Discretion and Uniformity in Criminal Record Clearance: Maximizing Impact and Racial Equity

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ABSTRACT

Criminal record relief, which refers to any process aimed at providing individuals with a second chance at an improved quality of life by limiting the visibility of their criminal records, is subject to the dual forces of discretion and uniformity. This paper explores the delicate balance between these two aspects within the context of record clearance policies, emphasizing their implications for racial equity and maximization of positive outcomes within the American legal system. The analysis reveals how this balance could positively impact individuals' access to employment, housing, and education, critical areas where the persistence of records can create significant barriers.

Criminal record relief offers transformative potential to mitigate the enduring consequences of records. Automatic record sealing, in

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particular, is the most direct path toward equity in the legal system by reducing the amount of potentially harmful discretion exercised by various stakeholders, including judges, prosecutors, and law enforcement involved in record sealing processes.

While discretion plays a pivotal role in determining the eligibility and outcomes of record clearance petitions, its influence underscores the subjectivity inherent in the current system, where personal judgments can significantly impact an individual's future, and individuals' biases (for example, based on race and ethnicity), can lead to and exacerbate systemic inequities. On the other hand, discretion, when properly applied, can allow for a nuanced consideration of each case, and acknowledges that a one-size-fits-all approach to criminal records also may not be equitable or just.

Uniformity, conversely, ensures consistency and predictability within the justice system. It aims to prevent arbitrary decision-making, bias, or unequal treatment of individuals seeking record clearance. Uniform policies and guidelines can establish clear eligibility criteria, streamline the clearance process, and promote transparency, reducing the risk of discrimination and favoritism. Such an approach minimizes the potential for personal biases to influence decisions, fostering a more equitable legal system. Introducing the element of automatic clearance can support a uniform approach.

The tension between discretion and uniformity is exemplified in the implementation of Clean Slate policies, which automatically clear certain types of records after a period of law-abiding behavior. Using novel estimates of the population of people with records in each state, disaggregated by race and ethnicity, we show how Clean Slate policy tradeoffs impact racial equity outcomes. Failure to apply these policies uniformly can exacerbate existing disparities in the legal system. At the same time, there may be a role for discretion when it comes to potentially clearing more serious records, so that the individual circumstances of such cases can be fairly evaluated, and a determination can be made as to whether an individual should qualify for relief.

Ultimately, the challenge for policymakers lies in designing record clearance policies that acknowledge the complexities of individuals' journeys toward rehabilitation and reintegration while safeguarding against potential disparities and injustices. Achieving this balance is essential to the success of record clearance, particularly Clean Slate automatic record clearance policies, as a means of addressing the collateral consequences of criminal convictions and increasing opportunities for those impacted by the legal system.

INTRODUCTION

Criminal record relief is a pivotal component in the ongoing evolution of the American legal system toward a more just and equitable process. Record relief provides opportunities to hundreds of thousands of individuals seeking employment, housing, and other aspects of a stable, law-abiding, and productive life. Providing opportunities for individuals to move beyond their past after serving their sentence through record relief acknowledges that past mistakes should not result in perpetual punishment under the law.

Numerous restrictions, known as collateral consequences, limit individuals with conviction records from accessing many forms of employment and business, certain occupational licenses, housing, voting, higher education, and other rights and opportunities afforded to citizens of the United States. Nationwide, there are over 42,000 collateral consequences of convictions, many of which are applied indefinitely and are not necessarily related to the offense type or severity.[1] This system of punishment that extends well beyond the completion of one's sentence effectively excludes individuals with conviction records from participating in the economy and prevents them from fully reintegrating back into society.

Locking individuals with records out of large parts of society, and the labor market in particular, has significant consequences not only for those individuals, but for communities and society at large. In terms of public safety, gainful employment can reduce the odds that a person released from prison will be incarcerated again, not only because having a legal job that pays well can mean that individuals will not have to resort to illegal activity in order to survive, but also because employment provides a structured routine and exposure to law-abiding peers that can provide a positive influence.[2]

With regard to the economy, the estimated loss in gross domestic product every year resulting from shutting people with records out of the workforce is 78 to 87 billion dollars annually.[3] As of May 2024, there were only 83 workers for every 100

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[1] *See Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION (2024), https://niccc.nationalreentryresourcecenter.org/consequences [https://perma.cc/ZPX8-KU5Z].

[2] *See* Jennifer Doleac, *Can Employment-Focused Programs Reduce Reincarceration Rates?*, ECONOFACT (June 29, 2018), https://econofact.org/can-employment-focused-reentry-programs-keep-former-prisoners-from-being-reincarcerated [https://perma.cc/U8VT-M2R4]; Joe LaBriola, *Post-prison Employment Quality and Future Criminal Justice Contact*, 6 RSF: RUSSELL SAGE J. SOC. SCIS. 154, 155 (2020).

[3] Cherrie Bucknor & Alan Barber, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies*, CTR. FOR ECON. & POL'Y RSCH. 1, 1 (June 2016), https://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf [https://perma.cc/267U-NJY5].

open jobs in the U.S.[4] Opening up employment opportunities to people with records who have paid their debt to society and remained crime-free through record relief policies, therefore, increases the available talent pool for employers and can simultaneously benefit public safety. Record relief is thus an important mechanism for promoting rehabilitation and reintegration into society for those impacted by the legal system. Record clearance policies underscore the capacity for individuals to change and contribute positively to their communities, and automatic record sealing (also known as "Clean Slate") is a form of relief that can efficiently foster redemption, empower personal growth and strengthen communities and the economy. While petition-based record clearance processes can be costly and complicated for individuals to navigate resulting in low numbers of eligible individuals receiving relief, automatic record relief policies shift the burden of clearance to the state and can thereby contribute to a more equitable and compassionate society.[5] Optimally, record relief policies balance accountability with opportunities for individuals to rebuild their lives.

Within the framework of the American legal system, record relief in states navigates the dual forces of discretion and uniformity. Discretion is often afforded to judicial authorities, namely prosecutors and judges, and allows for individualized assessments of eligibility, considering the nature of the offense, rehabilitation efforts, and the passage of time. At the same time, there is a need for record relief policies to be applied uniformly, underscoring the necessity for consistent and transparent criteria to guide the decision-making process across jurisdictions. Once eligibility criteria are met, as laid out by law, there is no reason to deny individuals meeting those criteria from receiving relief. Further, uniformity is critical to ensuring fairness and reducing systemic disparities in the legal system. As the dynamic between discretion and uniformity is examined, it becomes apparent that there must be a balance between these two forces in shaping the effectiveness and fairness of criminal record relief mechanisms.

As a uniformly applied mechanism of record relief, Clean Slate policies play an important role in mitigating racial and ethnic disparities and offer a more equitable path toward ending the collateral consequences of convictions, which persist long after individuals have served their sentences. However, in order to move closer toward racial equity in the legal system, discretion is imperative for those cases which require close examination of the eligibility of serious records for relief, which should not be excluded out of hand, under the law.

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[4] Stephanie Ferguson & Isabella Lucy, *America Data Works Center: Capturing the Current State of the U.S.*, U.S. CHAMBER OF COM. (June 24, 2024), https://www.uschamber.com/workforce/america-works-data-center [https://perma.cc/CP8E-EDP3].

[5] *See* Colleen Chien, *America's Paper Prisons: The Second-Chance Gap*, 119 MICH. L. REV. 519, 574 (2020); J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2467 (2020).

