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**CURBING COLLATERAL PUNISHMENT IN THE BIG  
DATA AGE: HOW LAWYERS AND ADVOCATES CAN USE  
CRIMINAL RECORD SEALING STATUTES TO PROTECT  
PRIVACY AND THE PRESUMPTION OF INNOCENCE**

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INTRODUCTION

We have entered an era of big data in which law enforcement agencies are collecting and using an enormous amount of information about the public in daily investigative activities.<sup>1</sup> In collaboration with technology giants such as IBM, police departments are implementing tools that allow for mass surveillance

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<sup>1</sup> See Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 556 (2016) (stating that police generate huge volume of records on individuals from stops and arrests).

through databases that store a spectrum of information—from addresses to acquaintances, from cellphone locations to license plate movements.<sup>2</sup> While a generation ago officers would have had to weed through paper files to investigate someone suspected of a crime, today some officers can use their department-issued smartphones to instantly access information from disparate and distance sources about a person they just encountered on the street.<sup>3</sup>

Arrests in general and arrests for misdemeanors in particular represent one discrete, and yet massive, body of information that is being collected and used by law enforcement agencies in this big data age.<sup>4</sup> Police departments maintain information about contacts with the criminal justice system.<sup>5</sup> That body of information reaches over sixty million Americans that have some kind of criminal record,<sup>6</sup> including those who are arrested on felonies and misdemeanors.<sup>7</sup> Between 2007 and 2016, there were close to four million misdemeanor arrests in the State of New York.<sup>8</sup> At The Bronx Defenders, the public defender service where I am the deputy director of the Impact Litigation Practice, we represented over twenty thousand clients arrested on misdemeanor cases in 2017 alone.<sup>9</sup> All of these criminal justice system contacts were uploaded into law enforcement databases.<sup>10</sup>

Arrest information can be used in myriad ways by various government entities. It can be used by law enforcement to direct police resources to certain

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<sup>2</sup> See Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOC. REV. 977, 977-91 (2017).

<sup>3</sup> Wendy Ruderman, *New Tool for Police Officers: Records at Their Fingertips*, N.Y. TIMES, Apr. 12, 2013, at A17.

<sup>4</sup> See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 818-19 (2015) (discussing implications of available data regarding arrests in general); Alexandra Natapoff, *Misdemeanor Criminalization*, 68 VAND. L. REV. 1055, 1063 (2015) (discussing implications of available data regarding misdemeanors, referring to them as “gateway to the criminal system”).

<sup>5</sup> See Brayne, *supra* note 2, at 977; Jain, *supra* note 4, at 818-19; Natapoff, *supra* note 4, at 1063.

<sup>6</sup> Jain, *supra* note 4, at 817 (stating that sixty-five million adults had criminal records in 2013). More recent reports indicate an even larger number. See Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas> [<https://perma.cc/LSG3-MKN4>] (finding that more than seventy million people have criminal records as defined by FBI’s data system—Interstate Identification Index).

<sup>7</sup> See Natapoff, *supra* note 4, at 1063.

<sup>8</sup> *Adult Arrests: 2007-2016*, N.Y. DIVISION CRIM. JUST. SERVS. (Feb. 17, 2017), <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nys.pdf> [<https://perma.cc/2MLX-VE2S>].

<sup>9</sup> Records on file with author.

<sup>10</sup> See Logan & Ferguson, *supra* note 1, at 556.

locations;<sup>11</sup> it can be used by prosecutors in bail applications;<sup>12</sup> it can result in being labeled as a recidivist or gang affiliated, with potential immigration consequences;<sup>13</sup> and it can be shared among government agencies and, in turn, could impact housing, employment, and family relationships.<sup>14</sup> Moreover, because of racial disparities in police targeting, the use of data—and the collateral consequences of that use—disproportionately affects people of color.<sup>15</sup>

Meanwhile, a significant number of misdemeanor arrests result in dismissal or acquittal. In New York City, the number for dismissal alone is approximately fifty percent.<sup>16</sup> At The Bronx Defenders, of our misdemeanor cases that closed in 2016, over ten thousand resulted in dismissals, acquittals, or adjournments in contemplation of dismissal (“ACD”).<sup>17</sup> The New York City Police Department (“NYPD”) has a web of databases that collect information from a wide array of sources, including from the misdemeanor arrest records created by the department itself.<sup>18</sup> The NYPD, in turn, uses arrest information for a host of investigative purposes, such as compiling photo identification arrays, determining whether to arrest or release, and interrogating witnesses.<sup>19</sup> The NYPD also has said that it uses dismissed arrest records for “a variety of reasons.”<sup>20</sup> Indeed, records on file with The Bronx Defenders indicate that the NYPD maintains information about dismissed arrests in databases that are used

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<sup>11</sup> See Brayne, *supra* note 2, at 990 (describing how Los Angeles Police Department (“LAPD”) used data to direct police resources and how these “predictive policing outputs sometimes—but not always—acted as a substitute for localized experiential knowledge”).

<sup>12</sup> Records on file with author; see also Jain, *supra* note 4, at 818-21 (explaining how “defendant’s treatment in criminal court depends,” in part, on “criminal history” and that “[p]rosecutors have professional incentives to exercise inadequate discretion and to overcharge”).

