

# Expungement in Pennsylvania After Pardon: Excluded by Clean Slate Limited Access

Joseph H. O'Donnell\*

## ABSTRACT

Pennsylvania law provides several methods to protect or dispose of a criminal record. Methods to protect a criminal record from public view include expungement, limited access, clean slate limited access, and pardon. Expungement is a relatively limited right in Pennsylvania, but individuals do have a right to expungement upon receipt of a governor's pardon. This right was created by case law. However, not every state follows this model. The recently enacted Clean Slate Limited Access Act created automated sealing for certain offenses, including cases where the Governor issued a pardon. This created a system of double protection for criminal records pardoned by the Governor. This Comment outlines the approach taken in Pennsylvania toward protecting or limiting criminal record information. It further discusses this approach in light of precedent and current statutory law. Finally, this Comment argues that, with the passage of the Clean Slate Act, automatic expungement after receiving a governor's pardon is no longer the best approach. Instead, Pennsylvania courts should apply the same interest-balancing approach to petitions for expungement after a pardon that courts apply to all other petitions for expungement.

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\* J.D. Candidate, Penn State Dickinson Law, 2024. This Comment is dedicated in loving memory of my grandfather, J. Wolford Herman, Jr. (1929–2023). Without his unfailing love and support in my life, I would not be the man I am today. I would also like to thank the *Dickinson Law Review* members who helped edit and improve this Comment.

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## INTRODUCTION

The retention and disposition of criminal records has recently become a topic of interest among lawmakers. State legislatures across the United States are creating and passing laws that protect the criminal records of individuals charged with or convicted of a crime.<sup>1</sup> These “Clean Slate” laws have the effect of sealing criminal records from public view to improve employment and housing prospects for people with criminal records.<sup>2</sup> In 2018, Pennsylvania passed the first Clean Slate legislation in the country.<sup>3</sup> Since then, 11 other states have followed suit,<sup>4</sup> with Minnesota and New York passing the most recent Clean Slate legislation.<sup>5</sup>

1. See *Clean Slate in the States*, CLEAN SLATE INITIATIVE, <https://tinyurl.com/mwcnpktv> [<https://perma.cc/HX7C-MSTM>] (last visited Jan. 19, 2023).

2. See Chris Marr & Robert Iafolla, *Punching In: ‘Clean Slate’ Laws Spreading Among States, Cities*, BLOOMBERG LAW (Dec. 5, 2022, 5:30 AM), <https://tinyurl.com/ypbexp5> [<https://perma.cc/XTU3-Q8QE>].

3. See 18 PA. CONS. STAT. § 9122.2 (2023) (Pa. Clean Slate Limited Access statute); see also Kimberly E. Capuder, *Can a Person’s “Slate” Ever Really Be “Cleaned”? The Modern-Day Implications of Pennsylvania’s Clean Slate Act*, 94 ST. JOHN’S L. REV. 501, 502 (2020).

4. See *Clean Slate in the States*, *supra* note 1. The 12 states with Clean Slate laws at the time of this writing are Pennsylvania, Utah, New Jersey, Michigan, Connecticut, Delaware, Virginia, Oklahoma, Colorado, California, Minnesota, and New York. *Id.*

5. See Marr & Iafolla, *supra* note 2. New York approved clean slate legislation on June 9, 2023, but the bill is awaiting approval by the governor at the time of this writing. *Id.*

This Comment focuses on the interaction between Pennsylvania's Clean Slate Act ("the Act") and prior existing Pennsylvania law relating to criminal record retention and disposition. This Comment will first discuss the patchwork body of Pennsylvania law governing criminal record retention. It will then examine the historical approach taken by Pennsylvania courts of balancing the interests of all stakeholders involved in deciding on criminal record retention.

Finally, this Comment will argue that applying the rules of statutory construction, the Act has excluded the precedent set by *Commonwealth v. C.S.*,<sup>6</sup> and an automatic right to expungement with a governor's pardon should no longer be recognized. Instead, Pennsylvania should apply an alternative approach that complements the interest-balancing approach historically used by Pennsylvania courts. To protect the interests of both the Commonwealth and the individual with a criminal record, Pennsylvania should apply the same interest-balancing approach to cases involving a governor's pardon that it applies to all other petitions for expungement.

## I. BACKGROUND

### A. *Expungement*

The purpose of expungement<sup>7</sup> is to encourage offender rehabilitation and recognize true change in a previously convicted offender.<sup>8</sup> Expungement theory is based on the belief that criminal conviction records should not be permanent.<sup>9</sup> Currently, a majority of states provide some method for convicted offenders to seek expungement, with many states expanding or modifying current expungement laws.<sup>10</sup>

The roots of Pennsylvania expungement law are found in the Commonwealth's Constitution.<sup>11</sup> Pennsylvania courts view expungement as a long-standing due process right.<sup>12</sup> Current expungement

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6. See generally *Commonwealth v. C.S.*, 534 A.2d 1053 (Pa. 1987) (establishing an automatic right to expungement after receiving a governor's pardon).

7. See *Expungement of Record*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The removal of a conviction (esp. for a first offense) from a person's criminal record.").

8. See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 113–14 (2015).

9. See *id.* at 114.

10. J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2463 (2020).

11. See Sharon M. Dietrich, *From Expungement to Sealing of Criminal Records in Pennsylvania*, 87 PA. BAR ASS'N Q. 161, 164 (2016).

12. See *Commonwealth v. Moto*, 23 A.3d 989, 993 (Pa. 2011) ("There is a long-standing right in this Commonwealth to petition for expungement of a criminal arrest record, a right that is an adjunct of due process.") (citing *Carlacci v. Mazaleski*, 798 A.2d 186, 188 (Pa. 2002)).

law in Pennsylvania arises from both statutory authority and case law.<sup>13</sup> Dissemination<sup>14</sup> of criminal history record information<sup>15</sup> in Pennsylvania is controlled by the Criminal History Record Information Act of 1979 (“CHRIA”).<sup>16</sup> Criminal justice agencies have a statutory duty to maintain complete and accurate criminal history information.<sup>17</sup> Anyone may review and challenge the accuracy of their criminal history record.<sup>18</sup>

CHRIA governs both expungement<sup>19</sup> and limited access.<sup>20</sup> CHRIA defines the term “expunge” as “to remove information so that there is no trace or indication that such information existed . . . to eliminate all identifiers which may be used to trace the identity of an individual.”<sup>21</sup>

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13. *See id.*

When an individual has been convicted of the offenses charged, then expungement of criminal history records may be granted only under very limited circumstances that are set forth by statute. When a petitioner has been tried and acquitted of the offenses charged, we have held that the petitioner is automatically entitled to the expungement of his arrest record.