I. WHAT'S THE PROBLEM?

Implementing automatic record clearance systems introduces a significant potential challenge regarding the appropriate exercise of discretion. While these systems aim to reduce the administrative burdens and barriers faced by individuals seeking post-sentence relief, they can also limit the nuanced decision-making that human oversight provides. However, prosecutorial discretion should not be limited entirely. Although research has shown that prosecutorial discretion in charging and the plea-bargaining process can result in racial inequities,[6] other scholars have pointed out that prosecutors can play a pivotal role in the pursuit of racial justice as well.[7]

By streamlining post-sentence record clearance relief mechanisms through an automatic clearance process, we can effectively allocate more time and resources for prosecutors to engage in their critical role during the earlier stages of the justice process. This allows prosecutors to thoroughly assess each case's unique circumstances, ensuring that charges are appropriately calibrated to reflect both the severity of the offense and the context in which it occurred. Importantly, this creates a role for the thorough examination of more serious records that could become eligible for relief after individuals meet certain eligibility criteria (e.g., completing their sentences and remaining crime-free).

Ultimately, this approach enhances the legal system's ability to achieve equity and justice. Individuals who have served their sentences can benefit from a more efficient pathway to clearing their records, reducing the long-term consequences of their convictions. In addition, prosecutors can exercise their discretion more fully during the charging phase, ensure that decisions are made with the utmost consideration for fairness and the pursuit of justice, and play a role in the record relief determination process for more serious records.

Of utmost importance is ensuring that discretion is not misused in the automatic record clearing process, as the misuse of discretion can not only undermine the intended benefits of clearing records but also comes with a cost, both in terms of state resources and the prosecutor's office's time. Implementing automatic software systems to determine eligibility is a step forward in efficiency and fairness, as demonstrated in Utah, where an algorithm developed by Code for America had a final accuracy rate of 99 percent in determining individuals' eligibility, compared to

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[6] *See* Besiki Luka Kutateladze et al., *Opening Pandora's Box: How Does Defendant Race Influence Plea Bargaining?*, 33 JUST. Q. 398, 401 (2016); Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 787–88 (2018).

[7] *See* Roger A. Fairfax, Jr., *Prosecutors, Ethics, and the Pursuit of Racial Justice*, 19 OHIO ST. J. CRIM. L. 25, 32–33 (2021); Hannah Shaffer, *Prosecutors, Race, and the Criminal Pipeline*, 90 U. CHI. L. REV. 1889, 1891–92 (2023).

a rate of 97.3 percent when performed by humans.[8] However, the lingering potential for misuse of discretion by prosecutors introduces a layer of complexity and can lead to a break in automation.

In states with petition-based processes, where prosecutors hold the power to object and request a judicial hearing, there may be a surprisingly low rate of leveraging this authority, although a lack of data within and across states makes a systematic empirical analysis impossible. However, Sarah Munro, Michigan Advocacy Program Pro-Bono Manager, notes that in Michigan "virtually every [petition-based record clearance] application that we file is granted at the hearing."[9] The lack of exercised discretion undermines a potential argument in favor of increased discretion during the automatic clearance process for most records that removing discretion is problematic. In fact, removing discretion to clear those records that have been determined to be eligible for relief under the law in a state-initiated and timely manner can free up prosecutors' time. This is especially salient given that, in the case of Michigan's Clean Slate law that included an expansion of the petition-based system, significant delays in the receipt of petition-based relief.[10]

The issue becomes even more nuanced when considering the potential pendulum swing of prosecutorial discretion. If too much discretion is eliminated in the post-conviction automatic record-sealing process, prosecutors may adopt a more stringent approach overall, for instance by charging individuals more harshly at the front end of the legal system process. This could lead to unintended consequences for individuals seeking relief. However, excessive discretion can perpetuate disparities, internal bias, and injustices within the system.

Other research published in the current issue shows that prosecutorial discretion is not evenly applied across jurisdictions within the same state. In California, data on the implementation of automatic cannabis record clearance revealed that prosecutorial challenges to relief were not evenly distributed by county. While some counties had few, if any, challenges, Madera County prosecutors challenged over 10% of eligible records, and Fresno, Kern, Napa, and Sutter challenged 5 to 7%.[11] It remains unclear why prosecutors challenged the cannabis sealings, and why challenges varied so widely between counties, but this finding highlights that

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[8] Sudbury Consulting, LLC, *Utah Clean Slate Implementation and Evaluation*, UTAH JUD. COUNCIL 1, 31 (July 19, 2021), https://legacy.utcourts.gov/utc/judicial-council/wp-content/uploads/sites/48/2021/07/Final-Clean-Slate-Report-Presentation-7.19.21.pdf [https://perma.cc/5ULP-25Z9].

[9] Anna Liz Nichols, *Three Years Later: The Wins and Wait Times of Michigan's 'Clean Slate' Expungement Laws*, MICH. ADVANCE (Apr. 11, 2024, 3:33 PM), https://michiganadvance.com/2024/04/11/three-years-later-the-wins-and-wait-times-of-michigans-clean-slate-expungement-laws/ [https://perma.cc/9BLP-NUAD].

[10] *Id.*

[11] *See* Sarah Gersten et al., *The Promise and Pitfalls of Cannabis Record Clearance: A Case Study*, 22 OHIO ST. J. CRIM. L. (forthcoming 2025).

prosecutorial discretion can result in unequal application which could have far-reaching consequences for individuals and communities.

The solution may lie in establishing clear guidelines and oversight mechanisms to ensure that prosecutorial discretion is used judiciously and in alignment with the goals of rehabilitation and equity. Recognizing that prosecutors play a vital role in the criminal legal system, their discretion should be carefully managed to prevent its misuse while allowing for the consideration of individual circumstances. Prosecutorial discretion is exercised early in a person's involvement with the legal system since prosecutors choose which charges to pursue, what to present to grand juries, and when to negotiate plea agreements. It must be used without exacerbating existing disparities in the legal system.

Ultimately, the aim of record relief should be to create a system where discretion serves the interests of justice without impeding the opportunities for those seeking to rebuild their lives. Specifically, the uniform application of automation for those deemed eligible by state legislatures should occur with little to no prosecutorial discretion. Simultaneously, as the availability for relief is expanded to more conviction types, we should carefully consider how prosecutorial discretion can be used in the petition-based process to ensure people with serious offenses who demonstrate rehabilitation can receive the benefits of a clear record. Finding the balance between discretion and automation is critical, as equally important is the role of uniformity in ensuring consistency and fairness across the board.

II. UNIFORMITY IN RECORD CLEARANCE AND CONSISTENCY AND PREDICTABILITY IN THE LEGAL SYSTEM

Uniformity plays a pivotal role in automatic record clearance policies, as the uniform application of these policies can foster consistency, predictability, and fairness and safeguard against arbitrary decision-making, bias, and unequal treatment. Ultimately, this solution has the potential to address systemic challenges.[12] Automatic record-sealing policies that establish clear eligibility criteria and streamlined processes through uniform guidelines are important steps toward approaching equity in the criminal legal system.

In many cases, the legal system cannot deliver on the principles of fairness and due process with consistency and predictability. A uniform approach to automatic record-sealing policies ensures that individuals eligible for record relief are subject to standardized criteria and procedures, creating a more predictable legal landscape. Predictability enhances the transparency of the record-clearing process and assures individuals seeking clearance that they can reasonably anticipate receiving relief in

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[12] Thierry Kirat et al., *Fairness and Explainability in Automatic Decision-Making Systems: A Challenge for Computer Science and Law*, 11 EURO J. ON DECISION PROCESSES, no. 100036, 2023, at 7 ("[I]n law, group fairness aims to improve the position of disadvantaged groups and to achieve substantive equality between them, without being limited to mere procedural or formal equality.") (citation omitted).

a set timeframe given set eligibility criteria. Moreover, a consistent framework contributes to the overall reliability of the legal process by minimizing uncertainties for eligible individuals and promoting public trust.

