and research needs is a longstanding legal concern, and a related set of issues are at play on questions related to health data, commercial data, and education data. Existing laws provide a broad range of models for balancing privacy or security considerations with research and statistical considerations.

Research serves as a quintessential example of a beneficial use of data, and the importance of that benefit is frequently directly acknowledged in privacy laws. This Section gives a very brief overview of frameworks for balancing privacy interests with research and data interests. It then provides an examination of the ways that laws related to health information, commercial data, and education records handle exceptions for research and statistical purposes, with an eye to considering how lessons learned from those areas might be applied to expungement laws. It looks particularly at how laws handle de-identification of data, how "research" is defined, when information can be shared for research purposes, and when an individual may request that personal information be deleted.

A. Frameworks for Balancing Privacy and Research Needs

The tension between sensitive personal information and research needs that arises when considering how data should be handled following an order of expungement in many ways parallels the longstanding interplay between public access to information and privacy with respect to "personally identifiable information" (PII). Responses to this tension have often focused on building frameworks for balancing the competing interests at play.[226] These frequently

226. *See, e.g.*, Micah Altman, Alexandra Wood, David R. O'Brien, Salil Vadhan & Urs Gasser, *Towards a Modern Approach to Privacy-Aware Government Data Releases*, 30 BERKELEY TECH. L.J. 1967, 1974–75 (2015) (highlighting gaps and inconsistencies in the handling and releasing of government data); Mike Hintze, *Science and Privacy: Data Protection Laws and Their Impact on Research*, 14 WASH. J.L. TECH. & ARTS 103, 104–05 (2019) (discussing this tension and addressing how privacy laws can best allow for scientific research while protecting personal information); Frederik Zuiderveen Borgesius, Jonathan Gray, & Mireille van Eechoud, *Open Data, Privacy, and Fair Information Principles: Towards a Balancing Framework*, 30 BERKELEY TECH. L.J. 2073, 2076–78 (2015) (discussing the balance between open data and privacy concerns).

involve pragmatic approaches that require context-driven weighing of individual risks and societal benefits.[227] Often these frameworks center around fair information practice principles (FIPPs). Since their development in the 1970s and 1980s, FIPPs have represented commonly shared values with respect to collection of personal data, including transparency, data access, data security, and choice or consent.[228]

For example, in their article "Open Data, Privacy, and Fair Information Principles: Towards a Balancing Framework," authors Frederik Zuiderveen Borgesius, Jonathan Gray, and Mireille van Eechoud identify a set of factors to be weighed in considering difficult questions that pit access to open data against individual privacy.[229] They identify three overarching categories of open data interests: open data can help promote innovation and economic growth, can advance political accountability and democratic participation, and can expand public sector efficiency and service delivery.[230] They also identify three overarching privacy interests: chilling effects on people engaging with public bodies, lack of control over personal information, and social sorting and discrimination.[231] They build on these often conflicting interests to propose a framework that is generally critical of releasing raw personal information as open data, but that potentially allows for releasing some forms of anonymized data with re-use restrictions.[232]

In a related argument, Micah Altman, Alexandra Wood, and collaborators argue that a framework for balancing competing interests in privacy and in data should involve consideration of five factors.[233] These include privacy controls, which are mechanisms that can help increase security of sensitive information; privacy threats,

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227. *See e.g.*, Altman et al., *supra* note 231, at 1974–75 (attempting to match privacy controls to the intended uses, threats, and vulnerabilities); Hintze, *supra* note 226, at 105 (distinguishing between academic research and commercial research and arguing privacy law should accommodate academic academic research); Borgesius et al., *supra* note 226, at 2077 (grouping different types of data into different research categories based on their privacy risks).

228. FED. TRADE COMM'N, FAIR INFORMATION PRACTICE PRINCIPLES, https://web.archive.org/web/20090331134113/http://www.ftc.gov/reports/privacy3/fairinfo.shtm (last visited Sept. 18, 2022).

229. Borgesius et al., *supra* note 226, at 2077.

230. *See id.* at 2078–86 (explaining these objectives, their backgrounds, and how they could fit into a schema for protecting privacy).

231. *See id.* at 2088–93 (expanding upon these concerns and their effects upon the field).

232. *See id.* at 2125–31 (discussing their proposed framework and possible compromises for releasing data).

233. Altman & Wood et al., *supra* note 226, at 2011.

defined as circumstances that could harm the subject of the data due to how the subject's data is collected, stored, or used; privacy harms, such as embarrassment or loss of employment due to data being shared; privacy vulnerabilities, meaning anything that makes it more likely information will be released; and the utility of the data in practice.[234] They use these considerations to propose a framework under which specific privacy controls should be designed to align with individual uses, threats, and vulnerabilities at different stages, from initial information collection through to release of the data and post-release access.[235]

Frameworks for balancing privacy and data interests often distinguish between categories of data that have differing levels of privacy risks attached. This frequently involves making a distinction between pseudonymized data and anonymized data, where pseudonymized data involves replacing unique identifiers such as names with numeric codes or other neutral terms, and anonymized data involves further limiting information so that individual subjects are no longer identifiable.[236] Pseudonymizing information can be helpful to reducing privacy risks, but is generally considered to be inadequate on its own to prevent reidentification.[237] Perfectly

234. *Id.* at 2011–13.

235. *Id.* at 2070–72.

236. *See Opinion of the Article 29 Data Protection Working Party on Anonymisation Techniques*, 0829/14/EN WP216 (Apr. 10, 2014) [hereinafter *Article 29 Data Protection Working Party*] (discussing the benefits and limits of current data anonymization methods and the factors to consider in assessing data anonymization methods); *see also* Borgesius et al., *supra* note 226, at 2114–20 (sorting data types into four categories: raw personal data, pseudonymized data, anonymized data, and nonpersonal data).

237. *See, e.g.*, *Article 29 Data Protection Working Party*, *supra* note 236, at 3 (noting that pseudonymization is not a method of anonymization but merely "reduces the linkability of a data set with the original identity of a data subject"); Borgesius et al., *supra* note 226, at 2117–18 (indicating that pseudonymization is useful but insufficient to protect personal data); Ira S. Rubinstein & Woodrow Hartzog, *Anonymization and Risk*, 91 WASH. L. REV. 703, 710–11 (2016) (finding that pseudonymization is inadequate against reidentification); Robert Gellman, *The Deidentification Dilemma: A Legislative and Contractual Proposal*, 21 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 33, 33–35 (2010) (highlighting the concern of reidentification following deidentification); Arvind Narayanan, Joanna Huey & Edward W. Felten, *A Precautionary Approach to Big Data Privacy*, *in* 24 DATA PROTECTION ON THE MOVE 357, 357 (Serge Gutwirth, Ronald Leenes, & Paul De Hert eds., 2016) (discussing the privacy risks associated with reidentification); PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFF. OF THE PRESIDENT, BIG DATA AND PRIVACY: A TECHNOLOGICAL PERSPECTIVE 38–39 (2014), https://bigdatawg.nist.gov/pdf/pcast_big_data_and_privacy_-_may_2014.pdf [https://perma.cc/RE5M-5BBT] (noting the ease of defeating anonymization techniques).