<sup>13</sup> See Natapoff, *supra* note 4, at 1090.

<sup>14</sup> See *id.* at 1063, 1107 (“The collateral consequences of even a minor conviction—from employment restrictions to housing, education, and immigration—have become a new and burdensome form of restraint and stigma.”).

<sup>15</sup> See *id.* at 1065 (concluding that disproportionate arrests made against African-American men convert “racially disparate arrest policies into formal criminalization”).

<sup>16</sup> Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 641-42 (2014).

<sup>17</sup> Records on file with author.

<sup>18</sup> See *infra* Section I.B.

<sup>19</sup> See *infra* Section I.B.

<sup>20</sup> Memorandum of Law in Opposition to Plaintiffs’ March 24, 2016 Letter Motion & in Support of Defendants’ Cross-Motion for the Court to Endorse Defendants’ Proposed Unsealing Order at 7-9, *Stinson v. City of New York*, 282 F.R.D. 360 (S.D.N.Y. 2012), ECF No. 295 (stating that “NYPD does indeed access sealed information for a variety of reasons” and describing hypothetical ways NYPD might use dismissed arrest information).

for investigatory purposes.<sup>21</sup> Given that the NYPD is a leading law enforcement agency in the United States, it is reasonable to expect that its practices might be emulated or followed in other jurisdictions. As a result, massive arrest information concerning legally innocent people is potentially being used by law enforcement agencies for surveillance and investigation.

Yet one readily available tool can curb this misuse of arrest data and its collateral consequences: Criminal record sealing statutes provide a mechanism to prevent arrest data from being used against people whose charges are dismissed. Criminal record sealing statutes exist in most states.<sup>22</sup> Although they differ in scope and application, they are designed, to some extent, to protect privacy and the presumption of innocence when a criminal process fails to result in a criminal conviction. New York has a sealing statute that applies to a breadth of dispositions, including dismissals and convictions for noncriminal violations, and it requires that photographs, records, and all information related to the criminal proceeding be discarded (in the case of photographs) or sealed (in the case of records) automatically at the time of disposition.<sup>23</sup> In 2016, The Bronx Defenders closed 18,503 cases whose dispositions required sealing.<sup>24</sup> If the NYPD is, in fact, using sealed arrests “for a variety of purposes,” then those cases represent a massive amount of information that the NYPD may be using in violation of current law, and enforcement of the New York sealing statute could offer an immediate mechanism for correcting this practice.

In this Article, I argue that the development and enforcement of strong criminal record sealing statutes, like the one in New York, will help both advance privacy and the presumption of innocence in this big data age, as well as stem the racial disparities in police practices and criminal justice outcomes that might otherwise be perpetuated. Additionally, implementing and enforcing criminal record sealing statutes could remove tremendous amounts of personal information from law enforcement databases and offer an immediate way to limit the potentially nefarious or undesirable effects of mass data surveillance.

In Part I, I review and discuss the use of arrest information in law enforcement databases, including the enormous body of data collected from misdemeanor arrests, the known or potential collateral consequences from its application, and an example of the NYPD’s four interconnected databases. In Part II, I explain the concept of criminal record sealing statutes and conduct a deep dive into New York’s statute. I explore the legislative intent behind the statute and review how courts—over the statute’s forty-year history—have interpreted its terms to

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<sup>21</sup> See *infra* Section I.B.

<sup>22</sup> See, e.g., CONN. GEN. STAT. ANN. § 54-142a (West 2018); IND. CODE ANN. § 35-38-9-1(h) (West 2017); MASS. GEN. LAWS ch. 276, § 100C (2017); MINN. STAT. ANN. § 609A.03 (West 2018); MONT. CODE ANN. § 46-18-204 (2017); NEB. REV. STAT. ANN. § 29-3523(4) (West 2017); 12 R.I. GEN. LAWS § 12-1.3-1(2) (2017).

<sup>23</sup> See N.Y. CRIM. PROC. LAW §§ 160.50, 160.55 (McKinney 2018).

<sup>24</sup> Records on file with author. This includes acquittals, dismissals, ACDs, and convictions for violations and infractions.

determine what information is protected and what amount of protection is required. I then note that courts have not been consistent in this regard. The inconsistency presents an opportunity to pursue stronger protections through advocacy and a possibility to bring creative civil rights litigation under the statute. I conclude by arguing that legislative advocacy and litigation should be used to protect against the nefarious collateral punishments that result from using arrest data.

## I. THE USE OF ARREST INFORMATION IN THE BIG DATA AGE

### A. *Mass Arrest Data—Collateral Punishments and Racial Disparities*

More than sixty million American adults have criminal records.<sup>25</sup> Criminal record data on individuals is shared widely among public and private entities and kept in apparent perpetuity.<sup>26</sup> Criminal histories are released to federal and state law enforcement agencies and non-law enforcement authorities, such as social service agencies, and sometimes that circulation is legally mandated.<sup>27</sup> The information being shared is not always accurate.<sup>28</sup>

Arrest information is part of a larger body of data that police collect and use in their surveillance and investigative activities.<sup>29</sup> Arrests alone represent an enormous volume of data on individuals.<sup>30</sup> A young adult in 2012 was thirty-six percent more likely to be arrested than her parents at the same age in 1960.<sup>31</sup> In New York, there were over 5.5 million arrests between 2007 and 2016,<sup>32</sup> the vast

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<sup>25</sup> See *supra* note 6 and accompanying text.