A. *Uniformity as a Scalable Solution*

The scalability of uniform record clearance policies is critical to the efficacy of state-initiated, automatic relief. A consistent and standardized approach allows for the streamlined application of relief mechanisms across jurisdictions, streamlining processes and reducing the burden on the legal system. This scalability is particularly important in addressing pervasive backlog issues[13] and ensuring that individuals seeking relief can access a timely and equitable process. The scalable nature of uniform policies enables jurisdictions to adopt and implement them relatively quickly, fostering a broader and more widespread impact on the criminal legal system landscape.

The scalability of uniform record clearance policies is critical to their efficacy in modernizing the legal system. A consistent and standardized approach allows for the streamlined application of relief mechanisms across various jurisdictions, simplifying processes and significantly reducing the administrative burden on the legal system.[14] By embracing uniformity, we can automate the record-sealing process for eligible individuals, address the pervasive backlog issues, and ensure that individuals seeking relief can access a timely and equitable process.

Uniform automatic record clearance policies provide a framework that can be readily adopted by different jurisdictions, making them a scalable solution to a widespread problem: that the overwhelming majority of those eligible for petition-based clearance never see relief.[15] In Maryland, only 2% of people with convictions eligible for clearance under the state's existing petition-based system get relief, and it would take 86 years to clear all the eligible convictions under that system.[16]

Standardizing these policies means that once a system is developed and proven effective in one area, it can be replicated and implemented in others with minimal modification. This ability to scale is particularly important in addressing the often-overwhelming backlog of cases awaiting record clearance under petition-based systems. By implementing a uniform approach, jurisdictions can efficiently process

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[13] Nichols, *supra* note 9.

[14] *See* PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS (Russell Sage Found. 2019), for a thorough review of the definition and function of administrative burdens in the United States.

[15] Chien, *supra* note 5, at 571–72; Prescott & Starr, *supra* note 5, at 2551.

[16] Colleen Chien et al., *The Maryland Second Chance Expungement Gap*, THE PAPER PRISONS INITIATIVE 1 (2024), https://www.paperprisons.org /states/pdfs/reports/The%20Maryland %20Second%20Chance%20Expungement%20Gap.pdf [https://perma.cc/77XF -MW6W].

a higher volume of cases, thereby reducing the time individuals must wait for their records to be cleared.

One of the significant advantages of uniform policies is the reduction in complexity for both individuals and the legal system. When record clearance procedures vary widely from one jurisdiction to another, it creates confusion and inequities, as some individuals may find it easier to navigate the system based on the legal requirements where they live.

Uniform policies ensure that everyone who meets eligibility requirements has an equal opportunity to benefit from record clearance. This uniformity also simplifies the training and operations for legal professionals who handle these cases, as they can rely on a consistent set of procedures and criteria regardless of the jurisdiction in which they are working.

Furthermore, the implementation of uniform record clearance policies fosters a more predictable and transparent legal system. Individuals seeking relief can better understand the requirements and steps involved, making the process less daunting and more accessible. Legal aid organizations and other support networks can also provide more effective assistance when the procedures are standardized across a given state, as they can develop resources and guides that apply universally rather than having to tailor them to each specific jurisdiction.

The scalable nature of uniform policies is also beneficial from a resource allocation perspective. Developing and maintaining multiple, varied systems for record clearance across jurisdictions is inefficient and costly. A uniform approach allows for the consolidation of resources, enabling jurisdictions to pool their efforts and share best practices. This can lead to the development of more sophisticated and effective tools and technologies for managing record clearance, such as automated systems that can handle large volumes of cases quickly and accurately.

Moreover, states adopting uniform policies can facilitate broader legislative and policy reforms to improve the criminal legal system. When record clearance procedures are standardized, it becomes easier to advocate for and implement further changes that build on this foundation. Policymakers can use the success of uniform record clearance policies as a model for other areas needing reform, creating a ripple effect that enhances the overall fairness and efficiency of the legal system.

The impact of uniform record clearance policies on the lives of individuals cannot be overstated. Having a criminal record is a significant barrier to employment, housing, education, and other opportunities. By streamlining the process of record clearance, uniform policies help remove these barriers more quickly and equitably, allowing individuals to move forward with their lives and contribute more fully to their communities: not only benefiting individuals directly affected but also positively impacting society as a whole, as it promotes rehabilitation and may reduce recidivism.[17]

The scalability of uniform automatic record clearance policies is an essential factor in their effectiveness. By providing a consistent and standardized approach,

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[17] LaBriola, *supra* note 2, at 155–56.

these policies enable the streamlined application of relief mechanisms across jurisdictions, addressing backlog issues and ensuring a timely and equitable process for individuals seeking relief. The broad adoption of uniform policies fosters a more predictable, transparent, and efficient system, ultimately enhancing the fairness and efficacy of the criminal justice system. As jurisdictions implement these scalable solutions, the impact on the criminal justice landscape will be profound, promoting more equity and justice for all.

B. *Automatic Record Sealing as a Step toward Equity through Uniformity*

Automatic record sealing involves the state initiating the process of identifying eligibility and expunging or sealing eligible criminal records without individuals needing to petition the court. Automatic record sealing exemplifies uniformity by establishing a standardized and streamlined process for record clearance, reducing reliance on discretionary decision-making. This approach accelerates the clearance process and addresses systemic inequities by ensuring that relief is applied uniformly to all eligible individuals, irrespective of socioeconomic background, race, or other demographic factors.

In automatic record sealing, although an initial body of work is required to set up an effective algorithm, software, and data systems to identify and seal eligible records, once this is completed the process can be continued without excessive intervention on the part of government actors. To effectively implement automatic record sealing policies, SEARCH, the National Consortium for Justice Information and Statistics, recommends centralized, agile, unified case management systems, structured data, and enterprise-wide transaction control numbers are adopted and used, while recognizing that Clean Slate planning and implementation can be complex and may involve phased implementation to ensure the highest level of accuracy and efficiency.[18]

Automatic record sealing, as a manifestation of uniformity, represents a pivotal step toward achieving equity in the criminal legal system. It offers a standardized and fair pathway for individuals seeking a second chance. By understanding the multifaceted dimensions of uniformity, more effective record relief policies addressing the complexities of the modern legal landscape can and should be passed and implemented.

III. DISCRETION IN RECORD CLEARANCE

Ideally, discretion allows for a nuanced and individualized consideration of cases, steering away from a rigid, one-size-fits-all approach. In record clearance, however, discretion is a double-edged sword, granting unchecked power to critical

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[18] David Roberts et al., *Technical and Operational Challenges of Implementing Clean Slate: Research Findings*, SEARCH GRP., INC. 1, 19 (2023), https://www.search.org /files/pdf/Tech _Op_Challenges_Clean_Slate_ResearchFindings.pdf [https://perma.cc/FQP8-UVTN].

stakeholders such as judges, prosecutors, and law enforcement officials.[19] Unlike mandatory expungement laws,[20] which provide clear guidelines for record clearance, the petition-based approach opens the door for subjective judgments that may only sometimes prioritize fairness or justice.

A. *Role of Discretion in the Petition-Based Record Clearance Process*

The petition-based record clearance process often allows decision-makers to rely on their biases and personal preferences when evaluating each petitioner's case. For example, in some jurisdictions, the prosecutor's office may have the opportunity to review the petition and offer an opinion on whether the record should be cleared.

In petition-based record clearance processes, it is ultimately up to a judge to decide whether to grant the petition. The judge will consider numerous factors, such as the law, the specifics of the case, any input from the prosecutor, and any additional factors deemed relevant. Discretion plays a significant role in this stage of the process as judges may weigh various factors differently. While in some jurisdictions, judges may grant all petitions for record relief, it is unclear, given a lack of data, how many may not approve and whether any variables (for example, race, ethnicity, gender, etc.) may correlate with petitions being granted or not.