*Id.* (internal citations and quotations omitted).

14. *See* 18 PA. CONS. STAT. § 9102 (2023) (defining “dissemination” as “[t]he oral or written transmission or disclosure of criminal history record information to individuals or agencies other than the criminal justice agency which maintains the information”).

15. *See id.* The statute defines “Criminal history record information” as:

Information collected by criminal justice agencies concerning individuals, and arising from the initiation of a criminal proceeding, consisting of identifiable descriptions, dates and notations of arrests, indictments, informations or other formal criminal charges and any dispositions arising therefrom. The term does not include intelligence information, investigative information or treatment information, including medical and psychological information, or information and records specified in section 9104 (relating to scope).

*Id.*

16. Aiden Kaplan, *Criminal Record Expungement and Orders for Limited Access in Pennsylvania*, 80 U. PITT. L. REV. 175, 176 (2018). *See generally* 18 PA. CONS. STAT. §§ 9101–83 (2023).

17. *See* 18 PA. CONS. STAT. § 9111 (2023) (“It shall be the duty of every criminal justice agency within the Commonwealth to maintain complete and accurate criminal history record information and to report such information at such times and in such manner as required by the provisions of this chapter or other applicable statutes.”).

18. *See* 18 PA. CONS. STAT. § 9151(a) (2023) (“Any individual or his legal representative has the right to review, challenge, correct and appeal the accuracy and completeness of his criminal history record information.”).

19. *See* 18 PA. CONS. STAT. § 9122 (2023) (outlining when a defendant is statutorily entitled to expungement).

20. *See* 18 PA. CONS. STAT. § 9122.1 (2023) (outlining when a defendant is eligible for limited access); 18 PA. CONS. STAT. § 9122.2 (outlining when a defendant is eligible for Clean Slate Limited Access).

21. 18 PA. CONS. STAT. § 9102 (2023) (defining “Expunge”).

There are two Pennsylvania Rules of Criminal Procedure (“PRCP”) that govern expungement.<sup>22</sup> Rule 490 outlines the process to petition a court for expungement in summary cases.<sup>23</sup> Rule 790 outlines the process to petition a court for expungement if the offense charged is graded as a misdemeanor, felony, or murder.<sup>24</sup> Petitions for expungement are filed in the county having jurisdiction over the original case.<sup>25</sup> In considering petitions for expungement, courts must engage in a balancing test where the court weighs the harm caused to an individual in preserving the record against the Commonwealth’s interests in preserving a complete record of the individual’s criminal history.<sup>26</sup>

*Commonwealth v. Wexler*<sup>27</sup> identified a non-exhaustive list of factors a court should consider when deciding whether to grant an expungement.<sup>28</sup> These factors include: (1) the strength of the Commonwealth’s case; (2) the reasons for retaining the record given by the Commonwealth; (3) the age, criminal record, and employment history of the petitioner; (4) the length of time between arrest and petition for expungement; and (5) any specific adverse consequences the petitioner may suffer as a result of denial.<sup>29</sup>

When an individual with a criminal record petitions a court to expunge charges dismissed pursuant to a plea agreement, expungement is not guaranteed.<sup>30</sup> If the Commonwealth proves charges were dismissed as part of a plea agreement, the agreement is viewed as a

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22. See Kaplan, *supra* note 16, at 177.

23. See PA. R. CRIM. P. 490(A)(1) (“[A]n individual who satisfies the requirements . . . for expungement of a summary case may request expungement by filing a petition with the clerk of the courts of the judicial district in which the charges were disposed.”).

24. See PA. R. CRIM. P. 790 (outlining the procedure for obtaining an expungement); see also PA. R. CRIM. P. 103 (defining “Court Case” as “a case in which one or more of the offenses charged is a misdemeanor, felony, or murder of the first, second, or third degree”).

25. See Dietrich, *supra* note 11, at 165.

26. See *Commonwealth v. Moto*, 23 A.3d 989, 993 (Pa. 2011) (“In applying the balancing test . . . the court must analyze the particular, specific facts of the case.”).

27. *Commonwealth v. Wexler*, 431 A.2d 877 (Pa. 1981).

28. See *id.* at 879 (“[T]his is not necessarily an exclusive or exhaustive list; other factors may require examination in a particular case.”).

29. See *Moto*, 23 A.3d at 993 (listing non-exclusive factors courts must weigh in considering a petition for expungement).

30. See Dietrich, *supra* note 11, at 166.

contract where the record holder stands to gain more than he or she originally bargained for.<sup>31</sup> Expungement is denied in these cases.<sup>32</sup>

In addition to expungement under Rule 490 and Rule 790, there are two other situations in which expungement can occur in Pennsylvania.<sup>33</sup>

First, Rule 320 of the PRCP establishes a right to automatic expungement for individuals who complete Accelerated Rehabilitative Disposition (“ARD”).<sup>34</sup> The initial decision on whether to recommend a case for ARD lies with the prosecutor, who has wide discretion in making such a recommendation.<sup>35</sup> Rule 320(B) preserves a right for the Commonwealth to object to this automatic expungement.<sup>36</sup> However, the Commonwealth must show a compelling reason why the record should not be expunged to retain the record.<sup>37</sup> Certain crimes are statutorily prohibited from expungement under the ARD program, such as sexual offenses involving a victim under the age of 18.<sup>38</sup>

The final way to expunge a criminal record in Pennsylvania is through the Controlled Substance, Drug, Device, and Cosmetic Act.<sup>39</sup> This Act allows for expungement in drug related cases only if the

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31. See *Commonwealth v. Lutz*, 788 A.2d 993, 1001 (Pa. Super. Ct. 2001) (“In the absence of an agreement as to expungement, Appellant stands to receive more than he bargained for in the plea agreement if the dismissed charges are later expunged.”).