anonymized or de-identified data would, in theory, fully prevent reidentification of individual subjects and be safe to release broadly without additional restrictions.[238] In practice, perfect anonymization is difficult—perhaps even impossible—and anonymized data may still require additional privacy protections.[239]

Access to data for research purposes can represent a particularly high-value use of personal information. As Mike Hintze notes,

> While privacy laws aim to restrict harmful data practices, they typically also are designed to allow for, or even encourage, uses of personal information that are beneficial and valuable to the individual or society. The inherent tension is often resolved by including reasonable exceptions in the laws to allow for necessary or beneficial data uses . . . . [I]f privacy laws do not take into account and make allowances for the beneficial uses of personal information for research, the advancement of science, the expansion of knowledge, and the realization of new discoveries can be seriously impaired.[240]

Hintze proposes a framework under which reasonable allowances for collecting, sharing, and using data for research in privacy law are encouraged, provided those allowances are paired with protections such as deidentification and other security measures.[241]

B. Research Exemptions in Privacy Laws

While laws from health, commercial, and education spaces have defined "research" in a wide range of different ways, statues from these disparate areas are united in all allowing for expanded access to information when specifically used for research purposes. What it means to de-identify varies significantly in different areas of law and

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238. *See, e.g.*, *Article 29 Data Protection Working Party*, *supra* note 236, at 7 (defining anonymization as "a technique applied to personal data in order to achieve irreversible de-identification").

239. *See, e.g.*, Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1759, 1764–68 (2010) (laying out a list of factors that regulators must use in balancing the risks of reidentification with countervailing values); Rubenstein & Hartzog, *supra* note 237, at 706 (arguing that "the best way to move data release policy past the alleged failures of anonymization is to focus on the process of minimizing risk, not preventing harm"); Borgesius et al., *supra* note 226, at 2118 (asserting that "anonymizing data does not guarantee privacy and fairness"). *But see, e.g.*, Jane Yakowitz, *Tragedy of the Data Commons*, 25 HARV. J.L. & TECH. 1, 5 (2011) (arguing that "concerns over anonymized data have all the characteristics of a moral panic and are out of proportion to the actual threat posed by data dissemination").

240. Hintze, *supra* note 226, at 104–05.

241. *See id.* at 136–37 (providing a list of six recommendations for policymakers).

may turn on expert assessment, may include explicit statutory or administrative criteria for what sorts of information must be removed, or may provide a general framework that avoids specifics.[242] While state juvenile expungement statutes include limited information at best about what it means to preserve data for statistical purposes, models from health, commercial, and educational spaces provide a range of approaches from which to draw.

1. Health data

The Health Insurance Portability and Accountability Act (HIPAA) governs the flow of health care information maintained by covered entities—such as health care clearinghouses, health plans, and some health care providers—and their business associates.[243] HIPAA regulations include a uniquely high level of detail on disclosure of information for research.[244] As with questions about how to handle data from expunged records, the information in question is frequently particularly sensitive. As a result, the model of disclosure of information for research purposes under HIPAA regulations provides a particularly useful comparison.

Disclosure of health information for research purposes under HIPAA is governed by federal regulations known as the Privacy Rule.[245] The Privacy Rule regulates disclosure of Protected Health Information ("PHI") by covered entities.[246] Health information can be used for research without violating HIPAA if the information did not originate from a covered entity, when the information in question does not meet the definition of PHI, or by falling under an exception to restrictions on disclosing PHI.[247]

One way that information can be used for research is by being de-identified to a degree where it is no longer considered to be Protected

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242. *See id.* at 113–14 (providing a brief background on techniques for de-identification compliance).

243. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

244. *See* Hintze, *supra* note 226, at 122–24 (describing several different circumstances under which protected health information can be disclosed for research purposes).

245. 45 C.F.R. §§ 164.500–164.524 (2013); *see also* Stacey A. Tovino, *The Use and Disclosure of Protected Health Information for Research Under the HIPAA Privacy Rule: Unrealized Patient Autonomy and Burdensome Government Regulation*, 49 S.D. L. REV. 447, 448–49 (2004).

246. 45 C.F.R. § 164.502.

247. *See* 45 C.F.R. §§ 164.502 (governing the use and disclosure of de-identified PHI).

Health Information.[248] Adequately de-identified information does not qualify as PHI and is therefore not governed by the Privacy Rule.[249] De-identification under HIPAA requires use of one of two methods: expert determination or "safe harbor."[250]

Under the expert determination method for de-identification, an individual with knowledge and experience in the principles of de-identifying information can determine that the risk that the information could be used to identify the individual in question is "very small."[251] The expert must document the methods and results of the analysis that led to that determination.[252] HIPAA regulations require that the expert have "appropriate knowledge of and experience with generally accepted statistical and scientific principles and methods for rendering information not individually identifiable,"[253] but does not mandate specific training or education requirements to qualify as an expert.[254] HIPAA regulations also do not provide specifics on what counts as a "very small" risk of identification.[255] Experts can de-identify by suppressing some features of the data before it is released, by generalizing data to broader categories, or by replacing specific pieces of information.[256]

Under the safe harbor method for de-identification, a covered entity must remove a specified list of identifying information including names; all geographic subdivisions smaller than state or, in some cases, first three digits of a zip code; dates, except for the year; phone, fax, and e-mail; uniquely identifiable numbers including social security numbers, medical record numbers, health plan beneficiary numbers, and Internet Protocol address numbers; biometric indicators such as fingerprints; full face photographic images; and other unique and identifying numbers, characteristics, or codes.[257]

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248. 45 C.F.R. § 164.502(d)(2).

249. *Id.; accord* U.S. DEP'T OF HEALTH, GUIDANCE REGARDING METHODS FOR DE-IDENTIFICATION OF PROTECTED HEALTH INFORMATION IN ACCORDANCE WITH THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) PRIVACY RULE 5–6, 8 (2012) [hereinafter U.S. DEPT. OF HEALTH].

250. 45 C.F.R. § 164.514(b); *see also* U.S. DEPT. OF HEALTH, *supra* note 249, at 7–8 (expanding upon these two methods).

251. 45 C.F.R. § 164.514(b)(1).

252. *Id.*

253. *Id.*

254. *Id.*

255. *See id.*; *see also* Lori J. Strauss, *De-identifying Protected Health Information*, 19 J. HEALTH CARE COMPLIANCE 51, 52 (2017).

256. Strauss, *supra* note 255, at 52.

257. 45 C.F.R. § 164.514(b)(2).