<sup>26</sup> See Logan & Ferguson, *supra* note 1, at 549 (“The digitization of [criminal] records, coupled with ever expanding computer power, has meant that data can be stored, accessed, and analyzed in a far more efficient manner.”).

<sup>27</sup> Jain, *supra* note 4, at 824 (“Every state now either requires or permits criminal histories to be released to noncriminal justice agencies, such as those that grant licenses and provide social services.”); see also Christie Thompson, *How ICE Uses Secret Police Databases to Arrest Immigrants*, MARSHALL PROJECT (Aug. 28, 2017, 7:00 AM), <https://www.themarshallproject.org/2017/08/28/how-ice-uses-secret-police-databases-to-arrest-immigrants> [<https://perma.cc/547B-YXGN>] (reporting that local law enforcement agencies share information from gang databases with federal authorities).

<sup>28</sup> See Liz Robbins, *A.C.L.U. Sues U.S. over Arrests of 3 Teenagers Suspected of Gang Ties*, N.Y. TIMES, Aug. 12, 2017, at A17 (reporting on lawsuit where three teenagers were unlawfully detained on suspicion of being gang members).

<sup>29</sup> See Brayne, *supra* note 2, at 989 (exploring how LAPD inputs data about range of encounters in addition to arrests).

<sup>30</sup> See Logan & Ferguson, *supra* note 1, at 556 (noting that “[i]n 2013 alone, arrests nationwide numbered almost 11.3 million” and each is “dutifully recorded and memorialized” by police agencies).

<sup>31</sup> Friedman, *supra* note 6.

<sup>32</sup> *Adult Arrests: 2007-2016*, *supra* note 8.

majority of which were for misdemeanors.<sup>33</sup> In the same ten-year period, there were 3,933,210 arrests for misdemeanors alone, constituting more than seventy percent of total arrests.<sup>34</sup> There are almost five times as many misdemeanor arrests as felony arrests every year.<sup>35</sup>

Arrest data is shared across networks and government agencies.<sup>36</sup> Mass arrest data is used by federal and local law enforcement agencies against those arrested in myriad ways, including surveillance and investigation,<sup>37</sup> and such uses are multiplying and spreading with technological advancements.<sup>38</sup> Further, arrests are used by both government and private actors—law enforcement agencies, criminal courts, employers, and many others—to judge the character and supposed criminal propensity of the person accused and to dispense consequences.<sup>39</sup> In this way, arrest information can lead to immigration, employment, economic, and social consequences.<sup>40</sup> Data on arrests can lead to bad warrants for re-arrest, which can then lead to detention, physically invasive searches, job loss, and humiliation.<sup>41</sup>

Numerous states and police departments use criminal record information or contacts with the criminal justice system to register people as affiliated with gangs in so-called gang databases.<sup>42</sup> Prosecutors and courts use prior arrests to

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<sup>33</sup> See Jain, *supra* note 4, at 818-19 (“Misdemeanors . . . constitute a majority of state court caseloads.”); Natapoff, *supra* note 4, at 1063 (“[O]ur criminal justice system is mostly about misdemeanors.”).

<sup>34</sup> *Adult Arrests: 2007-2016*, *supra* note 8.

<sup>35</sup> Natapoff, *supra* note 4, at 1063 (writing that “[e]very year in the U.S., approximately 2.3 million felony cases are filed compared to ten million misdemeanors”).

<sup>36</sup> See Brayne, *supra* note 2, at 994-95 (discussing one such initiative in Los Angeles County).

<sup>37</sup> See K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 U. DENV. CRIM. L. REV. 1, 14-19 (2015); Logan & Ferguson, *supra* note 1, at 554.

<sup>38</sup> See Logan & Ferguson, *supra* note 1, at 543 (reviewing history of data collection and noting that “prevailing zeitgeist of governments is one of database expansion”).

<sup>39</sup> See Kohler-Hausmann, *supra* note 16, at 644-45 (explaining how arrests can generate “marks” and how they “can be used to regulate access and opportunity across numerous social, economic, and political domains”).

<sup>40</sup> See Jain, *supra* note 4, at 826-43 (reviewing collateral consequences of arrests in immigration, housing, employment, and child protective services contexts); Logan & Ferguson, *supra* note 1, at 566 (noting that arrest data can “adversely affect employment, housing, occupational licenses, and student loan opportunities”).

<sup>41</sup> See Logan & Ferguson, *supra* note 1, at 564-69 (“An arrest record . . . has very tangible effects on individuals, serving as a basis to justify future detentions by police, and fueling a self-perpetuating cycle of criminal justice system contacts.”).