Unchecked discretion can lead to inconsistencies and injustices, as individuals with similar backgrounds or offenses may receive vastly different outcomes based solely on the whims of those in power. Research has shown that judicial discretion can lead to unequal outcomes in the legal system, particularly in terms of sentencing disparities by race. A comprehensive study analyzing over half a million sentencing records from the United States Sentencing Commission database between 2006 and 2020 found that Black and Hispanic defendants receive longer sentences on average compared to their white counterparts, even after controlling for personal demographics and sentencing guideline elements.[21] This suggests there may be differential treatment by courtroom actors, including judges and attorneys within federal judicial districts.

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[19] Raj Mukherji, *In Search of Redemption: Expungement of Federal Criminal Records*, SETON HALL UNIVERSITY EREPOSITORY 1, 8 (2013), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1163&context=student_scholarship [https://perma.cc/AS3X-UX77] ("The decision of which forum to charge a defendant is left entirely to the discretion of prosecutors, who may be driven by external pressures or sometimes make such decisions based on untoward motivations.").

[20] For an example of a mandatory expungement law, Maryland Code of Criminal Procedure § 10-105.1 stipulates that cases where all charges have a disposition of acquittal, not guilty, dismissal, or *nolle prosequi*, entered on or after October 1, 2021, will be automatically expunged after 3 years. Automatic record sealing or expungement can be considered mandatory, as they require the sealing of eligible records by the state after a given waiting period as long as the cases, offenses, or individuals meet certain criteria that are laid out in the law.

[21] Chad M. Topaz et al., *Federal Criminal Sentencing: Race-Based Disparate Impact and Differential Treatment in Judicial Districts*, 10 HUMANS, & SOC. SCIS. COMMC'NS, no. 366, 2023, at 1, 1.

In addition, the use of pretrial risk assessments, which are designed to help determine whether individuals who have been arrested pose a risk to public safety if released before trial, has been the subject of concern regarding racial disparities. Research indicates that disparities have been observed in the application of these assessments, with Black individuals being detained significantly longer than white individuals despite having comparable risk assessment scores,[22] potentially due to the inequalities in judicial discretion.[23]

Judges, prosecutors, and law enforcement officials can wield considerable influence in the record clearance process, specifically if states require every petition to be accompanied by a judicial hearing. While discretion opens the door for potential abuse, as personal biases and prejudices may taint their judgment, the flip side of the coin can create otherwise out-of-reach access to relief if a prosecutor or judge can look past a record to the qualities of an individual and grant petition-based record relief.

While discretion can be touted as a means of tailoring decisions to the unique circumstances of each case, it also enables decision-makers to prioritize specific individuals or interests over others. Overall, the lack of transparency and accountability in the decision-making process undermines the integrity of the record clearance process, perpetuating inequalities and reinforcing existing power dynamics within the legal system. The inherent tension between discretion and uniformity emerges as a critical point of analysis, especially in the context of Clean Slate policies.

IV. TENSION BETWEEN DISCRETION AND UNIFORMITY IN RECORD SEALING

The tension between discretion and uniformity in record-sealing policies underscores a fundamental debate within the criminal legal system. While discretion allows decision-makers to tailor outcomes to individual circumstances, uniformity promotes consistency and fairness across cases. This tension is particularly evident in discussions surrounding the implementation of Clean Slate policies, which aim to automate record-sealing processes to mitigate past convictions' effects on individuals' lives. Finding a middle ground that respects the nuances of individual cases while also striving for a legal system that is fair and equitable for all remains a significant challenge.

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[22] Douglas B. Marlowe et al., *Employing Standardized Risk Assessment in Pretrial Release Decisions: Association with Criminal Justice Outcomes and Racial Equity*, 44 L. & HUM. BEHAV. 361, 361 (2020).

[23] Megan T. Stevenson & Jennifer L. Doleac, *Algorithmic Risk Assessment in the Hands of Humans*, SSRN 1, 22 (Sept. 29, 2022), https://ssrn.com/abstract=3489440 [https://perma.cc/YY9N-U8JP].

A. *Clean Slate Policies as a Balancing Act*

Clean Slate policies represent a pragmatic approach to balancing discretion and uniformity. By automating the record sealing process for certain offenses after demonstrated rehabilitation (i.e., remaining law-abiding or "crime-free" for a specified waiting period), Clean Slate policies seek to provide a uniform mechanism for individuals to move beyond their past. A standardized approach helps to ensure that individuals with similar backgrounds receive equitable treatment under the law, regardless of personal biases or subjective judgments.[24] The movement toward an automated and less discretionary process highlights efforts to reduce biases and ensure more equitable treatment under the law.

However, when it comes to individuals with convictions for violent offenses, implementing uniform policies requires a nuanced approach. In these cases, discretion and a petition-based expungement process could be viable options. The flexibility offered through discretionary assessment acknowledges the unique circumstances of each case, including extenuating circumstances and proportional rehabilitation efforts. By allowing for a case-by-case evaluation, the legal system can ensure that those who have been convicted of violent offenses but have genuinely rehabilitated themselves are not unfairly excluded from the benefits of record clearance. This approach further emphasizes the importance of individual rehabilitation and the potential for societal reintegration.

Moreover, incorporating discretion into the expungement process acknowledges the importance of public trust in the criminal legal system. By carefully considering the nature of the crime, the individual's rehabilitation efforts, and the potential risks to public safety, the legal system can maintain transparency and accountability while providing opportunities for redemption for those convicted of serious crimes. This careful consideration may be key in balancing public safety and individual redemption.

While Clean Slate policies offer a promising avenue for addressing the inequities of the criminal legal system through automatic record relief, some avenues should be explored that consider the discretionary value in the review of expungement for serious and violent offenses. By balancing uniformity and discretion, depending on the severity of the conviction, record relief policies can fulfill their potential as catalysts for meaningful legal system reform.

V. EXAMINATION OF DISPARITIES IN THE LEGAL SYSTEM

Disparities in the legal system, particularly concerning race and socioeconomic status, can be exacerbated if Clean Slate policies are not uniformly applied. Without

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[24] *Id.* at 2 ("We find that, conditional on the risk score, judges are substantially more lenient with young defendants than older defendants and substantially harsher on Black defendants than non-Black defendants. These disparities are not explained by actual differences in recidivism risk across race or age").

adequate safeguards and oversight, there is a risk that the effects of past convictions further entrench cycles of poverty, and collateral consequences disproportionately impact distinct communities. Moreover, disparities in access to legal resources and information may prevent marginalized individuals from fully benefiting from Clean Slate initiatives, undermining the goal of promoting equity and opportunity for all. Clean Slate policies offer a promising solution to the tension between discretion and uniformity in record sealing.

A. *Clean Slate Policy Tradeoffs and Racial Equity*

In criminal legal system reform, Clean Slate policies represent a balance of tradeoffs, particularly regarding racial equity. At the same time, Clean Slate policies offer a promising path toward greater justice and rehabilitation. Using a newly published data model, the following discussion of policy tradeoffs that impact racial equity adds another important dimension to the analysis of discretion versus uniformity in record sealing, highlighting the impact on historically marginalized communities.

Clean Slate policies are designed to automatically seal or expunge eligible criminal records, removing significant barriers to employment, housing, and other opportunities. This automated approach can dramatically increase the number of individuals benefiting from record clearance, particularly those from racial and ethnic minority groups who are disproportionately impacted by criminal records. Uniform policies ensure that everyone meeting certain criteria receives the same opportunity for relief, which can mitigate the biases that often permeate discretionary systems.