If information is not de-identified, it may be shared for research purposes in limited circumstances.[258] Under the Privacy Rule, "research" is defined as "a systematic investigation, including research development, testing, and evaluation, designed to develop or contribute to generalizable knowledge."[259] The Privacy Rule distinguishes between research and "health care operations," with the key distinction resting on the requirement that the activity be designed to contribute to generalizable knowledge in order to constitute research.[260]

PHI may be shared for research purposes when individuals give written consent to have their information shared.[261] The Privacy Rule also lays out four exceptions under which PHI may be shared for research purposes without consent: sharing limited data sets, sharing information that is intended only to help prepare for research, sharing information about individuals who have died, and sharing information when an institutional review board has approved a waiver.[262] The limited data set exception allows information that has been only partially de-identified to be shared by covered entities.[263] However, unlike fully de-identified data, which no longer counts as PHI, limited data sets may include information related to dates, including when a patient was born or received health services, the patient's zip code or city of residence, and the patient's employer.[264] This information would not be allowable under provisions for de-identified data.[265] In order to obtain a limited data set without patient consent, researchers and the covered entity must form a data use agreement specifying that the data set recipient will only use or disclose information for the limited research purposes in question.[266] This agreement may take the form of a formal contract or a more informal memorandum of

258. *Id.* § 164.514(e).
259. *Id.* § 164.501.
260. *Compare id.* (defining research to include contributions to generalizable knowledge), *with id.* § 164.506 (explaining requirements for health care operations and not discussing generalizable knowledge). *See also* Tovino, *supra* note 245, at 454 (comparing definitions of research and health care operations).
261. 45 C.F.R. § 164.508.
262. *See* Tovino, *supra* note 245, at 455 (further describing these exceptions).
263. 45 C.F.R. § 164.514I(1).
264. *Compare* 45 C.F.R. § 164.514(e) (listing requirements for limited data sets), *with* 45 C.F.R. § 164.514(a)–(b) (listing requirements for de-identification).
265. 45 C.F.R. §§ 164.514(a)–(b), (e)(2).
266. 45 C.F.R. § 164.514(e)(4)(i).

understanding.[267] This approach allows for providing a more comprehensive data set than fully de-identified information, while still taking steps to protect the privacy of impacted individuals.

2. Commercial data

In May of 2018, the General Data Protection Regulation (GDPR) went into effect in the European Union and created a unified approach across much of Europe to privacy protections and disclosure of personal data.[268] One month later, California passed the California Consumer Privacy Act (CCPA), which is aimed at giving consumers increased control over personal information that businesses collect about them.[269] Both laws include statutory language directly protecting research and statistical uses of data, so long as clear safeguards are in effect.[270]

Under the GDPR, use of personal data requires an explicit legal basis, which can include the consent of the subject, necessity for the performance of a contract where the subject is a party, or circumstances in which the legitimate interests of the individual who controls the data outweigh that of the subject.[271] While "research" is not formally defined, the law allows for research as a lawful use of data, specifying that "[f]urther processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes should be considered to be compatible lawful processing operations."[272] To use data for research purposes under the GDPR, safeguards must be in place.[273] These safeguards can include pseudonymization when pseudonymizing data is compatible with the

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267. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,701 (Dec. 28, 2000).

268. *See* Eur. Comm'n, *A New Era for Data Protection in the EU: What Changes After May 2018*, 1–3, https://ec.europa.eu/info/sites/default/files/data-protection-factsheet-changes_en.pdf [https://perma.cc/TA96-GVCX].

269. Issie Lapowski, *California Unanimously Passes Historic Privacy Bill*, WIRED (June 28, 2018, 5:57 PM), https://www.wired.com/story/california-unanimously-passes-historic-privacy-bill (last visited Nov. 18, 2022).

270. *See, e.g.*, CAL. CIV. CODE § 1798.140 (West 2022) (a business can use de-identified data if the business "[h]as implemented technical safeguards that prohibit reidentification of the consumer to whom the information may pertain").

271. Regulation 2016/679 of the European Parliament and of the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and repealing Directive 95/46/EC, art. 6(1), 2016 O.J. (L 119) 36 [hereinafter GDPR].

272. *Id.* para. 50 at 9.

273. *See id.* para. 49–50 at 9–10 (describing the reasoning and the nature of those safeguards).

underlying research purposes.[274] The law also specifies that when scientific or historical research purposes "can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner."[275]

The CCPA focuses directly on regulating sales of personal information, and thus the impact of the CCPA on research depends heavily on the extent to which the disclosure of data for research purposes qualifies as a sale.[276] The legislation has been heavily critiqued for ambiguous statutory language, including confusion over the definition of what counts as a sale.[277] Some forms of research fall outside of the scope of the CCPA because they do not involve sales. For transactions that might otherwise count as sales, the CCPA exempts disclosures from the definition of "sale" if the disclosure is for "research," defined as "scientific, systematic study and observation, including basic research or applied research that is in the public interest and that adheres to all other applicable ethics and privacy laws or studies conducted in the public interest in the area of public health."[278] The CCPA lays out nine conditions for research, including that information shared must be "subsequently pseudonymized and deidentified, or deidentified and in the aggregate, such that the information cannot reasonably identify, relate to, describe, be capable of being associated with, or be linked, directly or indirectly, to a particular consumer."[279] The conditions for research also specify that

274. *Id.* art. 89(1) at 84–85.

275. *Id.* at 85.

276. *See* Hintze, *supra* note 226, at 128–29 (discussing the focus on sales in the CCPA and arguing that transfers of data for research purposes should not be considered sales of data under the CCPA).

277. *See, e.g.*. Patrick Hromisin, *The CCPA and Law Practices: Figuring Out Where You Stand*, 34 PROB. & PROP. 58, 58–60 (2020) (detailing the conflicting interpretations of vague CCPA provisions, including the definition of what it means to "do business"; Ronald I. Raether, Jr. & Sadia Mirza, *Insight: So the CCPA Is Ambiguous—Now What?*, BLOOMBERG L. (June 14, 2019, 4:00 AM), https://www.bloomberglaw.com/bloomberglawnews/privacy-and-data-security/X8CLJ0IK000000?bna_news_filter=privacy-and-data-security#jcite (last visited Dec. 19, 2022) (explaining several issues CCPA still leaves ambiguous for organizations seeking to comply with the privacy law); Joseph W. Guzzetta, *Beyond the Basics of the California Consumer Privacy Act: Unanticipated Challenges in Complying with the New Privacy Law*, 61 ORANGE CNTY. LAW. 28, 29–32 (2019) (examining five of the ambiguities within the CCPA that are causing problems for businesses preparing to comply); Hintze, *supra* note 226, at 128 (predicting that significant ambiguity will remain "for the foreseeable future").

278. CAL. CIV. CODE § 1798.140(s) (West 2022).

279. *Id.* § 1798.140(s)(2).

there must be safeguards and processes to prohibit reidentification, that the information must not be used for any commercial purpose, and that the information can only be used "for research purposes that are compatible with the context in which the personal information was collected."[280]

Outside of the research exception, the CCPA also more generally allows for businesses to "use, retain, sell, or disclose consumer information that is deidentified or in the aggregate consumer information."[281] To fall within this exception, businesses are required to have safeguards in place that prohibit reidentification and inadvertent release of information.[282] The CCPA provides only minimal context as to what it means to safeguard meaningfully against reidentification and inadvertent release.[283]

Both the GDPR and the CCPA give individuals the right to request that their information be deleted, but the implications for research in both cases are likely limited. Under the GDPR, the right to request deletion of personal data includes a specific exception for research uses. The law specifies that the right to erasure does not apply if processing is necessary "for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes,"[284] and if deleting the information is "likely to render impossible or seriously impair the achievement of the objectives of that processing."[285] Similarly, the CCPA includes a limited right to delete, specifying that companies need not delete information that is "public or peer-reviewed scientific, historical, or statistical research in the public interest that adheres to all other applicable ethics and privacy laws, when the businesses' deletion of the information is likely to render impossible or seriously impair the achievement of such research."[286] In both the GDPR and the CCPA, the research exceptions ultimately highlight an understanding that scientific, historic, and statistical uses of information deserve special attention and can justify maintaining and using data that might otherwise be destroyed or restricted.