<sup>42</sup> See Howell, *supra* note 37, at 14-19 (discussing NYPD’s gang database); Logan & Ferguson, *supra* note 1, at 554 (noting proliferation of gang databases among state and federal law enforcement agencies and explaining that “[p]olice on their own identify individuals

render more severe consequences. For example, they might increase bail, offer a worse plea deal, or seek a more stringent sentence because of a prior arrest.<sup>43</sup> Law enforcement agencies sometimes use prior arrests, regardless of disposition, to determine whether a person should be released with a summons or arrested and booked<sup>44</sup>—a process that, in New York, regularly means more than twenty-four hours in detention.<sup>45</sup> Thus, our criminal justice system arrests people for misdemeanors based on slim and sometimes specious evidence of wrongdoing, marks their records based not on evidence but on administrative norm, and then uses those prior arrests to punish.<sup>46</sup>

The increase in the accessibility of widespread information through database technologies has affected how the police distribute resources and conduct investigative activities in the first instance.<sup>47</sup> Data analytics inform where to send police resources.<sup>48</sup> Once there, though, police continue to have great discretion in what activities to conduct.<sup>49</sup> If you consider that officers initially have wide discretion in whom to stop and whom to arrest, then the data becomes partly self-perpetuating: Officers police certain people and places more heavily because they policed those people and places more heavily before.<sup>50</sup> Sociologist Sarah Brayne, in a deep investigation into the Los Angeles Police Department's use of data, characterized this as a shift from reactive policing, whereby officers investigate crime after being informed a crime may have been committed (as in

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thought worthy of inclusion"); Thompson, *supra* note 27 (discussing how gang databases have been used to deport immigrants and litigation surrounding this issue).

<sup>43</sup> See Kohler-Hausmann, *supra* note 16, at 668-70 (explaining “additive logic of the managerial misdemeanor justice system”).

<sup>44</sup> WILLIAM J. BRATTON, N.Y.C. POLICE DEP'T, BROKEN WINDOWS AND QUALITY-OF-LIFE POLICING IN NEW YORK CITY 15 (2015), [http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/qol.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/qol.pdf) [<https://perma.cc/S4TM-734Z>] (explaining NYPD policy of labeling people as “transit recidivist” based on prior arrests and that “person stopped for a violation of transit rules who is identified as a transit recidivist is ineligible for a civil notice and must be arrested for the offense”).

<sup>45</sup> Records on file with author.

<sup>46</sup> See Brayne, *supra* note 2, at 998-99 (explaining how data points in certain technological programs used by police departments increase surveillance and investigation of certain people, and writing that “[b]y virtue of being in the system, individuals are more likely—correctly or incorrectly—to be identified as suspicious”).

<sup>47</sup> *Id.* at 985-90 (describing how use of data analytics has changed LAPD practices in distributing police resources and initial investigations).

<sup>48</sup> *Id.* at 989-90 (describing LAPD's use of predictive policing, which utilizes data collection as basis for deployment).

<sup>49</sup> *Id.* at 990-91 (“Although ‘data drives deployment,’ what the police do once in the predictive box, and how long they stay there, remains within their discretion.”).

<sup>50</sup> See *id.* at 998 (“Predictive models are performative, creating a feedback loop in which they not only predict events such as crime or police contact, but also contribute to their future occurrence.”).

the case of 911 calls), to predictive policing, whereby officers use mass data algorithms to predict where crime is likely to happen in the future.<sup>51</sup> She writes that “[b]ig data and associated new technological tools permit unprecedentedly broad and deep surveillance.”<sup>52</sup> Data itself, divorced from human observation, can become a basis for suspicion.<sup>53</sup> It becomes even more critical that the data within these technologies is appropriate in terms of both democratic principles and constitutional rights, as a person becomes subject to greater surveillance activities based on that data.<sup>54</sup>

At the same time, arrests are commonly the result of encounters in which officers have great discretion. Stops are based merely on reasonable suspicion.<sup>55</sup> Arrests, in turn, are based on the relatively low evidentiary threshold of probable cause.<sup>56</sup> As a legal matter, an arrest signifies nothing more than probable cause that someone committed a crime.<sup>57</sup> Because police have significant discretion in determining whether observed conduct should lead to a misdemeanor arrest, the number of misdemeanor arrests in a given geographic area is fairly attributable to the policing tactics employed there, rather than local crime rates.<sup>58</sup> There is also reason to doubt that even the low evidentiary standard of probable cause is, in fact, met for all arrests given the large number of misdemeanor arrests that prosecutors decline to pursue charges.<sup>59</sup>

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<sup>51</sup> Brayne, *supra* note 2, at 989-90.

<sup>52</sup> *Id.* at 996.

<sup>53</sup> *Id.* at 998 (“Unchecked predictions may lead to an algorithmic form of confirmation bias, and subsequently, a misallocation of resources.”).

<sup>54</sup> Samantha Melamed, *Can Atlantic City’s Bold Experiment Take Racial Bias out of Predictive Policing?*, INQUIRER (Aug. 10, 2017, 5:03 AM), <http://www.philly.com/philly/news/crime/atlantic-city-risk-terrain-modeling-rutgers-predictive-policing-joel-caplan-2017-0810.html> [<https://perma.cc/Q5JN-MM9Y>] (reporting that Atlantic City Police Department, in part, uses HunchLab technologies because it does not use arrest data, which “would create a feedback loop by interpreting elevated police action as elevated risk”).

<sup>55</sup> *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (establishing reasonable suspicion standard for temporarily seizing pedestrians).

<sup>56</sup> Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 153 & n.110 (2017) (collecting citations arguing that probable cause is easy evidentiary standard for police to meet).