32. See *id.* at 1000 (“We therefore hold that where charges are dismissed pursuant to a plea agreement, those charges are not eligible for expunction, as to destroy them would obscure the true circumstances under which [Appellant] has been convicted.”).

33. See Kaplan, *supra* note 16, at 178.

34. See *id.*; PA. R. CRIM. P. 320(A) (“When the judge orders the dismissal of the charges against the defendant, the judge also shall order the expungement of the defendant’s arrest record. . . .”). ARD is a voluntary alternative criminal disposition for first time offenders, offering an opportunity for rehabilitation, avoidance of a criminal conviction, and ultimately expungement. See PA.R.CRIM.P. 300 *et seq.*

35. See *Commonwealth v. Cline*, 800 A.2d 978, 981 (Pa. Super. Ct. 2002) (“It is undisputed that the initial decision to recommend a case for ARD lies solely with the prosecutor.”) (citing *Commonwealth v. Lutz*, 495 A.2d 928, 935 (Pa. 1985)).

36. See PA. R. CRIM. P. 320(B) (“If the attorney for the Commonwealth objects to the automatic expungement, the objections shall be filed with the judge. . . .”).

37. See, e.g., *Commonwealth v. Armstrong*, 434 A.2d 1205, 1206 (Pa. 1981) (“[T]he policy considerations underlying ARD mandate that unless the Commonwealth demonstrates an overriding societal interest in retaining that record, expungement must be granted.”).

38. See 18 PA. CONS. STAT. § 9122(b.1) (2023) (“A court shall not have the authority to order expungement of the defendant’s arrest record where the defendant was placed on Accelerated Rehabilitative Disposition for a violation of any offense set forth in any of the following where the victim is under 18 years of age: [listing sexual offenses].”).

39. See Kaplan, *supra* note 16, at 178; 35 PA. STAT. ANN. §§ 780-101 to -144 (West 2023).

“charges are withdrawn or dismissed or the person is acquitted of the charges.”<sup>40</sup>

It is apparent from these examples that expungement “traditionally has been a narrow remedy in Pennsylvania,” applying primarily to situations involving convictions for summary offenses or situations resulting in a disposition other than conviction.<sup>41</sup> For misdemeanor and felony cases involving convictions, a governor’s pardon remained the primary way to clear a criminal record until sealing became available through Pennsylvania’s limited access laws.<sup>42</sup>

### 1. *Expungement After a Governor’s Pardon*

The Pennsylvania Supreme Court recognized a right to expungement in cases where the Governor granted a pardon in the seminal case *Commonwealth v. C.S.*<sup>43</sup> In that case, the court considered whether a lower court must order an expungement when the governor issued a pardon for the crime on which the record was based.<sup>44</sup> In 1954, Appellant C.S. was arrested for armed robbery, pleaded guilty, served his minimum sentence, and was subsequently paroled.<sup>45</sup> Over the ensuing years, Appellant developed an impressive list of accomplishments, working his way up from a laborer position to shelter supervisor at the Pennsylvania Society for the Prevention of Cruelty to Animals, volunteering in church and community programs, and generally leading an exemplary life.<sup>46</sup>

In 1982, Appellant applied for a governor’s pardon, but it was denied due to insufficient details on how the pardon would further Appellant’s employment opportunities.<sup>47</sup> Appellant subsequently reapplied for a pardon, including details about the negative impacts of his criminal past on his employment opportunities.<sup>48</sup> In 1984, the Governor pardoned Appellant to assist him in “furthering his job opportunities.”<sup>49</sup>

Appellant petitioned for expungement in the court where he was convicted in 1954.<sup>50</sup> The court denied his petition, and the Superior

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40. 35 PA. STAT. ANN. § 780-119(a) (West 2023).

41. See Dietrich, *supra* note 11, at 164.

42. *Id.*

43. See *Commonwealth v. C.S.*, 534 A.2d 1053, 1054 (Pa. 1987) (“A pardon without expungement is not a pardon.”).

44. See *id.* at 1053.

45. See *id.* (“He completed his parole without violation.”).

46. See *id.* (“It is clear that, in all respects, appellant has lived an exemplary life since he served his sentence thirty years ago.”).

47. See *id.*

48. See *id.*

49. *Id.* at 1054.

50. See *id.*



Court affirmed.<sup>51</sup> The Supreme Court disagreed with the lower courts, reasoning that under prior case law,<sup>52</sup> Appellant was entitled to expungement of the pardoned record to make him “innocent as if he had never committed the offense.”<sup>53</sup> This decision subsequently entitled all individuals in receipt of a governor’s pardon to expungement within the Commonwealth.<sup>54</sup>

However, not every state follows this model of recognizing an automatic right to expungement in cases of a governor’s pardon. Some states decline to extend an automatic right of expungement to individuals with a pardoned record.<sup>55</sup> States that decline to follow Pennsylvania’s approach include Ohio and Delaware.<sup>56</sup> A third approach takes the middle ground, granting expungement of conviction-related criminal records, but not records related to a defendant’s arrest.<sup>57</sup>

Courts in New Jersey take a balanced approach to this dilemma, considering case-specific facts when deciding whether to grant expungement to an individual who was pardoned by the governor.<sup>58</sup> “Courts and legal scholars recognize that a pardon removes the legal disabilities that stem from the fact of a conviction but does not erase what happened when an offense was committed or restore a person’s good character.”<sup>59</sup> There may be reasons to deny an expungement beyond the “fact of conviction” which “live on after a pardon has been granted.”<sup>60</sup> For example, a compelling state interest would be one reason to retain a pardoned record.<sup>61</sup>

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51. See *Commonwealth v. C.S.*, 534 A.2d 1053, 1054 (Pa. 1987) (“The law of this Commonwealth is clear. Rehabilitation and post-conviction accomplishments are not grounds for expungement of the record of a criminal conviction.”).

52. See *Commonwealth v. Sutley*, 378 A.2d 780, 789 (Pa. 1977) (“[Pardon] not only exempts him from further punishment but relieves him from all the legal disabilities resulting from his conviction. *It blots out the very existence of his guilt, so that . . . he is thereafter as innocent as if he had never committed the offense.*”).