However, the tradeoff between discretion and uniformity must be carefully considered. While uniform policies promote consistency and fairness, they may lack the flexibility needed to account for the unique circumstances of each case. Discretionary systems, however, allow for individualized assessments but can be susceptible to biases and inconsistencies. Historically, discretionary decision-making has often resulted in racial disparities, with people of color facing harsher outcomes compared to their white counterparts. Ensuring that Clean Slate policies do not perpetuate these disparities is essential.

Examining data on the impacts of Clean Slate policies can help navigate these tradeoffs by providing empirical evidence to inform policy design and implementation. Data can highlight patterns of inequity and identify areas where adjustments are needed to ensure that Clean Slate policies are truly equitable. For example, data can reveal if certain racial or ethnic groups are underrepresented among those benefiting from record clearance, prompting targeted outreach and support initiatives.

Moreover, data-driven approaches can enhance transparency and accountability when implementing Clean Slate policies. By regularly analyzing and reporting on these policies' outcomes, stakeholders can monitor progress toward racial equity and make necessary adjustments. This ongoing evaluation helps ensure

that the benefits of Clean Slate policies are equitably distributed, and that the justice system moves closer to achieving true equity.

Finally, Clean Slate policies hold significant potential for advancing racial equity within the criminal justice system. However, careful consideration of the tradeoffs between discretion and uniformity is essential. A data-driven approach can help balance these tradeoffs, ensuring that Clean Slate policies are implemented to maximize their positive impact on marginalized communities and promote a more equitable and just society.

B. *The Clean Slate Initiative Data Model*

The Clean Slate Initiative (CSI) is a national, bipartisan nonprofit organization that passes and implements laws that automatically clear eligible records for people who have completed their sentence and remained crime-free and expands who is eligible for clearance.[25] CSI has developed a data model to provide a nuanced understanding of how Clean Slate policies can impact different racial and ethnic groups. Using comprehensive data, CSI, researchers, advocates, and policymakers can identify disparities in the existing criminal legal system and offer a clear picture of who benefits from Clean Slate record clearance policies. This section explores how these policies can be tailored to most effectively address racial inequities.

The methodology that CSI employs to estimate the number of people with conviction and non-conviction records as of 2019 across all 50 states and the District of Columbia (D.C.) leverages data from federal and state databases. It builds on the research of Sarah K. Shannon and colleagues, estimating the growth, scope, and spatial distribution of people with felony records in the U.S. between 1948–2010,[26] as well as the Brennan Center for Justice at New York University's work, estimating misdemeanor convictions to create a holistic view of the impact of records across the United States.[27]

In order to ensure estimates do not overstate the numbers of people with records, and by extension, the numbers of individuals who can become eligible for

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[25] The organization's vision is that people will no longer be defined by their records and will have the opportunity to contribute to their community, have a fair opportunity to work, get an education, and achieve their full potential. *See* THE CLEAN SLATE INITIATIVE, https://www.cleanslateinitiative.org [https://perma.cc/7MZ5-KJV4] (last visited Oct. 16, 2024).

[26] Sarah K. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1801 (2017).

[27] Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. FOR JUST. (Sept. 15, 2020), https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal [https://perma.cc/6AXT-YLEH]; *Population Estimate to Maximize Policy Impact: The Clean Slate Initiative Methodology for Estimating State Populations with a Record*, THE CLEAN SLATE INITIATIVE 1, 2 (2024), https://static1.squarespace.com/static/62cd94419c528e34ea4093ef/t/65fdd1ae5042c132b8c46fc9/1711133106060/CSI+Data+Dashboard+Methodology+PUBLIC+%282%29.pdf [https://perma.cc/58MY-W2HP].

full or partial record clearance under Clean Slate legislation in the states, the estimates are adjusted for interstate mobility, mortality, recidivism, and deportation rates. Estimates of the population with conviction and non-conviction records in the states are adjusted for mortality rates using CDC age-adjusted death rates by race and sex; interstate mobility using data from the U.S. Census Bureau; recidivism using methodologies from the Brennan Center and Shannon et al.,[28] research from the Prison Policy Initiative,[29] and data from the National Corrections Reporting Program (NCRP), Measures for Justice, and the National Longitudinal Survey of Youth (NLSY); and deportations using the Transactional Records Access Clearinghouse (TRAC) data on Immigration and Customs Enforcement removals by state 2003–2019.[30] It is important to note that the CSI data model does not incorporate records for federal arrests or convictions, nor does it model the potential overlap between people who may have records at the state and federal levels.

To estimate the population with felony convictions, CSI draws on data from the National Corrections Reporting Program (NCRP, 1991–2019), National Prisoner Statistics Program (1978–1990), Annual Survey of Probation (1985–2018), and Survey of Prison Inmates (2016).[31] To estimate misdemeanor convictions, CSI relied on the Uniform Crime Reporting Program (UCR) arrest data (1995–2019), National Center for State Courts Court Statistics Project, data on misdemeanor recidivism from 8 states, adjusted using state-level probation recidivism data, as well as the 2018 Illinois Sentencing Policy Advisory Council (SPAC) report, and data from the 2018–2019 National Survey on Drug Use and Health, an analysis of the overlap between misdemeanor and felony convictions using data from New York City, Texas, Florida, and Illinois, and adjusted to determine the number and distribution of convictions per person using data from the NCRP (1991–2019) and National Longitudinal Survey of Youth (NLSY, 1997–2019).[32]

Finally, to estimate the number of people with only non-conviction records, CSI uses national misdemeanor and felony conviction rates obtained from the National Center for State Courts, as well as state-level conviction rates derived from Measures for Justice.[33]

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[28] Craigie et al., *supra* note 27; Shannon et al., *supra* note 26, at 1800–02.

[29] *See, e.g.,* Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL'Y. INITIATIVE (Aug. 2018), https://www.prisonpolicy.org/reports/housing.html [https://perma.cc/NQV2-6WMW]; Leah Wang, *Updated Data and Charts: Incarceration Stats by Race, Ethnicity, and Gender for All 50 States and D.C.*, PRISON POL'Y. INITIATIVE (Sept. 27, 2023), https://www.prisonpolicy.org/blog/2023/09/27/updated_race_data/ [https://perma.cc/A69F-B87J].

[30] THE CLEAN SLATE INITIATIVE, *supra* note 27, at 4.

[31] *Id.* at 3–4.

[32] *Id.* at 4.

[33] *Id.*

To differentiate between the population with misdemeanor convictions typically eligible for Clean Slate record relief and those that may be considered "hard-to-clear," CSI first used the Brennan Center's methodology to calculate initial raw, unweighted totals of the arrests most likely to be classified as misdemeanors.[34] "This method counts the following offense types as misdemeanors: stolen property, vandalism, prostitution, simple assaults, gambling, driving under the influence (DUI), liquor law violations, drunkenness, disorderly conduct, vagrancy, and 'all other offenses.'"[35] Of these likely misdemeanor offense types, CSI "classified arrests for DUI and simple assault as hard-to-clear misdemeanors (arrests for weapons offenses or sex offenses are not included as hard-to-clear misdemeanors since they are not classified as likely misdemeanors according to the Brennan Center's methodology)."[36] CSI then took the raw counts of likely misdemeanor and hard-to-clear misdemeanor arrests for each race/ethnicity and sex and disaggregated these and weighted the population's distribution of convictions according to cluster-specific estimates.[37]

To determine whether individuals had violent felony convictions, as well as the breakdown of these convictions by race/ethnicity and sex, CSI used the demographic data provided by the NCRP and calculated the proportion of all prison releases of people with a prison sentence of one year or longer from state prisons between 1991–2019 (the full period of coverage for the NCRP database), who were incarcerated for a violent conviction, disaggregated by race/ethnicity and sex.[38] The NRCP includes prior release data from 44 states, so CSI imputed national averages for the remaining 6 states.[39] The resulting proportions were then applied to the total population of each group estimated to have a felony conviction of any kind.[40]

> One note on the estimation of violent felony convictions is that:
> CSI used the Bureau of Justice Statistics (BJS) definition of violent offenses in the NCRP database, which includes convictions that include murder or non-negligent manslaughter, negligent manslaughter, rape or sexual assault, aggravated or simple assault, robbery, or "other violent offenses," a catch-all category that includes blackmail, extortion, hit-and-run driving with bodily injury, child abuse, criminal endangerment, kidnapping, and other or unspecified violent offenses. This is a broader

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[34] *Id.* at 13.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 11.