<sup>57</sup> *Spinelli v. United States*, 393 U.S. 410, 419 (1969) (noting that probable cause is “only the probability, and not a prima facie showing, of criminal activity”).

<sup>58</sup> Kohler-Hausmann, *supra* note 16, at 636-37 (stating that police use both individual discretion and organizational policies to address low-level offenses); *id.* at 690-91 (noting that African Americans and Latinos “face vastly unequal risk of arrest,” in part, “because of the density and form of policing in different spaces”).

<sup>59</sup> *Id.* at 645 (noting that New York prosecutors declined to prosecute between 17,000 and 30,500 misdemeanor arrests each year from 2009 to 2014).

Indeed, misdemeanor arrests regularly result in dismissal. In New York, close to half of misdemeanor arrests get dismissed.<sup>60</sup> At The Bronx Defenders, a public defender organization contracted to represent approximately thirty thousand people trapped in the criminal justice system each year, more than three thousand criminal cases resulted either in dismissal before trial or an ACD in the first quarter of 2017 alone.<sup>61</sup> The most common form of dismissal is an ACD,<sup>62</sup> which is, as a legal matter, a complete dismissal for purposes of adjudicating guilt.<sup>63</sup> In addition, among those misdemeanor cases that result in conviction, more than half are convictions for noncriminal violations.<sup>64</sup> As Issa Kohler-Hausmann has shown, the rate of misdemeanor dismissals has actually gone up as the number of misdemeanor arrests has increased.<sup>65</sup>

Arrests are not race neutral. Nearly fifty percent of African-American men and more than forty percent of Latino men will be arrested by the age of twenty-three,<sup>66</sup> while that rate for white men is only thirty-eight percent.<sup>67</sup> As Professor Alexandra Natapoff writes, “[b]ecause African American men are disproportionately subject to arrest for minor disorder and possession crimes, the misdemeanor process effectively converts racially disparate arrest policies into formal criminalization.”<sup>68</sup> Similarly, data is also not race and class neutral: People of color in low-income urban neighborhoods are more likely to have information about them input into these databases.<sup>69</sup> Indeed, concerns about the racial impacts from using one data technology recently led the Oakland Police Department to abandon its plans to use the technology.<sup>70</sup>

Again, New York is an example of this problem. Between 1990 and 2012, African Americans and Latinos consistently faced far more arrests for

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<sup>60</sup> *Id.* at 641-42.

<sup>61</sup> Records on file with author.

<sup>62</sup> Kohler-Hausmann, *supra* note 16, at 648.

<sup>63</sup> See N.Y. CRIM. PROC. LAW § 170.55(8) (McKinney 2018).

<sup>64</sup> Kohler-Hausmann, *supra* note 16, at 650.

<sup>65</sup> *Id.* at 642 fig.8.

<sup>66</sup> Jain, *supra* note 4, at 817; Friedman, *supra* note 6.

<sup>67</sup> Crimesider Staff, *Study: 49% Black Men, 38% White Men Arrested by Age 23*, CBS NEWS (Jan. 8, 2014, 7:38 AM), <https://www.cbsnews.com/news/study-49-black-men-38-white-men-arrested-by-age-23/> [<https://perma.cc/7XMD-WL7G>].

<sup>68</sup> Natapoff, *supra* note 4, at 1065.

<sup>69</sup> Brayne, *supra* note 2, at 998; *see also* Melamed, *supra* note 54 (reporting that “civil-rights advocates have raised alarms” about mass data technologies and that “coalition of [sixteen] groups” issued statement “warning that such tools exacerbate racial biases, ignore community needs and contribute to the over-policing of poor minority neighborhoods”).

<sup>70</sup> Melamed, *supra* note 54 (reporting that Oakland police decided not to use PredPol technologies because study found “that if deployed in Oakland, Calif., it would concentrate forces in low-income communities of color”).

misdemeanors in New York than whites.<sup>71</sup> In 2012, there were more than one hundred thousand misdemeanor arrest incidents for African Americans, approximately eighty thousand for Latinos, but fewer than forty thousand for whites.<sup>72</sup> The NYPD's stop and frisk practice targeted misdemeanor offenses and was found in 2013 to have unlawfully targeted African Americans and Latinos based on race.<sup>73</sup>

Despite being in the midst of an extensive remedial process because of the federal court's ruling, the NYPD's stop and frisk data as of 2017 showed that racial disparities in stops persist at the same levels.<sup>74</sup> Sarah Brayne suggests that data can reproduce racial disparities, writing that "data-driven surveillance practices may be implicated in the reproduction of inequality in three ways: by deepening the surveillance of individuals already under suspicion; widening the criminal justice dragnet unequally; and leading people to avoid 'surveilling' institutions that are fundamental to social integration."<sup>75</sup>

#### B. *The NYPD Example*

The NYPD is not transparent about its use of technologies. Based on records on file with The Bronx Defenders, limited public statements from the NYPD, and investigative journalism, it appears that the NYPD currently uses several interconnected databases, including Palantir (or a version of Palantir created by the NYPD),<sup>76</sup> the Domain Awareness System ("DAS"), the Recidivist Tracking and Reporting Database ("RTRD"), the Real Time Crime Center ("RTCC"), and the Transit Recidivist Database ("TRD"). Each of these databases tracks arrest information.<sup>77</sup>

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<sup>71</sup> Kohler-Hausmann, *supra* note 16, at 634 fig.3.