53. See *C.S.*, 534 A.2d at 1054.

54. See George Henry Newman, *Setting the Record Straight*, 30 PA. LAW. 44, 44, 46 (2008).

55. See, e.g., *State v. Boyken*, 4 N.E.3d 980, 988 (Ohio 2013) (holding that a governor’s pardon does not create an automatic right to expungement); *Polk v. State*, 150 So. 3d 967, 970 (Miss. 2014) (holding that there was “no statutory basis for expungement of the record of the criminal conviction for which Polk was pardoned”).

56. See *Boyken*, 4 N.E. 3d at 988; *Polk*, 150 So. 3d at 970.

57. See, e.g., *Blake v. State*, 860 N.E.2d 625, 631 (Ind. Ct. App. 2007) (holding that the “trial court erred in denying Blake’s request to expunge his record of conviction, but properly denied his request to expunge the records related to his arrest”).

58. See *In re Petition for Expungement of Crim. Rec. Belonging to T.O.*, 242 A.3d 842, 854–55 (N.J. 2021).

59. See *id.* at 854.

60. See *id.* at 855.

61. See *id.*



Both expungement and limited access protect an individual from disclosing protected criminal history record information.<sup>62</sup> Pennsylvania's statute provides that an individual may not be "required or requested" to disclose protected information.<sup>63</sup> One author criticizes this approach, arguing that it might infringe on the First Amendment constitutional rights of employers and others who may have reason to inquire about a criminal record.<sup>64</sup> The alternative approach is authorizing the beneficiary of the expungement to lie about ever being arrested.<sup>65</sup> Hybrid approaches like Pennsylvania's, which require an individual to disclose information to law enforcement but not to other entities, lead to confusion and can undermine the legitimacy of expungement.<sup>66</sup>

### B. Pardon

The Pennsylvania Constitution grants the Governor authority to pardon criminal convictions.<sup>67</sup> The Pennsylvania Supreme Court recognizes that the pardon power is left to the sole discretion of the governor.<sup>68</sup> A pardon is viewed as an "exercise of the sovereign's prerogative of mercy.<sup>69</sup> [Pardon] completely frees the offender from the control of the state."<sup>70</sup> The Court further stated that "[a pardon] blots out the very existence of . . . guilt, so that . . . he is thereafter as innocent as if he had never committed the offense."<sup>71</sup>

The positive effects of pardon include expanded employment opportunities, repairing one's name and reputation, and elimination of social stigma related to criminal convictions.<sup>72</sup> These positive

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62. See 18 PA. CONS. STAT. § 9122.5(a)(1) (2023) ("Except if requested or required by a criminal justice agency . . . an individual may not be required or requested to disclose information about the individual's criminal history record that has been expunged or provided limited access.").

63. *Id.*

64. See JACOBS, *supra* note 8, at 123.

65. *See id.*

66. *See id.* at 124.

67. See PA. CONST. art. IV, § 9(a) ("In all criminal cases . . . the Governor shall have power . . . to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons.").

68. See *Commonwealth v. Williams*, 129 A.3d 1199, 1217 (Pa. 2015) ("Article IV, Section 9(a) of the Pennsylvania Constitution entrusts clemency decisions to the sole discretion of the executive branch.").

69. See *Commonwealth v. C.S.*, 534 A.2d 1053, 1054 (Pa. 1987) (quoting *Commonwealth v. Sutley*, 378 A.2d 780, 789 (Pa. 1977)).

70. *See id.*

71. *Id.*

72. See Thomas L. Austin & Don Hummer, *The Effect of Legal and Extra-Legal Variables on the Recommending and Granting of a Pardon*, 22 LAW & POL'Y 49, 50 (2000).

effects can extend beyond the individual to the family.<sup>73</sup> Out of necessity, pardons often take place quietly with details obscured due to privacy rights.<sup>74</sup>

Despite the widely cited benefits of pardons, there are relevant shortcomings to consider. The first shortcoming stems from a lack of judicial review.<sup>75</sup> Because pardons are strictly a function of the executive realm, once a governor signs a pardon, it becomes final, with no opportunity for appeal or recourse by an interested party.<sup>76</sup> Consequently, no branch of government retains the power to revoke a pardon once it is granted by the governor.<sup>77</sup> Additionally, the legislative branch is left powerless to issue a recall in cases of executive abuse of the pardon power, the judicial branch is unable to review a pardon, and even the executive who issued a pardon is powerless to revoke a pardon once it is granted.<sup>78</sup>

Recently, former Pennsylvania Governor Tom Wolf made attempts to remove barriers to applying for a pardon within the state.<sup>79</sup> For example, fees associated with applying for a pardon in Pennsylvania were waived in an effort to make pardons more accessible.<sup>80</sup> A one-time pardon project focused on clearing records of people with low-level, non-violent marijuana convictions was also recently implemented.<sup>81</sup> There is no limit to the number of pardons a governor may grant in Pennsylvania.<sup>82</sup>

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73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See Governor Signs 2,000th Pardon*, LEVITTOWNNOW.COM (Aug. 23, 2022), <https://tinyurl.com/mt2dzps> [<https://perma.cc/46HP-GRT3>].

80. *See id.*

81. *See A.J. Herrington, Pennsylvania Governor Launches Program to Pardon Marijuana Convictions*, FORBES, (Sept. 2, 2022, 4:42 PM), <https://tinyurl.com/2s446d2e> [<https://perma.cc/RQH4-5Z5K>] (“Urging those with past marijuana convictions to apply for relief, [the Lt. Governor] said the Marijuana Pardon Project will deliver second chances to thousands of deserving Pennsylvanians trying to improve their lives.”).