[39] *Id.* at n.5.

[40] *Id.* at 12.

> definition of violent crime than the definition used by the Federal Bureau of Investigation (FBI), which includes murder and non-negligent manslaughter, rape, robbery, and aggravated assault, and may also be broader than many state-level definitions of violent crime. By using prison release data to estimate the proportion of all people with felony convictions who have a violent felony, the prevalence of violent convictions among people with felony convictions who did not go to prison is very likely overestimated.[41]

In all, CSI estimates that over 71 million people in America "had a state conviction or non-conviction record as of 2019, including 6.1 million people in prison, jail, or state supervision that year."[42] Another 21.4 million people had felony convictions but were not currently incarcerated, and of those, 15.7 million individuals' felony convictions were non-violent.[43] Around 46 million people had misdemeanor convictions, and, of those, 32.6 million had no felonies on their record.[44] "Over 10 million people had a non-conviction record from a prior arrest but no convictions."[45] These data are also displayed in an interactive dashboard on The Clean Slate Initiative's website.[46]

1. The Population of People with Records by Race/Ethnicity and Sex

CSI disaggregates data describing the population of individuals with conviction and non-conviction records by race, ethnicity, and sex using data from the Annual Survey of Probation, NCRP, National Prisoner Statistics Program, UCR, Survey of Prison Inmates, and Annual Survey of Jails.[47] Disaggregation is imperative for examining the impacts of records, given that discriminatory criminal legal system policies and practices have historically targeted people of color, particularly Black individuals, leading to disparities in charges and sentencing and, thus, records.

CSI estimates that nearly 15 million Black people, or nearly half of the Black population of adults in the United States, had a conviction or non-conviction record

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[41] *Id.*

[42] *Id.* at 2.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *See The Clean Slate Initiative's Data Dashboard*, THE CLEAN SLATE INITIATIVE (2024), https://www.cleanslateinitiative.org/data [https://perma.cc/9B23-LLP4].

[47] THE CLEAN SLATE INITIATIVE, *supra* note 27, at 4.

as of 2019.[48] In addition, around 1 million Native Americans[49] (34% of Native American adults), 10 million Latinos (25% of Latino adults), 44 million white Americans (27% of white adults), and 18.5 million women (14% of adult women) had a record.[50]

These data reveal stark disparities in the American criminal legal system. Disaggregated data highlights the urgent need to address systemic inequities and their pervasive impacts in terms of collateral consequences for people who have records. The roots of these disparities can be traced to slavery, Jim Crow, and more recently, the War on Drugs, starting in the 1980s under President Ronald Reagan.[51] This campaign significantly intensified the criminalization of drug offenses, disproportionately affecting communities of color. Despite similar rates of drug use across racial groups, Black and Latino individuals were targeted and arrested at much higher rates, leading to severe racial imbalances in the criminal justice system.[52] The Anti-Drug Abuse Act of 1986, which established mandatory minimum sentences for drug offenses,[53] further exacerbated these disparities by imposing harsher penalties for crack cocaine offenses (more prevalent in Black communities) compared to powder cocaine offenses (more prevalent in white communities).[54]

The War on Drugs period saw a dramatic increase in incarceration rates, particularly among Black men, and contributed to the entrenchment of systemic

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[48] *Id.* at 3.

[49] CSI's estimates regarding Native Americans reflect reports of individuals classified by police or correctional agencies as Native American or Alaskan Native. In addition, CSI used Census data corresponding to the non-Hispanic population that identifies as Native American or Alaskan Native alone, excluding individuals who identify as more than one race, to calculate the proportion of Native Americans with a record, consistent with how the portion of non-Hispanic Black people with a record and non-Hispanic white people with a record were calculated. *See Id.* at n.1.

[50] *Id.* at 3.

[51] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6 (2010).

[52] Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 JUST. Q. 288, 291 (2015).

[53] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 21 U.S.C.).

[54] *See* Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2548–49 (2010); Marc Mauer, *The Changing Racial Dynamics of the War on Drugs*, THE SENT'G. PROJECT 1 (Apr. 2009), https://search.issuelab.org/resources/7021/7021.pdf [https://perma.cc/JCG4-SKSS]; Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, ACLU 1, 1–2 (Oct. 26, 2006), https://www.aclu.org/documents/cracks-system-20-years-unjust-federal-crack-cocaine-law [https://perma.cc/PH59-Z4WW].

racism within the justice system.[55] Policies and practices such as racial profiling, stop-and-frisk, and the use of biased risk assessment tools have continued to perpetuate these disparities. The result is a criminal legal system where people of color, especially Black individuals, face disproportionate rates of arrest, conviction, and incarceration. And of course, these systemic biases extend beyond the judicial process into areas such as employment, housing, and social services, creating significant barriers for individuals with records and perpetuating cycles of poverty and marginalization.[56]

Black individuals are more likely to be arrested, charged, and receive harsher punishments than their white counterparts. Due to heightened police surveillance in Black neighborhoods, a disproportionate number of Black people are arrested. For example, a study in Washington, D.C. revealed that while Black residents comprised 47% of the population, they made up 86% of those arrested and were arrested at a rate 10 times higher than white residents.[57] This disproportionality in arrests could be explained by the large concentration of Metropolitan Police Department officers in predominately Black neighborhoods throughout the city.[58]

Not only are Black people more likely to be stopped, searched, and arrested by police,[59] particularly when encountered by police in groups,[60] but prosecutor bias can also lead to more severe outcomes for Black people. Research on mandatory sentencing and racial disparities highlights the significant role of prosecutorial discretion in the initial charging phase, which can lead to racial disparities in sentencing. People of color are more likely to be prosecuted, held in pretrial detention, and to receive other harsh treatment.[61] Federal prosecutors are more likely to charge Black people with offenses that carry higher mandatory minimum

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[55] Mauer, *supra* note 54, at 1, 4.

[56] ALEXANDER, *supra* note 51, at 5.

[57] *Racial Disparities in D.C. Policing: Descriptive Evidence from 2013–2017*, ACLU (May 13, 2019), https://www.acludc.org/en/publications/racial-disparities-dc-policing-descriptive-evidence-2013–2017 [https://perma.cc/6G7A-73X4].

[58] *Id.*

[59] *See* Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, 4 NATURE HUM. BEHAV. 736*,* 737–39 (2020).

[60] *See* Erin Cooley et al., *Racial Biases in Officers' Decisions to Frisk Are Amplified for Black People Stopped Among Groups Leading to Similar Biases in Searches, Arrests, and Use of Force*, 11 SOC. PSYCH. AND PERSONALITY SCI. 761, 766 (2020).