<sup>72</sup> *Id.*

<sup>73</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561-62 (S.D.N.Y. 2013) (finding that NYPD had "unwritten policy" of targeting African-American and Latino men for stops).

<sup>74</sup> See Letter from Darius Charney, Attorney, Ctr. for Constitutional Rights, to Hon. Analisa Torres, U.S. Dist. Court, S. Dist. of N.Y. (June 7, 2017), <https://ccrjustice.org/sites/default/files/attach/2017/06/Response%20to%20Monitor%27s%205th%20Status%20Report.pdf> [<https://perma.cc/JAB7-JM98>].

<sup>75</sup> Brayne, *supra* note 2, at 997.

<sup>76</sup> *Id.* at 985 (noting that Palantir has contract with NYPD); Mark Harris, *How Peter Thiel's Secretive Data Company Pushed into Policing*, WIRED (Aug. 9, 2017, 9:40 AM), <https://www.wired.com/story/how-peter-thiels-secretive-data-company-pushed-into-policing/> [<https://perma.cc/K4T6-F2FT>] (reporting same and that NYPD is seeking to cancel contract and "move to in-house technology that it hopes will be cheaper and easier to use").

<sup>77</sup> Records on file with author.

RTCC “is a centralized data hub that rapidly mines information from multiple crime databases and disseminates that information to officers in the field.”<sup>78</sup> The RTCC “occupies a physical office space” at NYPD headquarters and is staffed by “more than 40 detectives and civilian analysts.”<sup>79</sup> The NYPD created this database to address the difficulty of drawing data that had been “stored in multiple city, state and federal databases that require significant time to sift through and gather the data.”<sup>80</sup> The RTCC “allow[s] officer[s] to sift through billions of records with a single Web-based interface.”<sup>81</sup> Using the RTCC, officers can get “in a matter of minutes” information mined from, among other sources, “[m]ore than 5 million New York State criminal records, parole, and probation files” and “[m]ore than 20 million NYC criminal complaints, emergency calls, and summonses.”<sup>82</sup>

RTRD “provides a comprehensive snapshot of every previous perpetrator, including his vulnerabilities to arrest, parole violation, or other sanctions.”<sup>83</sup> According to a description of a master’s program on the future of policing technology, “RTRD notifies law enforcement officers, via email, of any new criminal activity of a known recidivist as soon [as] the new data is entered into [the] computer system.”<sup>84</sup> Within RTRD, a person’s entire criminal history is “compiled in a single place.”<sup>85</sup>

The TRD, which might be a subset of RTRD, was created by the NYPD as “an effort to identify persons likely to commit crimes in the transit system or persons who routinely violate transit rules and disregard notices to appear at the Transit Adjudication Bureau.”<sup>86</sup> Under NYPD policy, “[a] person stopped for a violation of transit rules who is identified as a transit recidivist is ineligible for a civil notice and must be arrested for the offense.”<sup>87</sup> Recidivists are identified in part based on any prior misdemeanor or transit arrests in the preceding two years.<sup>88</sup>

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<sup>78</sup> N.Y.C. GLOB. PARTNERS, BEST PRACTICE: REAL TIME CRIME CENTER: CENTRALIZED CRIME DATA SYSTEM 1 (2010), [http://www.nyc.gov/html/ia/gprb/downloads/pdf/NYC\\_Safety%20and%20Security\\_RTCC.pdf](http://www.nyc.gov/html/ia/gprb/downloads/pdf/NYC_Safety%20and%20Security_RTCC.pdf) [<https://perma.cc/Z9QX-Z3M3>].

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> N.Y.C. POLICE DEP’T, THE POLICE COMMISSIONER’S REPORT 48 (2016), <http://www1.nyc.gov/assets/nypd/downloads/pdf/publications/pc-report-2016.pdf> [<https://perma.cc/5PPX-J7E7>].

<sup>84</sup> *Spring 2011 Seminar Course Invites You!*, CITY C. OF N.Y. (Jan. 6, 2012), <http://css8a0.engr.cuny.cuny.edu/csblog/tag/experts/> [<https://perma.cc/P2AJ-LDF2>].

<sup>85</sup> *Id.*

<sup>86</sup> BRATTON, *supra* note 45, at 15.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

DAS appears to be an omnibus database system that pulls information from a wide range of sources, including thousands of cameras throughout the city, license plate scanners, criminal databases, and other city databases.<sup>89</sup> In 2013, the NYPD indicated that it intended to equip all patrol officers with devices that would allow them to bring up the DAS dashboard while patrolling.<sup>90</sup> Records on file with The Bronx Defenders indicate that officers are now able to pull up the DAS dashboard on department-issued cell phones.<sup>91</sup> Among other databases, DAS notably pulls data from RTCC, which includes complaints, arrests, and summonses.<sup>92</sup> It also pulls from other city and state databases.<sup>93</sup> This gives officers an ability to immediately retrieve extensive data on someone they encounter on the street.