82. *See* Press Release, Gov. Tom Wolf, Lt. Gov. Fetterman: Time is Running Out for People Interested in Quick Pardons Through PA Marijuana Pardon Project (Sept. 28, 2022, 11:51 AM), <https://tinyurl.com/jnrhyvns> [<https://perma.cc/5U8C-8ZRC>]. Governor Wolf granted 2,098 pardons as of September 28, 2022, compared to only 1,805 pardons granted in total in the 15 years prior to Governor Wolf taking office. *Id.*

### 1. *The Pardon Process*

Applications for a pardon in Pennsylvania are made to the Board of Pardons (“the Board”).<sup>83</sup> The applications are screened by the secretary of the Board, before being forwarded to the five-member Board.<sup>84</sup> The Board is composed of the currently-serving lieutenant governor and attorney general, a penologist,<sup>85</sup> an attorney, and a doctor (either a medical doctor, psychologist, or psychiatrist).<sup>86</sup> Stakeholders including the District Attorney and President Judge from the county where the case was prosecuted are allowed to provide input on the application for the Board’s consideration.<sup>87</sup>

Once the Board has considered the case, it holds a public hearing, where interested stakeholders, including the petitioner, have an opportunity to address the Board.<sup>88</sup> After the public hearing and once the Board has an opportunity to discuss the application, the Board holds a public vote.<sup>89</sup> A majority vote sends the application to Pennsylvania’s Governor, while a vote consisting of less than a majority results in denial of the application.<sup>90</sup> Once an application reaches the Governor, he has the discretion to approve or disprove a favorable recommendation from the Board.<sup>91</sup> If the Governor denies an application, a petitioner may not appeal the Governor’s decision but may reapply after one year.<sup>92</sup> If a petitioner reapplies for pardon and is denied a second time, the petitioner must wait two years before reapplying.<sup>93</sup>

### C. *Limited Access*

While lacking an exact definition, the general concept of limited access is that criminal history record information may “be disseminated only to a criminal justice agency . . . ,” rather than the

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83. See Austin & Hummer, *supra* note 72, at 51.

84. See *id.*

85. See *Penology*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The study of penal institutions, crime prevention, and the punishment and rehabilitation of criminals, including the art of fitting the right treatment to an offender.”).

86. See Austin & Hummer, *supra* note 72, at 51–52; see also *Board Members*, PA. BD. OF PARDONS, <https://tinyurl.com/nw98esu3> [<https://perma.cc/6SB3-XBGE>] (last visited July 9, 2023).

87. See *The Process*, PA. BD. OF PARDONS, <https://tinyurl.com/59xk4utp> [<https://perma.cc/QJF3-RY3W>] (last visited July 9, 2023).

88. See Austin & Hummer, *supra* note 72, at 52.

89. See *The Process*, *supra* note 87.

90. See *id.*

91. See *id.*

92. See Austin & Hummer, *supra* note 72, at 52.

93. See *id.*

information being available as a public record.<sup>94</sup> The Clean Slate Act passed in Pennsylvania was the first law of its kind in the United States.<sup>95</sup> The policy reasons behind the Act were “to allow those with criminal records to reduce the stigma against themselves” and to remove barriers to such individuals in finding educational opportunities, housing, and employment.<sup>96</sup> Additional policy reasons prompting the law included reducing recidivism and enabling rehabilitation for those with a criminal record.<sup>97</sup> Research reveals that a criminal record poses a significant barrier to finding educational, housing, and employment opportunities.<sup>98</sup>

In November 2016, the Pennsylvania General Assembly enacted legislation creating procedures to obtain an order limiting access to criminal history record information.<sup>99</sup> Rule 791 of the PRCP outlines the procedure for obtaining an order for limited access.<sup>100</sup> A petitioner must file a petition requesting limited access.<sup>101</sup> The Commonwealth may consent or object to the petition.<sup>102</sup> If the Commonwealth objects, a hearing is held, and the court issues an order either granting or denying limited access for the criminal history record information.<sup>103</sup>

### 1. *Clean Slate Limited Access*

In 2018, the Commonwealth of Pennsylvania took the concept of limited access a step further and instituted the Act, which provided for the automatic sealing of criminal records.<sup>104</sup> Within the first year, “over 34 million cases and nearly 47 million offenses” were

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94. See 18 PA. CONS. STAT. § 9122.1(a) (2023).

95. See Capuder, *supra* note 3, at 502.

96. See *id.* (“A multitude of public policy considerations were the driving forces behind the drafting and passing of the Act. These considerations included finding ways for certain people with criminal records to reduce stigma against them when applying for educational programs, employment opportunities, and housing arrangements.”).

97. See *id.*

98. See *id.*

99. See Kaplan, *supra* note 16, at 175. This was the first limited access legislation of its kind passed by any state in the United States. *Id.*

100. See PA. R. CRIM. P. 791. “An individual who satisfies the statutory requirements for . . . limited access may request an order that limits the dissemination of his or her criminal history record information by filing a petition with the clerk of the courts of the judicial district in which the charges were disposed. . . .” PA. R. CRIM. P. 791(A)(1).

101. See PA. R. CRIM. P. 791(A).

102. See PA. R. CRIM. P. 791(B).

103. See *id.*

104. See Act of Jun. 28, 2018, Pub. L. 402, No. 56 (codified at 18 PA. CONS. STAT. § 9122.2 (2018)); see also Capuder, *supra* note 3, at 502.

sealed from the public view.<sup>105</sup> The Pennsylvania General Assembly amended the legislation again in 2020, expanding the eligible categories for clean slate limited access.<sup>106</sup>

The current version of the law provides automatic shielding from public view for four categories of criminal history record information.<sup>107</sup> The first category shields eligible misdemeanor offenses.<sup>108</sup> The second category can be broadly construed as non-conviction data or criminal history record information related to charges that did not result in a conviction.<sup>109</sup> The third category provides limited access for summary offenses subject to several limitations.<sup>110</sup> The fourth category in this statute provides for limited access “pertaining to a conviction for which a pardon was granted.”<sup>111</sup>

Despite being the first law of its kind passed in the United States, the Act is not without limitations.<sup>112</sup> For example, the Act only controls criminal history information on file with courts and law enforcement agencies.<sup>113</sup> The Act does not control other information that may be available to the public such as news articles or other information available through a search of the internet.<sup>114</sup> Similarly, commercial vendors are still free to report on sealed convictions, and

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105. See *Over 24 Million Cases Sealed From Public View Under Pennsylvania's Clean Slate Law*, UNIFIED JUD. SYS. OF PA. (June 12, 2020), <https://tinyurl.com/3s57fzf2> [<https://perma.cc/TF53-DGG9>].

106. See Act of Oct. 29, 2020, Pub. L. 718, No. 83 (codified at 18 PA. CONS. STAT. § 9122.2(a)(4) (2020)) (“The following shall be subject to limited access: . . . Criminal history record information pertaining to a conviction for which a pardon was granted.”).