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280. *Id.* §§ 1798.140(s)(4)–(8).
281. *Id.* § 1798.145(a)(5).
282. *Id.* § 1798.140(h)(1).
283. *See id.* (providing only four short provisions for guidance).
284. GDPR, *supra* note 271, art. 17(3)(d), at 44.
285. *Id.*
286. CAL. CIV. CODE § 1798.105(d)(6) (West 2022). Hintze also notes that beyond the specific research exception: "The impact of this right [to delete] is likely to be quite limited, however, because there are many exceptions such that companies will be able to decline a request to delete information in most cases." Hintze, *supra* note 226, at 129.

3. School records

The privacy of educational records is governed by the Family Educational Rights and Privacy Act (FERPA), which applies to schools that receive federal funding.[287] Under FERPA, the term "education records" is defined to include "those records, files, documents, and other materials which . . . contain information directly related to a student; and . . . are maintained by an educational agency or institution or by a person acting for such agency or institution."[288] Personally identifiable information under FERPA regulations includes:

> (a) The student's name; (b) The name of the student's parent or other family members; (c) The address of the student or student's family; (d) A personal identifier, such as the student's social security number, student number, or biometric record; (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.[289]

FERPA allows exceptions for disclosing limited "directory information" and for sharing de-identified information.[290] FERPA also includes an exception for sharing information with a third-party organization that is conducting studies on behalf of educational agencies or institutions, which will not lead to the identity of students or parents being publicly disclosed.[291]

Under the regulation governing de-identified information, data may be de-identified in one of two ways.[292] First, educational institutions can share information from records provided that all personally identifiable information is removed, and that the educational institution or agency makes a "reasonable determination" that a student's identity cannot be determined from the information

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287. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.

288. *Id.* § 1232g(a)(4)(A).

289. 34 C.F.R. § 99.3.

290. 20 U.S.C. § 1232g(b)(1)(allowing for "directory information" to be shared); 34 C.F.R. § 99.31(b)(1)(2012) (interpreting FERPA to allow for de-identified information to be shared).

291. 20 U.S.C. § 1232g(b)(1)(F) (allowing personal information to be used for studies in some cases).

292. 34 C.F.R. § 99.31(b).

shared.[293] Alternatively, institutions or agencies may release information for educational research by using a unique identifier to pseudonymize records, provided no information is shared that would allow a recipient to identify a student based on the identifier code, and that identifier codes are not based on a student's social security number.[294]

Records released under the exception for conducting studies on behalf of educational agencies or institutions need not be fully de-identified or pseudonymized, but must be limited to research intended to help improve testing, administration of student aid programs, or instruction, and must be conducted in "such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations."[295] FERPA also requires that the information in question be destroyed when it is no longer needed for research purposes.[296] Department of Education regulations on this exception mandate the creation of a written agreement to govern data use.[297] The written agreement must specify the purpose, scope, duration of the study, and what information will be disclosed.[298] The written agreement must also require that the organization only use PII for the purposes laid out in the agreement, make it clear that information will not be shared in a way that could allow parents or students to be identified, and include a timeframe for destruction of personally identifiable information when it is no longer needed for the study.[299]

As one author notes, the research exception under FERPA "is not a 'general' research exception, but rather, limited to the purposes of the study outlined by the researcher. Thus, the initial study parameters influence the extent to which the data may be released and how the disclosed data may be used."[300] Ultimately FERPA's approach creates a

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293. *Id.* § 99.31(b)(1).

294. *Id.* § 99.31(b)(2). Although FERPA treats this pseudonymization as one form of de-identification, many theorists distinguish between pseudonymization and de-identification. *See supra* Section IV.A (discussing the frameworks for balancing privacy and research needs).

295. 20 U.S.C. § 1232g(b)(1)(F).

296. *Id.*

297. 34 C.F.R. § 99.31(a)(6)(iii)(C).

298. *Id.* § 99.31(a)(6)(iii)(C)(1).

299. *Id.* §§ 99.31(a)(6)(iii)(C)(2)–(4).

300. Elise Young, Note, *Educational Privacy in the Online Classroom: FERPA, MOOCS, and the Big Data Conundrum*, 28 HARV. J.L. & TECH. 549, 580 (2015); *see also* Hintze, *supra* note 226, at 126 (noting that "[t]hese exceptions to consent for certain research

two-tiered model of disclosure of information for research, wherein easily identifiable information may only be shared for relatively narrow research purposes, while de-identified or pseudonymized information can be shared for a much broader range of research projects.

V. POLICY RECOMMENDATIONS

While the tension between confidentiality of sensitive personal information and research needs has been extensively explored in a wide range of areas, it remains underexplored with respect to what happens to data from records following expungement. Although some state laws allow for preservation of information for research purposes, expungement laws and policies rarely detail what sorts of information may be preserved, who can access information saved for research purposes, or what additional security precautions are needed.[301] In the states whose expungement statutes mention that only some form of pseudonymized or de-identified data may be preserved, the legislation does not provide additional context on what it means to pseudonymize or de-identify the data in a way that avoids risk of reidentification.[302] This Section first lays out guiding principles to use in assessing policy solutions, and argues for the importance of access to information at a general, but not an individual level: following an order of expungement, to the greatest extent feasible, we should preserve information that can be used to hold government actors accountable, but not to impose consequences on specific individuals with expunged records. It then uses those principles to inform recommendations for legislative and administrative approaches to preserving data following juvenile expungement. It argues for a tiered model, in which pseudonymized, but not fully de-identified, information may be maintained if it can be held outside of the control of law enforcement or the court system, but only fully de-identified information may be maintained in states that choose to leave law enforcement or courts in control of data.

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purposes under FERPA are narrower than a general research exception. Disclosures for 'education research' purposes are given more favorable treatment").

301. *See supra* Section II.D (identifying which states allow for preservation of data for research purposes).

302. *See supra* Section II.D (detailing the extent to which each state explains its qualifications).

A. Guiding Principles

Like many issues that pit access to information against individual privacy, policy on preserving data following expungement requires a careful balancing of important interests. Expungement of juvenile records is a particularly challenging issue because the interests on both sides are so critical: on the one hand, improper use of data from an expunged record can have a devastating and long-lasting impact on an individual's well-being.[303] On the other, the information that stands to be lost through destruction of data plays a particularly essential role in promoting transparency, accountability, and data-driven policymaking.[304]

This Section discusses rehabilitation first, then access to information. Any legislative solution focused on preserving data following expungement must first and foremost ensure that no individual-level consequences are imposed on individuals with expunged records due to preservation of information for research purposes. Legislative solutions must also ensure that those individuals receive a full chance at rehabilitation, free from the burdens of a record. Because of the devastating impact records can have on individual lives, and because of the racial inequities pervasive at every stage of our criminal and juvenile justice systems, access to accurate information is treated as a secondary goal. Taken cumulatively, this Section argues that policy on preserving data after juvenile expungement should focus on preserving information that speaks to general trends rather than to specific individual actions, with the goal of holding systems, not individuals, accountable.