Arrest information is, therefore, a central component of the NYPD's data surveillance system. The NYPD has taken the position that it is permitted to use dismissed arrest information, and it has suggested it uses that information for a variety of law enforcement purposes.<sup>94</sup> Additionally, records on file at The Bronx Defenders suggest that the NYPD does not ensure that its use of arrest data comports with the sealing statute, which has existed in New York for four decades. Specifically, our files indicate that NYPD databases contain information about sealed arrests, including dismissed arrest charges, dismissed arrest reports, and personal identifying information that is pulled from dismissed arrest paperwork. Our files further indicate that NYPD personnel use this information to investigate crime, interrogate criminal defendants, identify suspects, label people as so-called "recidivists," and more. An enormous number of our clients at The Bronx Defenders have arrests that result in dismissals or other outcomes that should be sealed. In 2016, 18,503 cases—or more than seventy-five percent of cases closed that year—resulted in an outcome that

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<sup>89</sup> Chris Francescani, *NYPD Expands Surveillance Net to Fight Crime as well as Terrorism*, REUTERS (June 21, 2013, 11:27 AM), <http://www.reuters.com/article/us-usa-ny-surveillance/nypd-expands-surveillance-net-to-fight-crime-as-well-as-terrorism-idUSBRE95K0T520130621> [<https://perma.cc/4EZ5-4KDZ>]; Neal Ungerleider, *NYPD, Microsoft Launch All-Seeing "Domain Awareness System" with Real-Time CCTV, License Plate Monitoring*, FAST COMPANY (Aug. 8, 2012), <https://www.fastcompany.com/3000272/nypd-microsoft-launch-all-seeing-domain-awareness-system-real-time-cctv-license-plate-monitoring> [<https://perma.cc/EU4H-4VJK>].

<sup>90</sup> Francescani, *supra* note 89.

<sup>91</sup> Records on file with author.

<sup>92</sup> *Audit Report on the Information System Controls of the Domain Awareness System Administered by the New York City Police Department*, N.Y.C. COMPTROLLER (June 26, 2015), <https://comptroller.nyc.gov/reports/audit-report-on-the-information-system-controls-of-the-domain-awareness-system-administered-by-the-new-york-city-police-department/> [<https://perma.cc/44YN-57DU>].

<sup>93</sup> *Id.*

<sup>94</sup> See *supra* note 20 and accompanying text.

required sealing.<sup>95</sup> This helps illustrate the potential impact that sealing statute enforcement might have on law enforcement's use of big data.

## II. SEALING STATUTES

Most states have created statutory schemes that keep information about certain arrests and prosecutions private.<sup>96</sup> These statutes differ in scope of protection, trigger of protection, subject of protection, and treatment of protected information.<sup>97</sup> In New York, protection is automatic. The accused person does not need to take any action to invoke the statutory protections—once the triggering event occurs, the statute applies.<sup>98</sup> In other states, an accused person needs to specifically move the court to invoke the statutory protections.<sup>99</sup> Though the precise protections vary, these statutes provide some defense against the use of arrest data in law enforcement surveillance and investigation. I now review, in depth, New York's sealing statute and demonstrate how its existence and enforcement can help protect privacy and the presumption of innocence in the big data age.

### A. *New York's Sealing Statute*

In 1976, New York promulgated section 160.50 of the Criminal Procedure Law ("CPL") to protect information related to arrests and prosecutions that terminate in an accused person's favor.<sup>100</sup> In 1980, section 160.55 of the CPL, which protects the same information for those who were accused of crimes or misdemeanors but who ultimately were only convicted of violations, was promulgated.<sup>101</sup> These two provisions are triggered in different situations, but once triggered, they provide almost exactly the same protections.<sup>102</sup>

Section 160.50 protects certain information when "a criminal action or proceeding" terminates in favor of the accused.<sup>103</sup> Favorable termination

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<sup>95</sup> This includes acquittals, dismissals, ACDs, or convictions for violations and infractions.

<sup>96</sup> See Fruhan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 31 (2008) (collecting state laws that require expungement, sealing, or other mechanisms for protecting privacy of criminal records).

<sup>97</sup> See, e.g., CONN. GEN. STAT. ANN. § 54-142a (West 2018); IND. CODE ANN. § 35-38-9-1(h) (West 2018); MASS. GEN. LAWS ch. 276, § 100C (2017); MINN. STAT. ANN. § 609A.03 (West 2018); MONT. CODE ANN. § 46-18-204 (2017); NEB. REV. STAT. ANN. § 29-3523(4) (West 2017); 12 R.I. GEN. LAWS § 12-1.3-1(2) (2017).

<sup>98</sup> N.Y. CRIM. PROC. LAW § 160.50(1) (McKinney 2018).

<sup>99</sup> See, e.g., MINN. STAT. ANN. § 609A.03 (requiring accused individual who seeks expungement to file petition).

<sup>100</sup> 1976 N.Y. Sess. Laws 2451 (McKinney).

<sup>101</sup> N.Y. Bill Jacket, 1980 ch. 192.

<sup>102</sup> Compare N.Y. CRIM. PROC. LAW § 160.50, with *id.* § 160.55.