107. See *Over 24 Million Cases Sealed From Public View Under Pennsylvania's Clean Slate Law*, *supra* note 105.

108. See 18 PA. CONS. STAT. § 9122.2(a)(1) (2023) (outlining the requirements for clean slate limited access related to misdemeanor convictions, including payment of all court-ordered restitution).

109. See 18 PA. CONS. STAT. § 9122.2(a)(2) (2023) (“Criminal history record information pertaining to charges which resulted in a final disposition other than a conviction.”).

110. See 18 PA. CONS. STAT. § 9122.2(a)(3) (2023). In summary cases, the law requires ten years since conviction and payment of all court-ordered restitution for an individual to be limited access eligible. *Id.*

111. See 18 PA. CONS. STAT. § 9122.2(a)(4) (2023).

112. See Capuder, *supra* note 3, at 502.

113. See *id.*

114. See *id.* (“[T]his Act does not control news websites and other public information accessible online.”); see also Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 341 (“A common practical critique of sealing and expungement laws is that they are essentially useless in our current information environment. Once information is released, it is disseminated into the digital world in so many potential venues that a person can never fully ‘expunge’ anything.”).

the First Amendment<sup>115</sup> prevents the government from prohibiting reporting on sealed convictions.<sup>116</sup>

Implementing the Act without causing unwanted secondary effects proved challenging. Civil rights advocates criticized the Act's implementation, alleging that county clerks of court have sealed entire case files instead of only sealing those charges that qualify for limited access.<sup>117</sup> A reporter for The Patriot News in Harrisburg, Pennsylvania alleged that multiple convictions not covered by the Act were sealed from the public, including convictions for murder, rape, and assault.<sup>118</sup> Critics of the Act argue that this misapplication undermines public trust in open courts and the judicial system.<sup>119</sup>

A third version of the legislation would seal certain low-level felonies after ten years if the felon does not re-offend.<sup>120</sup> Advocates of the legislation contend that sealing some criminal records promotes crime-free communities by improving employment prospects.<sup>121</sup> Under this proposed version of the Act, most drug felonies would be eligible for automatic sealing without requiring eligible individuals to file a petition.<sup>122</sup>

## II. ANALYSIS

### A. *Balancing Interests in Criminal Record Maintenance*

#### 1. *The Argument for Maintaining Criminal Records*

Despite a recent trend toward removing access to criminal records to rehabilitate prior offenders, some courts have recognized that criminal records serve as a useful and necessary tool for law

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115. See U.S. CONST. amend. I.

116. See JACOBS, *supra* note 8, at 121.

117. See Joshua Vaughn, *Millions of Pa. Conviction Records Are Being Hidden from the Public. Advocates Want That to Change.*, PENN LIVE (May 24, 2022, 3:50 PM), <https://tinyurl.com/bdf6dapd> [<https://perma.cc/6BX8-HPPB>].

118. See *id.* (“Clerks are completely sealing cases rather than removing information about dropped charges because they are concerned about releasing information they are not supposed to.”).

119. See *id.*

120. See Marley Parish, *‘This is a People Issue’: Pa. Lawmakers, Advocates Push for Clean Slate Expansion*, PA. CAPITAL-STAR (Aug. 31, 2022, 4:37 PM), <https://tinyurl.com/m576mrtw> [<https://perma.cc/AW2L-SWHZ>]; see also Press Release, Rep. Jordan A. Harris, Harris: Expanding Clean Slate Would Give Thousands More Pennsylvanians Their Second Chance (Aug. 31, 2022), <https://tinyurl.com/2p9ffrye> [<https://perma.cc/2KRG-8JJR>] (noting that legislation currently pending in the Pennsylvania House of Representatives would expand automated sealing to include low-level drug felony convictions after an individual remained crime free for 10 years).

121. See Parish, *supra* note 120.

122. See *id.*

enforcement.<sup>123</sup> In *Morrow v. District of Columbia*,<sup>124</sup> the D.C. Circuit Court adopted the view that criminal records serve a useful purpose, and recognized that “[n]ation, state and city-wide crime detection and prevention are based upon a system of information and communication.”<sup>125</sup> More recently, the American Bar Association also recognized the utility of criminal record information in aiding law enforcement and criminal investigations.<sup>126</sup> In addition to aiding law enforcement investigations and crime detection, arrest record data compiled from stored criminal records can also guide legislatures in future decision making.<sup>127</sup>

## 2. *Pennsylvania’s Interest Balancing Approach*

Pennsylvania courts use an interest-balancing approach when determining whether to retain a criminal record.<sup>128</sup> This balancing approach was first seen in *Wexler*<sup>129</sup> and has been routinely applied since it was introduced by the court in 1981.<sup>130</sup> For example, in *Commonwealth v. Drummond*,<sup>131</sup> the Superior Court held that a lower court could deny expungement of a non-conviction record where the Commonwealth proved it had a strong case and the petitioner failed to offer particularized evidence of harm just one year after his initial arrest.<sup>132</sup> The court found that the Commonwealth retained a strong interest because if the victim in the case decided to testify, the Commonwealth could refile the charges.<sup>133</sup>

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123. See, e.g., *Morrow v. District of Columbia*, 417 F.2d 728, 748 (D.C. Cir. 1969) (“[A]s a means for identification and apprehension of criminals, an arrest record does serve the police community as a most valuable tool.”).

124. *Morrow v. District of Columbia*, 417 F.2d 728 (D.C. Cir. 1969).

125. See *id.* at 748.

126. LAW ENF’T ACCESS TO THIRD PARTY RECS. Standard 25-3.2 (AM. BAR. ASS’N 2013) (“Obtaining [records can] facilitate, and indeed be essential to, the detection, investigation, prevention and deterrence of crime; the safety of citizens and law enforcement officers; and the apprehension and prosecution of criminals; and can be the least confrontational means of obtaining needed evidence.”).

127. See Sharon Cassidy, *Davidson v. Dill: A Compelling State Interest in Retaining Arrest Records*, 35 U. PITT. L. REV. 205, 217 (1973).