1. Rehabilitation

Expungement is, at its core, a policy designed to ensure that individuals with records are able to receive a fresh start.[305] It plays a critical role in mitigating lifelong consequences of criminal convictions and juvenile adjudications.[306] If information from an

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303. *See supra* notes 112–118 (exploring the case for expungement).

304. *See supra* notes 93–98 (discussing the case against expungement).

305. *See supra* Section I.A (exploring the history of expungement).

306. *See, e.g.*, Roberts, *supra* note 22, at 330 (detailing how expungement laws are one way to help address some of the collateral consequences of a criminal conviction); Murray, *supra* note 22, at 362 (analyzing how broadening expungement remedies will alleviate the collateral consequences that "enmesh individuals trying to rebuild their lives"); Prescott & Starr, *supra* note 24, at 2462–63 (examining how expungement laws provide a possibility of "sweeping aside" collateral consequences stemming from criminal records, including employment and housing barriers).

expunged record is disclosed, it flies in the face of the underlying policy goal, and can cause significant, lifelong consequences for the individual in question.[307] A perfectly-executed expungement policy should ensure that individuals with expunged records are free from facing any stigma due to the record, and that individuals with expunged records are able to avoid the associated barriers to employment, education, future eligibility for diversionary programs, and other critical opportunities.

In a world where records are heavily stigmatized, expungement remains the most effective way to remove the barriers that records can erect. As Michael Pinard has argued:

> A more robust redemptive-focused approach to criminal records would recognize both that many individuals at some point move past their interactions with the criminal justice system and that those who access criminal records—such as employers—fail to recognize the changes and continue to judge them based on those records regardless of the time that has passed.[308]

In a system where combatting this stigma is difficult or impossible, ensuring the security of information from records is critical to building an approach in which individuals are not trapped in the shadow of their system involvement.[309]

Furthermore, the current proliferation of information about records has left reason to be cautious about allowing the preservation of any information following expungement. If information from a record that was supposed to be expunged is made public, whether through unintentional or purposeful mismanagement, consequences can be long-lasting and devastating.[310] This is particularly troubling given that law enforcement officials continue to have access to information from expunged juvenile records in many states.[311] When

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307. *See supra* Section I.C.2 (considering the consequences of forgetting records, as opposed to forgiving records).

308. Pinard, *supra* note 111, at 992.

309. *See, e.g.*, Roberts, *supra* note 22, at 346–47 (analyzing how companies have found a way to monetize the sale of criminal records and emphasizing the need for legislation to address this issue).

310. *See* Brogan, *supra* note 1, at 7–21 (discussing ways that information from expunged records can be made public and the consequences that can have for the individuals in question); Roberts, *supra* note 22, at 341–43 (discussing challenges of keeping information from expunged records private); *see also supra* Section I.C.2 (discussing lifelong consequences from criminal records).

311. *See, e.g.*, COLO. REV. STAT. ANN. § 19-1-306(3)(a) (2022) (allowing law enforcement agencies to access identification information for juveniles whose records

records are held by law enforcement, the door is left open for law enforcement to use information from expunged records in future investigations. The limited number of states that include statutory language about preserving information for research purposes following expungement provide some reason to worry that when information isn't fully destroyed, it leaves the possibility of uses for functions other than research open.

For example, in Pennsylvania, rules allow for preserving information for "statistical and research purposes,"[312] but also allow for information from expunged records to be retained for "intelligence and investigative purposes,"[313] for "determining compliance with an expungement order,"[314] and for "determining eligibility for a court program, the grading or penalty of an offense, or for other purposes as provided by law."[315] For this reason, any policy that allows some limited form of information to be preserved following expungement should be particularly cautious about leaving information in the hands of law enforcement or courts, and should be especially clear that data may not be stored or accessed for purposes other than research and statistical uses.

The systemic racism pervasive in criminal and juvenile justice systems makes ensuring the security of expunged records particularly urgent. Black populations are much more likely to have juvenile and criminal records than their white peers.[316] Black and Latinx individuals are also more likely to face stigma due to having records than similarly

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were expunged); NEB. REV. STAT. ANN. § 43-2,108.05(3)(h) (2022) (allowing law enforcement officers to access sealed records); OHIO REV. CODE ANN. §§ 2151.357(E)(2), (4), § 2151.358(D)(4) (West 2022) (same).

312. 237 PA. CODE § 173(D) (2022).

313. *Id.* § (E).

314. *Id.* § (B).

315. *Id.* § (C).

316. *See, e.g.*, STATISTICAL BRIEFING BOOK, OFF. JUV. JUST. & DELIQ. PREVENTION (Oct. 31, 2019), https://www.ojjdp.gov/ojstatbb/special_topics/qa11501.asp?qaDate=2018 [https://perma.cc/X5LB-GKFZ] ("For most offenses, black youth were arrested at higher rates than white youth in 2018."); CHARLES PUZZANCHERA, OFF. OF JUST. PROGRAMS, JUVENILE ARRESTS, 2019 (2021), https://ojjdp.ojp.gov/publications/juvenile-arrests-2019.pdf [https://perma.cc/JN7E-4KEQ] ("Arrest rates for murder and robbery were higher for black youth than youth of other races."); Steven Raphael & Sandra V. Rozo, *Racial Disparities in the Acquisition of Juvenile Arrest Records*, 37 J. LAB. ECON. S125, S126 (2019) (finding that Black youth are roughly fifty percent more likely to have booked arrests than white youth).

situated white peers.[317] If information from expunged records is preserved in a way that risks hindering rehabilitation, Black and Latinx populations will disproportionately shoulder the burden.

2. Information

Fully destroying all information following an expungement order might be the safest way to ensure records don't erect barriers for individuals, but it would also have the most significant impact on research. Laws governing preservation of information following expungement need to consider whether and how the information may be stored, as well as questions about how that information can be further shared with a broader audience. Making information widely accessible can increase its utility, but can also pose a significant threat to individual rehabilitation.