[61] *See* Besiki Kutateladze et al., *Do Race and Ethnicity Matter in Prosecution?: A Review of Empirical Studies*, VERA INST. OF JUST. 1, 11 (June 2012), https://vera-institute.files.svdcdn.com /production/downloads/publications/race-and-ethnicity-in-prosecution-first-edition.pdf [https://perma.cc/F4VV-PEKJ].

sentences compared to white people in identical circumstances,[62] and Black men are nearly twice as likely than white men to be charged with offenses carrying mandatory minimum sentences.[63] In addition, state prosecutors may be more likely to charge Black people under habitual offender statutes than their white counterparts under similar conditions.[64]

Black individuals using drugs are seven times more likely to receive a serious drug charge and face incarceration compared to their white counterparts engaging in the same activities.[65] Researchers have also found that Black people were admitted to jail at more than double the rate of white people, and stayed in jail for 12 more days on average, contributing to significant overrepresentation in jail populations.[66] This overrepresentation is consistent across states, with every state incarcerating Black individuals at a rate at least double that of white individuals and, on average, at six times the rate of white individuals.[67]

Further exacerbating these disparities, research highlights significant racial biases in the plea-bargaining process, where white individuals were found to be 25 percent more likely than Black individuals to have their most serious initial charge dropped or reduced.[68] Due to this, white individuals who faced initial felony charges were 15 percent more likely than similar Black individuals to be convicted of a misdemeanor instead.[69] Such disparities are not limited to adult populations, either, as students of color face harsher punishments in schools, leading to a higher number of youths of color being incarcerated.[70]

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[62] M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1320 (2014).

[63] Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L. J. 1, 7 (2013).

[64] Charles Crawford et al., *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 CRIMINOLOGY 481, 490 (1998).

[65] Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. 1, 6 (May 2018), https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/2ASR-BCHE].

[66] *Racial Disparities Persist in Many U.S. Jails*, THE PEW CHARITABLE TRS. 1, 2 (May 2023), https://www.pewtrusts.org/-/media/assets/2023/05/racial_disparities_persist_in_many_us_jails_brief_digital.pdf [https://perma.cc/AD67-RU3T].

[67] Wang, *supra* note 29, at 3.

[68] Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191 (2018).

[69] *Id.*

[70] Matthew L. Mizel et al., *To Educate or Incarcerate: Factors in Disproportionality in School Discipline*, 70 CHILD. & YOUTH SERVS. REV. 102, 102–03 (2016).

The sentencing phase also reveals stark disparities, with Black and Hispanic males receiving disproportionately harsher punishments, a trend attributed to factors including the use of risk assessments and prosecutorial discretion.[71] These systemic biases also extend beyond sentencing and incarceration, affecting re-entry into communities where individuals with records, particularly Black men, face significant barriers to securing employment, housing, and accessing social services.[72]

The collateral consequences of conviction records are not equally distributed. Employers are less likely to call back job applicants who have a criminal record across the board, but the likelihood of a call back is reduced by around 60 percent for Black applicants compared to 30 percent for white applicants with records.[73] Since Black applicants with records are less frequently invited to interview, they have fewer opportunities to establish rapport with employers and gain employment.[74] The racial bias in employment opportunities for individuals with records is stark, emphasizing a systemic issue that demands comprehensive reform.

Moreover, this disparity extends to the housing sector, where Black individuals with records face even greater challenges. Housing applications often include background checks. According to the National Consumer Law Center, 90% of landlords require a background check,[75] and the presence of a record can lead to outright denial, regardless of the nature of the offense or how much time has passed since.[76] This barrier not only limits access to safe and affordable housing but also segregates communities and perpetuates cycles of poverty and recidivism.[77] This is especially true as formerly incarcerated people are nearly ten times more likely to experience homelessness than the general population, and homelessness in turn

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[71] Weihua Li, *The Growing Racial Disparity in Prison Time*, THE MARSHALL PROJECT (Dec. 3, 2019, 6:00 AM), https://www.themarshallproject.org/2019/12/03/the-growing-racial-disparity-in-prison-time [https://perma.cc/53PQ-SZRV].

[72] *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENT'G PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/ [https://perma.cc/MD75-NW9L].

[73] Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009).

[74] *Id.* at 196, 199.

[75] Ariel Nelson, *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing*, NAT'L CONSUMER L. CTR. 1, 3 (Dec. 10, 2019), https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf [https://perma.cc/5XV3-7P87].

[76] Laura M. DeMarco, *Criminal Record Stigma, Race, and Neighborhood Inequality*, 61 CRIMINOLOGY 705, 723 (2023).

[77] *See* Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 176–77 (2019).

makes formerly incarcerated people more likely to be re-arrested and re-incarcerated, creating a revolving door of incarceration.[78]

The racial bias embedded in every stage of the legal system results in people of color, particularly Black communities, being more likely to have records with felony charges and multiple offenses, complicating their eligibility for Clean Slate legislation. Therefore, implementing Clean Slate automatic record clearance policies that adhere to uniform standards can attempt to amend the harms of overcriminalization of Black individuals by offering a meaningful second chance and opportunity for stability in housing and employment via state-initiated record clearance.

C. *Policy Tradeoffs and Racial Equity*

Given the significant disparities in records that disproportionately impact people of color, particularly Black individuals, Clean Slate policies must be carefully designed to minimize these disparities and maximize racial equity. According to CSI's data model, 46% of Black adults and 34% of Native American adults have a record compared to only 27% of white adults, underscoring the urgent need for policies that not only provide broad access to record clearance but also ameliorate these disparities.[79]

Clean Slate automatic record clearance policies must be carefully crafted to ensure existing racial disparities are not exacerbated. For example, a hypothetical nationwide Clean Slate policy that would clear only non-conviction records in all 50 states and D.C. would enable 18% of white adults with records to have their records fully cleared, but only 14% of Black and 12% of Latino adults would be eligible for full record relief.[80]

By contrast, a nationwide Clean Slate policy that would clear all non-convictions and non-violent misdemeanors plus all non-violent felony convictions would result in 71% of white adults and 70% of Latino adults becoming eligible for full record clearance along with 66% of Black adults.[81] While the impact would be larger, white adults' receipt of relief would still outpace that of Black adults, not effectively reducing the existing disparity in records. The reason for this persistent racial disparity can be traced back to the disparities extant in the legal system at every stage.

Effectively addressing racial disparities in criminal record remediation may, therefore, need to include a consideration to not arbitrarily limit the number of eligible records that an individual can have cleared. Furthermore, given the evidence

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[78] Couloute, *supra* note 29.

[79] THE CLEAN SLATE INITIATIVE, *supra* note 27, at 3.

[80] THE CLEAN SLATE INITIATIVE, *supra* note 46, at 5.

[81] *Id.* at 6.

that people of color, and Black people in particular, face harsher charging and sentencing outcomes, to potentially include more serious convictions in the categories of offenses eligible for relief after a given waiting period.

In some states, individuals may only be eligible to expunge a single conviction or non-conviction, regardless of the number of records they have. For example, in Florida, courts are limited to expunging only one non-conviction record (under a petition-based process).[82] Furthermore, even in states that allow for the expungement of multiple convictions, there may be caveats and limitations (also known as "caps") that restrict eligibility based on the nature of the offenses, the time elapsed since the convictions, or other factors. For example, under Utah's Clean Slate law, passed in 2019, individuals with some misdemeanor Class A Drug Possession convictions (typically limited to 2) may be eligible for automatic record relief after 7 years from the date of adjudication, those with Class B misdemeanors (typically limited to 3) may be eligible after 6 years from adjudication, and those with Class C misdemeanors, infractions, or minor regulatory offenses on their record may be eligible after 5 years from their adjudication date.[83]

Advocates and policymakers have increasingly called for reforms to expand access to expungement and eliminate arbitrary limitations on the number of convictions eligible for clearance. For instance, Michigan's Clean Slate Law includes eligibility for offenses that occurred during "one bad night:" a concept in record clearance eligibility that multiple felony or misdemeanor convictions occurring within a 24-hour period and stemming from the same transaction are considered as one felony or one misdemeanor conviction.[84]

Caps on convictions eligible for expungement disproportionately impact marginalized communities, including people of color and low-income individuals. States that expand eligibility by reducing caps on convictions eligible for relief would see a move toward greater racial equity among individuals with records. For example, Delaware passed a Clean Slate law in 2021 that capped the number of misdemeanor and felony records eligible for automatic, state-initiated relief at 1.[85] Under the current configuration of this law, an internal analysis conducted by CSI estimates that when implementation begins, at least 61,000 individuals will be eligible for full record relief (meaning their entire criminal record would be cleared),[86] and of these, 17,000 Black people would be eligible for full clearance, representing 24% of the population of Black people in the state who had a record as

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[82] FLA. STAT. ANN. § 943.0585 (West 2023); However, the court can order the clearance "of a criminal history record pertaining to more than one arrest if the additional arrests directly relate to the original arrest." *Id.* § 943.0585(4)(c).