128. See generally *Commonwealth v. Wexler*, 431 A. 2d 877 (Pa. 1981).

129. See *id.* at 879 (establishing a non-exhaustive list of five factors courts should balance when considering whether to grant expungement, including: (1) the strength of the Commonwealth’s case, (2) the reasons given by the Commonwealth for retaining the record, (3) age, criminal record, and employment history of the petitioner, (4) length of time between arrest and petition for expungement, and (5) any specific adverse consequences the petitioner may suffer as a result of denial).

130. See, e.g., *Commonwealth v. Drummond*, 694 A.2d 1111 (Pa. Super. Ct. 1997); *Commonwealth v. Wallace*, 97 A.3d 310 (Pa. 2014); *Commonwealth v. Persia*, 673 A.2d 969 (Pa. Super. Ct. 1996).

131. *Commonwealth v. Drummond*, 694 A.2d 1111 (Pa. Super. Ct. 1997).

132. See *id.* at 1113–14.

133. See *id.*



Similarly, in *Commonwealth v. Wallace*,<sup>134</sup> the Pennsylvania Supreme Court found that the decision to grant or deny an expungement petition was within the sound discretion of the trial court.<sup>135</sup> However, the court made clear that expungement was not automatic in cases where charges were terminated for reasons other than acquittal, and required a balancing of the *Wexler* factors.<sup>136</sup> “[T]he trial court must balance the individual’s interest against the Commonwealth’s interest when a prosecution has been terminated without conviction or acquittal.”<sup>137</sup>

The expungement court has greater discretion when the charges in question relate to sexual offenses.<sup>138</sup> In *Commonwealth v. Persia*,<sup>139</sup> charges were *nol prossed*<sup>140</sup> because the child victim was too apprehensive to testify against the defendant in open court.<sup>141</sup> The court found that immediate expungement was not warranted, but that it may be warranted in the future if new allegations were not brought against the defendant.<sup>142</sup>

*B. The Duplicity of Pardoned Records Subject to Expungement and Clean Slate Limited Access*

The Pennsylvania Supreme Court established an automatic right to expungement where the governor granted a pardon.<sup>143</sup> This ruling protected the petitioner in that case and subsequently protected the records of other individuals in receipt of a governor’s pardon.<sup>144</sup> In the years that elapsed since that ruling, Pennsylvania’s legislature passed the Clean Slate Act which also shields the records of individuals in receipt of a governor’s pardon from the public.<sup>145</sup>

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134. *Commonwealth v. Wallace*, 97 A.3d 310 (Pa. 2014).

135. *See id.* at 317.

136. *See id.* at 318 (“In *Wexler*, this Court set in place the following five factors that the trial court must balance when considering a petition for expungement. . . .”).

137. *See id.*

138. *See generally* *Commonwealth v. Persia*, 673 A.2d 969 (Pa. Super. Ct. 1996).

139. *Commonwealth v. Persia*, 673 A.2d 969 (Pa. Super. Ct. 1996).

140. *See* *Commonwealth v. Banks*, 198 A.3d 391, 403 (Pa. Super. Ct. 2018). The Superior Court of Pennsylvania noted:

*A nolle prosequi* is a voluntary withdrawal by a prosecuting attorney of proceedings on a particular criminal bill or information, which at anytime in the future can be lifted upon appropriate motion in order to permit a revival of the original criminal bill or information. Since a *nolle prosequi* acts neither as an acquittal nor a conviction, *double jeopardy does not attach to the original criminal bill or information.*

*Id.*

141. *See Persia*, 673 A.2d at 971.

142. *See id.* at 973.

143. *See* *Commonwealth v. C.S.*, 534 A.2d 1053, 1054 (Pa. 1987).

144. *See id.*

145. *See* 18 PA. CONS. STAT. § 9122.2 (2023).

The resulting overlap in case law and statutory law creates a situation where criminal records are effectively protected twice. The records of a pardoned charge are automatically subject to Clean Slate protection, while simultaneously, the pardoned record is also subject to automatic expungement if the individual files a petition for expungement under the Pennsylvania Rules of Criminal Procedure.<sup>146</sup>

This process duplicates protection of the criminal record without leaving meaningful recourse for the Commonwealth to challenge the expungement. This approach clashes with the interest-balancing approach long recognized by Pennsylvania courts beginning with *Wexler* and promulgated by *Drummond, Wallace, and Persia*.<sup>147</sup> *Commonwealth v. C.S.* should be considered excluded by the protections afforded individuals with a pardoned record under the Clean Slate Act<sup>148</sup> because the Pennsylvania general assembly implemented a law that includes statutory protections for pardoned records.<sup>149</sup> Retaining *Commonwealth v. C.S.* as good law is redundant.

C. *Automatic Right to Expungement is Excluded by Clean Slate Limited Access Under the Pennsylvania Rules of Statutory Construction*

The Pennsylvania rules of statutory construction are adopted by the legislature through statute and interpreted by the courts.<sup>150</sup> The concept that the express inclusion of one idea in a statute excludes all others is steeped in Pennsylvania jurisprudence.<sup>151</sup> “[W]here the legislature includes specific language in one section of the statute and excludes it from another, the language should not be implied where excluded.”<sup>152</sup> The Pennsylvania Supreme Court recently reiterated

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146. See PA. RS. CRIM. P. 490, 790.

147. See *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Pa. 1981); *Commonwealth v. Drummond*, 694 A.2d 1111, 1113–14 (Pa. Super. Ct. 1997); *Commonwealth v. Wallace*, 97 A.3d 310, 317 (Pa. 2014); *Commonwealth v. Persia*, 673 A.2d 969, 973 (Pa. Super. Ct. 1996).

148. See *C.S.*, 534 A.2d at 1054 (establishing a right to automatic expungement of a criminal record when the Governor grants a pardon); see also 18 PA. CONS. STAT. § 9122.2 (“The following shall be subject to limited access: . . . Criminal history record information pertaining to a conviction for which a pardon was granted.”).

149. See 18 PA. CONS. STAT. § 9122.2(a)(4) (2023).

150. See 1 PA. CONS. STAT. §§ 1901–1991 (2023) (“In the construction of the statutes of this Commonwealth, the rules set forth in this chapter shall be observed, unless the application of such rules would result in a construction inconsistent with the manifest intent of the General Assembly.”).