Unchecked rights to delete information, with no option to preserve data in any form, pose a particularly significant threat to the integrity of data sets.[318] As Hintze notes, "[i]f a privacy law includes a right for individuals to request the deletion of personal information, there must be an exception available if the personal information is needed for research purposes."[319] Because of this, even in cases where a legal right to delete is recognized, this right tends to be paired with research exceptions, such as those seen in the GDPR and the CCPA.[320]

Perfect access to information would mean not only allowing that material to be stored, but also making that information available to be

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317. *See, e.g.*, Pinard, supra note 111, at 970–71 (discussing a range of ways criminal justice systems marginalize communities of color); MICHAEL CERDA-JARA, AMINAH ELSTER & DAVID J. HARDING, INST. FOR RSCH. ON LAB. & EMP., CRIMINAL RECORD STIGMA IN THE COLLEGE-EDUCATED LABOR MARKET, 1, 2 (2020), https://irle.berkeley.edu/files/2020/05/ Harding_Jara-Cerda-Elster-brief.pdf [https://perma.cc/M3EA-QYF4] (finding that "[c]ollege-educated Black and Latino applicants with criminal records receive fewer callbacks than college-educated white applicants with records"); Bruce Western & Catherine Sirois, *Racialized Re-entry: Labor Market Inequality After Incarceration*, 97 SOC. FORCES 1517, 1537 (2019) (finding that white ex-prisoners had higher employment rates and higher earnings than Black and Hispanic ex-prisoners, despite white ex-prisoners having higher rates of drug addiction); Scott H. Decker, Natalie Ortiz, Cassia Spohn, & Eric Hedberg, *Criminal Stigma, Race, and Ethnicity: The Consequences of Imprisonment for Employment*, 43 J. CRIM. JUST. 108, 114 (2015) (finding that Black ex-prisoners are 125% less likely to receive a callback interview or job offer than white ex-prisoners).

318. *See* Hintze, *supra* note 226, at 110–11 (explaining the consequences on research).

319. *Id.* at 136.

320. *See, e.g.*, GDPR, *supra* note 271, art. 17(3)(d) at 44; CAL CIV. CODE § 1798.105(d)(6) (West 2022).

broadly used for research purposes. The importance of transparency in understanding actions taken by government actors is recognized in many arenas. We place a premium on government transparency in spaces ranging from the Administrative Procedure Act, to the Freedom of Information Act and its state analogues, to the Sunshine Act and its state equivalents.[321] Access to government data can increase transparency, encourage civic engagement, improve government functions, and promote governmental accountability.[322] As Altman and collaborators argue, "improving access to government data also advances the state of research and scientific knowledge, changing how researchers approach their fields of study and enabling them to ask new questions and gain better insights into human behaviors."[323]

These data interests are heightened when dealing with the use of data from expunged records for research purposes because it represents a particularly high-value form of information. Of Borgesius et al.'s three overarching categories of open data interests, information from expunged records is particularly critical in advancing political accountability, and in expanding public sector efficiency and service delivery.[324] A policy that governs how data should be handled following an order of expungement should account for the fact that the information in question can be useful in holding carceral systems publicly accountable, in advocating for evidence-based policy reform, and in ensuring meaningful access to supportive services.[325]

3. Knowledge of the general, rather than the individual

Taking the interests in rehabilitation and in access to information together, this Article argues that in considering how data should be handled after expungement, the priority should be to preserve information at a general level, but not at an individual level. While there is often an important interest in forgetting a specific individual's connection to a record, that interest does not extend to forgetting the data about government activity contained in it, provided the

321. *See* Altman & Wood et al., *supra* note 226, at 1970–72 (discussing the recent efforts of government agencies to be more open).

322. *Id.* at 1970.

323. *Id.*

324. *See* Borgesius et al., *supra* note 226, at 2080, 2083–85 (explaining these categories).

325. *Supra* Introduction; Sections I.C, III.A & III.B (synthesizing the debate surrounding expungement, detailing the effects of information expungement, and providing a case study on how system level expungement can impact research and data).

individual's identity can be adequately obscured. Any policy solution needs to place top priority on the rehabilitation of an individual and that individual's ability to move forward without shouldering lifelong extrajudicial consequences. That priority, however, can be consistent with also continuing to preserve limited information at a general level.

A criminal or juvenile record is ultimately two things: a record of what has happened to the individual who is the subject of the record, and a record of government action. An optimal solution would perfectly preserve information about government action while fully removing any record of a specific individual's activity or experiences: it would hold the government accountable while recognizing the injustice of continuing to impose consequences on individuals. Because a record describes the government doing *something* to *someone*—such as law enforcement making an arrest of someone, or a court adjudicating someone delinquent—perfectly separating the record of government action from the record of what has happened to an individual is impossible. Because of the tremendous sensitivity of the information in question, in cases where preserving information that helps in understanding government action puts an individual with an expunged record at risk, policy should err on the side of restricting access to information.

As a result, legislation and policy that governs preserving data following juvenile expungement should pair heavily-restricted access to pseudonymized data, from which direct personal identifiers have been removed, with partially-restricted access to de-identified data sets. Data that is pseudonymized, but not fully de-identified, would allow for some longitudinal research, but would also involve some attached risk of reidentification. As a result, preservation of pseudonymized data requires an additional set of security measures. De-identified data would be more protective of individual identity but would make many forms of research harder or impossible. The recommendations that follow focus on what this should look like in practice, and on concrete suggestions for legislation and policy.

B. Legislative and Policy Recommendations

In effect, expungement functions as a right to delete within a broader scheme of data protections governing criminal records. In many ways, the closest analogue in existing privacy law is to the research and statistical exceptions built into laws like the GDPR that give individuals some ability to request the deletion of their own

information.[326] Thus while laws like HIPAA and FERPA can continue to allow hospitals and schools to handle complete data sets, and focus instead on regulating how that data is disclosed, expungement laws need to handle not just questions of how records should be disclosed, but also the additional question of whether any actors at all should continue to have access to complete data sets.

A policy designed to govern preservation of information following expungement needs to address what information can be saved for research purposes, whether and how that information may be disseminated, and any additional security measures that are needed to protect against improper disclosure. Some actors merit broader access to information than others. In particular, the current system in which law enforcement continues to be able to access complete records in many states poses a particular threat to rehabilitation.[327]

Because of this, states should be able to pursue one of two paths for handling data from expunged records. Under the optimal path, data should be maintained outside of the control of law enforcement and the court system. Under this approach, laws should allow for maintaining pseudonymized, but not fully de-identified data. In states that are unable or unwilling to allow for data to be maintained outside of the control of traditional justice system actors, law enforcement or courts may continue to maintain a more limited set of information that meets clear regulatory guidelines for de-identification. The latter option would significantly hinder longitudinal research, including questions about recidivism rates and employment outcomes. The former option would allow for preservation of data for longitudinal research but would mean that some types of personal information aren't permanently destroyed in a literal sense. Because of the impact on longitudinal research, the former option is preferable. Under either approach, law and policy must also directly address how information may be further disseminated to broader audiences for research purposes down the road.

State juvenile expungement statutes should clearly address who will be responsible for maintaining information from expunged records. Legislation should also require that rules be promulgated to address specific questions about pseudonymization and de-identification. The

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326. *See, e.g.*, GDPR, *supra* note 271 art. 17, at 43–44 (requiring companies to delete an individual's data at that individual's request but enumerating an exception for research purposes); *see also* CAL CIV. CODE § 1798.105(d)(6) (West 2022) (providing a similar research exception).

327. *Supra* Section I.C (surveying how each state handles records).

recommendations below include guidance for both law and policy, with the understanding that many of the individual details may be too specific for statutory language and should instead be incorporated into rules or procedures.