[83] *Who Qualifies?*, CLEAN SLATE UTAH (2024), https://www.cleanslateutah.org/about#Qualify [https://perma.cc/VH7L-H7HR].

[84] MICH. COMP. LAWS ANN. § 780.621(b) (West 2021).

[85] DEL. CODE ANN. tit. 11, § 4373 (West 2022).

[86] THE CLEAN SLATE INITIATIVE, *supra* note 27, at 29.

of 2019. If the caps were eliminated, however, nearly twice as many people would become eligible for full record clearance (114,000 residents of Delaware, and 35,000 Black people), and nearly half (49%) of Black adults with a record in the state would become eligible for full clearance. The impact of reducing caps on racial equity becomes clear in this example.

Similarly, in Utah, under the state's 2019 Clean Slate law, The Clean Slate Initiative estimates that around 239,000 people are eligible for full record clearance,[87] including 4,000 Black people, or 26% of the estimated population of Black people with records in the state. Were Utah to remove the caps on misdemeanor convictions eligible for automatic clearance, another 60,000 individuals would be eligible for full record clearance, and there would be a 50% increase in the number of Black individuals eligible for full record relief (6,000, or 38% of the population of Black people with records).

In addition to limiting the caps on records eligible for relief, potentially incorporating serious convictions, including hard-to-clear misdemeanors and violent felonies, into record relief eligibility, including under Clean Slate laws, requires a nuanced approach to ensure a balance between public safety, rehabilitation, and reintegration. This approach must also balance discretion with uniformity. While the severity of many violent offenses necessitates careful consideration, the fundamental belief in the potential for rehabilitation and second chances that underlies record relief policies remains. In particular, considering the disparities in charging and sentencing that disproportionately impact people of color, especially Black men, clearing records of violent crimes with well-defined parameters, including specified waiting periods, can offer individuals opportunities to move forward. This is particularly true with regard to employment and housing that can provide stability during reentry and improve individual outcomes, along with reducing the likelihood of recidivism.[88]

There is a clear role for discretion in record relief for violent offenses, where a streamlined petition-based process could be particularly effective in the states. Expanding the eligibility of individuals with such offenses to receive relief after meeting specific criteria, courts can accomplish an individualized review of cases, with prosecutorial and judicial discretion, and consider factors such as the nature of the offense, rehabilitation efforts, and the passage of time.

Using an automated record clearance process for as many conviction types as possible while developing an easy-to-navigate petition-based process for more serious offenses provides a balance between uniformity and individual

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[87] *Id.* at 30.

[88] *See* Grant Duwe & Makada Henry-Nickie, *Training and Employment for Correctional Populations*, *in* A BETTER PATH FORWARD: A REPORT BY THE BROOKINGS-AEI WORKING GROUP ON CRIMINAL JUSTICE REFORM 58, 59 (Apr. 2021), https://www.brookings.edu/wp-content/uploads/2021/04/6_Better-Path-Forward_Ch6_Training-and-Employment.pdf [https://perma.cc/M559-A4DT]; Brianna Remster, *A Life Course Analysis of Homeless Shelter Use Among the Formerly Incarcerated*, 36 JUST. Q. 437, 438–40 (2017).

circumstances, recognizing that blanket policies may not capture the complexities of each situation. It is important to underscore, however, that the petition-based process must be easy to navigate for those with records, including being affordable and easily accessible.

To ensure that Clean Slate policies do not exacerbate existing racial disparities, policymakers must carefully consider the impact of excluding or including certain offenses, such as serious convictions, from eligibility for record clearance. By incorporating these strategies, Clean Slate policies can more effectively address, or at least not exacerbate, the racial inequities inherent in the legal system, ensuring that the benefits of automatic record clearance are more equitably distributed.

VIII. UNIFORMITY AND DISCRETION IN CLEAN SLATE IMPLEMENTATION

Uniformity in the implementation of Clean Slate policies is essential to minimize the impacts of racial disparities in the legal systems and move toward equity. As CSI's data model shows, disparities in records disproportionately impact people of color. To counteract these disparities, Clean Slate policies must be implemented uniformly across jurisdictions to ensure that all eligible individuals can benefit from record clearance. However, discretion is still necessary as policymakers consider expanding record relief eligibility to offenses that are not commonly afforded relief, but disproportionately impact people of color.

The use of automated systems in Clean Slate implementation offers a promising avenue for achieving uniformity. These systems can be programmed to apply eligibility criteria consistently, reducing the influence of human bias or errors. Moreover, algorithms can be updated to reflect changes in legislation or policy guidelines, ensuring that the criteria for record clearance remain relevant and equitable over time. However, the success of these automated systems hinges on the inclusivity and fairness of the eligibility criteria they are programmed to apply. It is crucial that these criteria are developed with a focus on equity, considering the broader societal and racial implications of record clearance. Stakeholder engagement, including input from leaders disproportionately impacted by records, is essential in this process.

Again, the implementation of automated systems for Clean Slate policies benefits from uniformity but does not preclude the use of discretion for serious convictions. There remains a critical role for discretionary judgment in cases where automated eligibility criteria might not fully capture the nuances of an individual's circumstances. This approach ensures that while the process is predominantly uniform for a set of agreed-upon eligibility criteria, there is still room for individual cases to be considered on their own merits, particularly in complex situations involving more serious convictions, via a petition-based process that offers expansion eligibility.

A hybrid model that combines the efficiency and fairness of automation with the nuanced understanding of discretion can provide a more holistic and just approach to record clearance policies. The equitable implementation of Clean Slate

policies requires a commitment to uniformity, transparency, and continuous evaluation to ensure that these initiatives fulfill their promise of offering second chances to individuals with records while also addressing the systemic inequities that have long characterized the American legal system.

CONCLUSION

The journey towards a more equitable legal system is complex and requires a nuanced understanding of the trade-offs between discretion and uniformity in record clearance policies. Clean Slate legislation represents a significant step forward, aiming to balance these considerations while also addressing the systemic inequities that have long characterized the system.

This paper examined how automatic record sealing can streamline the record relief process, reducing administrative burden on impacted individuals as well as the legal system. This uniform approach ensures that individuals eligible for relief receive consistent treatment, promoting fairness and reducing the potential for bias. By leveraging comprehensive data to inform policy design and implementation, Clean Slate policies can be tailored to address the needs of those most impacted by records. This approach promotes fairness and justice and contributes to the broader societal benefits of reducing recidivism and facilitating successful reintegration into society.

The Clean Slate Initiative's data model highlights racial disparities in criminal records and emphasizes the need for policies that specifically address these inequities. That can include reducing or eliminating caps on the number of records eligible for relief and establishing a role for prosecutorial discretion in the decision-making process for potential relief for individuals with more serious records.

In conclusion, the pursuit of record relief through Clean Slate policies represents a critical opportunity to advance racial equity in the legal system. By thoughtfully balancing the principles of discretion and uniformity and by prioritizing the application of these policies, the United States can move closer to a system that truly offers second chances to all impacted individuals regardless of their race or background. As automatic record clearance policies continue to be refined and implemented, it will be essential to remain adaptive and committed to the principles of justice and equity.