151. See, e.g., *Commonwealth v. Johnson*, 125 A.3d 822 (Pa. Super. Ct. 2015).

152. See *id.* at 831 (“Moreover, where a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a different legislative intent.”) (citing *Commonwealth v. Kinney*, 777 A.2d 492, 495 (Pa. Super. Ct. 2001)).

this view in *Sivick v. State Ethics Commission*.<sup>153</sup> “Under the doctrine *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters.”<sup>154</sup> The Court explained the meaning of this maxim, stating, “as a matter of statutory interpretation, although one is admonished to listen attentively to what the statute says, one must also listen attentively to what it does not say.”<sup>155</sup>

Additionally, under the statutory interpretation framework adopted by Pennsylvania courts, each word of a statute has meaning and is not treated as surplus.<sup>156</sup> “The principles of statutory construction indicate that ‘[w]henver possible each word in a statutory provision is to be given meaning and not to be treated as surplusage.’”<sup>157</sup> When “the words of a statute are not explicit,” Pennsylvania courts “discern legislative intent by examining . . . the former law . . . and the consequences of a particular interpretation.”<sup>158</sup> There is a presumption in determining the legislature’s intent that favors the public interest over any private interest.<sup>159</sup>

The Superior Court of Pennsylvania recently applied these rules of statutory construction in *Commonwealth v. Sanchez-Frometa*.<sup>160</sup> In that case, the defendant appealed his sentence of life imprisonment without parole after being convicted of second-degree murder.<sup>161</sup> The defendant, a juvenile, asserted that the applicable statute<sup>162</sup> only provided for life imprisonment without parole for convictions of first-degree murder.<sup>163</sup> The court did not interpret the statute to include

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153. *Sivick v. State Ethics Comm’n*, 238 A.3d 1250, 1264 (Pa. 2020).

154. *Id.* (“It is axiomatic that we may not add statutory language where we find the extant language somehow lacking.”).

155. *See id.* (quoting *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020)).

156. *See Commonwealth v. Ostrosky*, 866 A.2d 423, 429 (Pa. Super. Ct. 2005).

157. *See id.* (quoting *Commonwealth v. Tome*, 737 A.2d 1239, 1241 (Pa. Super. Ct. 1999)).

158. *See Ostrosky*, 866 A.2d at 429.

159. *See* 1 PA. CONS. STAT. § 1922 (“In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: . . . That the General Assembly intends to favor the public interest as against any private interest.”).

160. *See Commonwealth v. Sanchez-Frometa*, 256 A.3d 440, 448 (Pa. Super. Ct. 2021).

161. *See id.* at 442.

162. *See* 18 PA. CONS. STAT. § 1102.1(c)(1) (“A person who at the time of the commission of the offense was 15 years of age or older shall be sentenced to a term of imprisonment the minimum of which shall be at least 30 years to life.”).

163. *See Sanchez-Frometa*, 256 A.3d at 443 (“Appellant argues that a sentence of life imprisonment without parole is not an available sentence under Section 1102.1(c) as it was not explicitly specified.”).

second-degree murder, stating “[w]e decline to add language which the legislature did not see fit to include.”<sup>164</sup>

Applying these rules of statutory construction and the reasoning used in *Commonwealth v. Sanchez-Frometa* to the Clean Slate Act, there is a strong argument that the Act excludes an automatic right to expungement after a governor’s pardon. The Act does this by expressly addressing instances of a governor’s pardon as being protected under the Act.<sup>165</sup> However, after expressly addressing instances of a governor’s pardon as being protected by the Act, the legislature chose not to add such language to the statute pertaining to expungement.

“[T]he inclusion of a specific matter in a statute implies the exclusion of other matters.”<sup>166</sup> This is a situation where it is important to listen to what the legislature chose not to say. The legislature chose not to write the precedent set by *Commonwealth v. C.S.* into statute while addressing the very same scenario as that case. The court in *Commonwealth v. Sanchez-Frometa* declined “to add language which the legislature did not see fit to include.”<sup>167</sup> Similarly, the legislature has now spoken on the matter of when a pardoned record is protected. The presumption in favor of the public interest over private interest should be applied here,<sup>168</sup> and pardoned records should be subject only to Clean Slate Limited Access. This approach would balance both the interests of the individual and the Commonwealth by protecting the individual’s criminal record so he or she could pursue employment and housing opportunities, while also allowing the Commonwealth to have visibility of the record.

## CONCLUSION

Expungement is viewed by Pennsylvania courts as a long-standing due process right.<sup>169</sup> However, the right to expungement was traditionally limited to non-conviction data, certain summary cases, and ARD. The right to expungement was expanded in 1987 to include the records of individuals pardoned by the governor.<sup>170</sup> In 2018, with

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164. *See id.* at 448.

165. *See* 18 PA. CONS. STAT. § 9122.2(a)(4) (2023) (“The following shall be subject to limited access: . . . Criminal history record information pertaining to a conviction for which a pardon was granted.”).

166. *See* *Sivick v. State Ethics Comm’n*, 238 A.3d 1250, 1264 (Pa. 2020).

167. *See Sanchez-Frometa*, 256 A.3d at 448.

168. *See* 1 PA. CONS. STAT. § 1922 (“In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: . . . That the General Assembly intends to favor the public interest as against any private interest.”).

169. *See* *Dietrich*, *supra* note 11, at 164.

170. *See* *Commonwealth v. C.S.*, 534 A.2d 1053 (Pa. 1987).

the passage of the Clean Slate Act,<sup>171</sup> the Pennsylvania legislature revisited instances of a governor's pardon, making pardoned records eligible for automatic sealing under the Clean Slate Act.<sup>172</sup>

Retaining automatic expungement after a pardon as good case law provides double protection to pardoned records, deprives law enforcement of a useful tool, and denies the legislature useful data in future decision-making. The rules of statutory construction as interpreted by courts in Pennsylvania indicate that pardoned records should be excluded from the protection of automatic expungement. The legislature could have included language addressing automatic expungement of a pardoned record in the Act but deliberately chose to exclude such language. *Commonwealth v. C.S.* remains the governing case law of Pennsylvania, but it clashes with the intent of the legislature and the Clean Slate Act as interpreted under the rules of statutory construction.

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171. See Capuder, *supra* note 3, at 502.

172. See 18 PA. CONS. STAT. § 9122.2(a)(4) (2023).