1. Pseudonymized information stored by a third-party actor

In the optimal solution, an organization that is separate from law enforcement or the court system should be charged with maintaining records following expungement. This could mean that information is stored by an independent nonprofit organization or by a government agency that is set up to track information in a way that cannot be directly accessed by law enforcement. In the alternative, states could also establish a public-private partnership with an academic institution that would be responsible for housing the data. Critically, the organization responsible for storing the information should have a mission focused on research and existing infrastructure for protecting data security. Data should not be housed with either state actors responsible enforcing individual consequences for criminal or delinquent activity, or with for-profit entities that might have a motive for selling data or that have a history of sharing data without adequate oversight.[328] Because this approach would be one step removed from law enforcement and court systems, it would allow for somewhat more sensitive information to be maintained with a reduced degree of risk to the individual whose record was expunged.

Because of this reduced risk, under this approach, the organization in question should be permitted to set up a system in which direct identifiers are removed from a record to reduce risk of accidental disclosure of personal information, without fully de-identifying the information. Direct identifiers should include information that would clearly point toward a specific individual, such as name, social security number, phone number, street address, and fingerprints. For each record, the individual's name should be replaced with a unique identifier code. This method of removing direct identifiers, without fully de-identifying data, is in some ways a parallel to the limited data set approach seen in HIPAA, under which data that is not fully de-

328. The private data broker industry plays a troubling role in sharing information from expunged records and is not consistently regulated. *See generally* Logan Danielle Wayne, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253 (2012) (arguing that the commercial industry needs to be more strictly regulated in this area); Roberts, *supra* note 22, at 328–29 (raising concerns about the ease of accessibility of individual personal information).

identified but that has direct personal identifiers removed may be shared for research purposes, provided a data use agreement is in place.[329] While removing direct identifiers would not completely de-identify data, it would make it harder to connect a record with an individual or to mistakenly disclose individual information.

In order to be able to link information from expunged records with information about subsequent arrests, employment, or other long-term outcomes, a key that links identifier codes with names should be allowed to be maintained but should be heavily protected and available to at most two or three researchers who are carefully trained in best practices in information security. Without maintaining this sort of a key, data related to critical longitudinal questions—particularly those about recidivism rates—would continue to be made permanently inaccessible. With sufficient risk mitigation measures in place, a third-party system in which a key is carefully secured would pair retaining critical data with a high degree of protection for the sensitive information in question.

2. De-identified information stored by law enforcement or courts

In some states, housing information from expunged records with a third-party entity may not be feasible. In states in which expungement remains rare, for example, setting up a separate system for maintaining information from the limited number of expunged records may not be worth the additional administrative effort. In other states, an appropriate third-party organization may not exist. For states in which partnership with a third-party entity is not feasible, law enforcement or courts could continue to maintain some limited de-identified information but should not be permitted to maintain a key that links that information with specific individuals.

Existing privacy laws and regulations lay out several potential approaches to defining de-identification. Some approaches rely on an individual, case-by-case determination, such as the expert determination method in HIPAA regulations.[330] Others involve spelling out specific information that may not be included, such as the Safe Harbor regulations from HIPAA, which specify a host of information that cannot be included in de-identified data sets,

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329. *See supra* Section IV.B.1 (examining the model of disclosure that HIPAA uses, specifically the de-identification steps for protected health information).

330. 45 C.F.R. § 164.514(b)(1); *see also* 34 C.F.R. § 99.31(b)(1) (allowing for de-identification through the removal of personally identifiable information paired with a reasonable determination that no student is identifiable from the data alone or in combination with other reasonably available information).

including all geographic subdivisions smaller than a state, or specific dates except for the year.[331] Other statutes provide a broader definition of de-identification, without giving guidance on specific methodology.[332]

In the context of preserving only de-identified information following expungement, a model that specifies in concrete terms which information may not be included is the best fit. Methods that allow for case-by-case determinations made by experts make more sense in the context of systems in which full data sets are still being stored, and the central question is how that information may be shared or disseminated. Because the question of preserving data after expungement is, at its core, about a large-scale right to delete, and about whether information from expunged records may continue to be stored in any form, case-by-case expert determination is not feasible. Because of the tremendous sensitivity of the information in question, statutory approaches that define de-identification in general terms without giving additional guidance are also not the right fit, as the discretion involved could lead to heightened risk for impacted individuals.

Ultimately, an approach that clearly specifies which information may not be stored affords the highest degree of protection to those most directly impacted. In addition to removing direct personal identifiers such as name, social security number, phone number, street address, and fingerprints, statutory requirements for de-identified data should also require, at a minimum, removal of key dates other than the year and removal of all geographic designations smaller than the state. While this approach would limit the ability to include information from expunged records in longitudinal research studies, it would continue to allow for the information to be used to better understand arrest numbers and demographic trends.

3. Further protection for broader dissemination

Regardless of how information is stored following an order of expungement, an additional set of protections is needed in determining how information may be shared out with researchers, advocates, policymakers, and others following a request for data. Since perfect anonymization of data is often difficult or impossible, and de-identification of information is not a perfect guarantee of the security

331. 45 C.F.R. § 164.514(b)(2).
332. *See, e.g.*, CAL. CIV. CODE § 1798.140(h) (West 2022).

of information, data should be further protected if it is being more broadly released to external researchers.[333]

Because data from criminal and juvenile records, even before expungement, is highly sensitive, these protections are often already in place to protect confidentiality of records before they can be further shared.[334] Similarly, at a federal level, regulations govern disclosure of identifiable information to researchers, and often require creation of an information transfer agreement, use of a privacy certificate that explains the precautions researchers will take, and destruction of materials after a three-year period.[335] In states that do not already have such requirements in place for criminal or juvenile records more broadly, protocols should require that data from expunged records may only be shared with researchers either as part of aggregated data sets, in which information about categories containing under a specific number of individuals cannot be disclosed, or as part of de-identified but not aggregated data that is subject to additional security requirements.

If the information is de-identified but not aggregated, researchers should be required to go through institutional review board clearance and to sign a data use agreement. Although this approach does limit the accessibility of information and makes it harder for groups like policy and legal nonprofits to access information without being part of an academic collaboration, the extreme sensitivity of the information in question merits a heightened degree of caution. Requiring institutional review board clearance provides a structure for ensuring the data will be adequately secured during use, only published in an aggregated format, and destroyed in a timely manner. It also provides a mechanism for accountability should data be used in ways that violate a data use agreement.

4. Additional protections

In addition to prescribing clear protocols for removing connections between individuals and records while still preserving data, legislation should also include additional measures designed to help protect confidentiality. In particular, statutes should include four additional protections designed to further safeguard individuals from facing consequences connected to their records: clear limitations on other

333. *See supra* Sections IV.A & B for discussion of the barriers to perfect anonymization of data.

334. MYRENT, *supra* note 220, at 3.

335. 28 C.F.R. § 22.

uses of the information, penalties for violation of restrictions on disclosure of expunged information, notice requirements for individuals whose records have been expunged about how data will be maintained, and guidance as to how information previously shared for research purposes should be treated.

First, statutory language should explicitly state that information from expunged records may not be used for any other reason beyond research or statistical purposes, and should include clear restrictions on use for future investigations or for determinations about access to diversionary programs. As Jenny Roberts notes, "[l]aws and regulations that limit how decision-makers use criminal records, even when those records are accessible, are critical complements to any sealing or expungement scheme."[336] Although protections requiring removal of direct identifiers or de-identification should on their own be sufficient to protect individuals from future use of their information, additional statutory language to clarify that no individual-level consequences may be imposed is helpful in ensuring an additional degree of protection, and in clarifying that the only permissible use of the information is to track general statistical trends, not to impose any consequences at the individual level.

States like Pennsylvania, which include exceptions for research purposes but also for a range of individual consequences, such as use in future investigations and in determining eligibility for court programs, provide some reason to be concerned that without additional protections, preserving data for research purposes could leave the door open for other uses.[337] States like Wyoming, which include language clarifying that information preserved for research purposes may not otherwise be disclosed, provide some reassurance, but should be expanded upon.[338] An ideal statute would go further, and specify that it is illegal to attempt to reidentify information from an expunged record, and that information from an expunged record may never be used to impose consequences on a specific individual, including but not limited to licensing or employment consequences, heightened penalties for future offenses, determinations about eligibility for diversionary programs, or use in future criminal investigations of any kind.

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336. Roberts, *supra* note 22, at 344.

337. *Supra* Section V.A.

338. WYO. STAT. ANN. § 14-6-241(g)(i) (2022) (specifying that "[r]ecords kept under this paragraph shall not be otherwise disclosed or released except for the federal reporting purposes").

Second, statutes should address concerns about improper handling of data by imposing clear penalties for disclosing expunged information beyond the permitted research and statistical exemption. The only risk to individuals whose records have been expunged under the legislative solutions proposed by this Article stems from improper compliance with the proposed systems. Consequently, it is critical for legislation to ensure that individual actors are incentivized to follow procedures for destruction and preservation of information carefully. States have currently taken a range of different approaches to penalties for disclosure of information from expunged or sealed records, such as criminal sanctions including fines, civil sanctions, workplace sanctions including firing, and denying access to records moving forward.[339] This is also reflected in the American Bar Association's Model Act Governing the Confidentiality and Expungement of Juvenile Delinquency Records, which specifies that unlawful disclosure of information from expunged records constitutes a misdemeanor and that fines may be imposed.[340] Because of the tremendous barriers that disclosed record information can erect for individuals, penalties should be available even when disclosure of information was unintentional. Statutes could also include private rights of action for individuals directly impacted by improperly shared data.

Third, expungement statutes should require that individuals receive written notice upon having their records expunged about the types of

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339. *See, e.g.*, 18 PA. CONS. STAT. § 9181 (2022) (specifying that "[a]ny person, including any agency or organization, who violates the provisions of this chapter or any regulations or rules promulgated under it may: (1) Be denied access to specified criminal history record information for such period of time as the Attorney General deems appropriate. (2) Be subject to civil penalties or other remedies as provided for in this chapter. (3) In the case of an employee of any agency who violates any provision of this chapter, be administratively disciplined by discharge, suspension, reduction in grade, transfer or other formal disciplinary action as the agency deems appropriate"); MD. CODE ANN. CRIM. PROC. § 10-108(d) (West 2022) (specifying that "[a] person who violates this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1,000 or imprisonment not exceeding 1 year or both" and that "[i]n addition to the penalties provided in paragraph (1) of this subsection, an official or employee of the State or a political subdivision of the State who is convicted under this section may be removed or dismissed from public service").

340. MODEL ACT GOVERNING THE CONFIDENTIALITY AND EXPUNGEMENT OF JUVENILE DELINQUENCY RECORDS § 6(g) (AM. BAR ASS'N 2015), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2015/2015-annual-103a.pdf [https://perma.cc/4M9U-9G8J] (specifying that "[t]he disclosure of an expunged record in violation of this section shall be unlawful. A person who discloses an expunged record in violation of this section is guilty of a misdemeanor in the [X] degree or a fine of [$XXX]. This subsection shall not apply to the person whose record was expunged").

information that will continue to be preserved. This notice will help prevent a situation in which individuals feel misled by claims that their records have been destroyed, despite the preservation of limited information for research purposes. Notice requirements will also help increase transparency about what happens to records following expungement.

Finally, statutes should address how information that has previously been received by researchers should be handled following an order of expungement or should require that rules be promulgated to address this issue. The ABA's model statute specifies that the provision governing juvenile expungement

> does not apply [to] any person or agency that previously-received records for research purposes that are subsequently expunged, assuming that person or agency is employed by the state or is under contract with the state and is authorized by [STATE AGENCY] services to conduct such research; and the person or agency conducting the research ensures that all documents containing identifying information are maintained in secure locations and that access to such documents by unauthorized persons is prohibited; that no identifying information is included in documents generated from the research conducted; and that all identifying information is deleted from documents used in the research when the research is completed.[341]

This language could potentially allow for some level of pseudonymized information from expunged records to remain accessible to researchers who had received the information prior to an order of expungement.

The underlying problem of how to handle records that have been previously shared with researchers following expungement is a difficult one. Requiring all researchers who previously received data to remove expunged records would pose tremendous practical challenges. Instead, to most effectively ensure information is protected from records that might later be expunged, front-end protections should apply to all information disclosures. These may include already common existing requirements such as reasonable retention limitation requirements on pseudonymized data shared for research purposes, increased security requirements, and requiring institutional review board clearance to access the information. Because of the practical difficulties of alerting researchers every time a record is expunged, these protections are more likely to make a concrete

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341. *Id.* § 3(f).

difference than requirements that apply only to information previously shared with researchers that is subsequently expunged.

CONCLUSION

Before the advent of automatic expungement statutes, the impact of expungement on data about juvenile systems was relatively limited. As automatic juvenile expungement laws expand in popularity, the impact on data sets has the potential to grow more pronounced. The existing patchwork of state approaches to regulating preservation of data following expungement has become increasingly outdated. As states make important strides in expunging more records, a strengthened system for regulating how information is tracked for research and statistical purposes is necessary. Without carefully designed data protections for research purposes, states run the risk either of erasing information that plays a vital role in understanding the impact of juvenile justice systems or, in the alternative, of preserving too much information and leaving individuals vulnerable to exposure of information that could hinder their paths to rehabilitation.

While this Article focused specifically on juvenile record expungement, similar questions about impact on data arise when considering expungement of adult records. Similar questions also arise with respect to information that is sealed rather than expunged. While a much smaller percentage of adult records are expunged than of juvenile records, concerns about distortion of data still apply, albeit at a smaller scale, and similar protections to ensure access to purely statistical information, while still protecting individual identities, may also be needed. Similarly, in considering how information from sealed records is made available for research, a closely related set of questions apply.

The need to protect individual record information from disclosure and the need to preserve statistical information for research and advocacy purposes function as two sides of the same coin. In a system rife with racial inequity and far-reaching punitive consequences, information from records can both hold individuals back if used improperly and can help shine a light on inequity and hold government actors accountable. Research exceptions should be designed to set individuals and systems alike on a positive path forward.