<sup>103</sup> *Id.* § 160.50(1).

includes acquittal;<sup>104</sup> ACD;<sup>105</sup> dismissal of the accusatory instrument on motion,<sup>106</sup> through court order<sup>107</sup> or after appeal;<sup>108</sup> order vacating a judgment, through court order<sup>109</sup> or habeas petition;<sup>110</sup> or dismissal of charges as a result of a grand jury's voting no true bill.<sup>111</sup> Although this section of the CPL cross-references at least twenty other sections, the unifying thread is legal innocence—the protections of the sealing statute will apply if the arrest or prosecution fails to result in a guilty plea or conviction.

Section 160.55 is a companion sealing statute to section 160.50 that affords protections not when there was a favorable termination, but when a criminal prosecution resulted in certain violations or traffic infractions.<sup>112</sup> This provision excludes loitering for purposes of engaging in prostitution and driving while under the influence of alcohol or drugs.<sup>113</sup> Palmprints and fingerprints related to certain domestic violence arrests are also excluded.<sup>114</sup> While protection under this provision is provided to people who are guilty of some form of misconduct, the misconduct is not criminal. Thus, this provision, as with section 160.50, protects those who are legally innocent of any crime.

The two companion provisions operate in virtually identical fashion. Once the triggering event occurs—in the case of section 160.50, favorable termination; in the case of section 160.55, prosecution resulting in a violation or traffic infraction—sealing is automatic.<sup>115</sup> Should the prosecutor or court believe sealing is contrary to the public interest, there must be a hearing on the matter, with at least five days' notice given to the accused.<sup>116</sup> If the prosecutor is the movant, she bears the burden of demonstrating “to the satisfaction of the court that the interests of justice” requires unsealing.<sup>117</sup>

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<sup>104</sup> *Id.* § 160.50(3)(c).

<sup>105</sup> *Id.* § 160.50(3)(b).

<sup>106</sup> *Id.* § 160.50(3)(d).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* § 160.50(3)(f).

<sup>109</sup> *Id.* § 160.50(3)(e).

<sup>110</sup> *Id.* § 160.50(3)(g).

<sup>111</sup> *Id.* § 160.50(3)(h).

<sup>112</sup> *Id.* § 160.55(1).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* § 160.55(1)(a).

<sup>115</sup> *Id.* § 160.50(1) (“Upon the termination of a criminal action or proceeding against a person in favor of such person . . . the record of such action or proceeding shall be sealed . . .”); *id.* § 160.55(1) (stating that “[u]pon the termination of a criminal action or proceeding against a person by the conviction of such person of a traffic infraction or a violation,” division of criminal justice services and all law enforcement agencies must be immediately notified and then must seal records).

<sup>116</sup> *Id.* §§ 160.50(1), 160.55(1).

<sup>117</sup> *Id.*

Once sealing has occurred, criminal justice agencies have limited means to unseal records. A prosecutor may move for unsealing when the accused seeks certain dispositions in marijuana related cases,<sup>118</sup> because those dispositions are only available if the person was not previously granted that disposition in a prosecution for that charge.<sup>119</sup> Those are the only circumstances under which prosecutors may unseal records.

Law enforcement agencies who want access to sealed official records must persuade a court on *ex parte* motion “that justice requires that such records be made available to it.”<sup>120</sup> Because of a 2009 amendment to section 160.55,<sup>121</sup> certain records related to domestic violence arrests are available to “police agency, probation department, sheriff’s office, district attorney’s office, department of correction of any municipality and parole department, for law enforcement purposes,” when a person previously convicted of certain domestic violence charges is again arrested on such charges.<sup>122</sup> Agencies that issue gun licenses, parole and probation departments, and employers of police officers or peace officers are also given access to sealed records, but such access is only granted in specific and enumerated circumstances.<sup>123</sup> New York’s highest court has held that the “primary focus” of the subdivision allowing law enforcement access upon motion “is the unsealing of records for investigatory purposes.”<sup>124</sup> These unsealing mechanisms are “precisely drawn” and demonstrate legislative intent to prohibit disclosure “except where the statute explicitly provides otherwise.”<sup>125</sup> Notably, prosecutors have attempted to invoke the more lenient *ex parte* avenue for unsealing available to law enforcement, and courts have rejected their attempts.<sup>126</sup>

These two sealing statutes together, then, offer strong privacy protections to those accused but not found guilty of crimes. The statutes are triggered by a wide array of dispositions, and the accused does not need to take any action to seek sealing. Sealing will automatically occur unless a court determines that unsealing is necessary for the interests of justice, and the prosecutor or the court must specifically move for that relief in short order. Prosecutors may only seek

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<sup>118</sup> *Id.* §§ 160.50(1)(d)(i), 160.55(1)(d)(i).

<sup>119</sup> *See id.* §§ 170.56(1)(a)-(b), 210.46 (disallowing suspension of proceedings in cases involving marijuana violations for defendants previously granted ACD or dismissal under these provisions).

<sup>120</sup> *Id.* §§ 160.50(1)(d)(ii), 160.55(1)(d)(ii).

<sup>121</sup> Assemb. 9017, 2009-2010 Reg. Sess. (N.Y. 2009), N.Y. Bill Jacket, 2009 ch. 476.

<sup>122</sup> N.Y. CRIM. PROC. LAW § 160.55(1)(d)(vi).

<sup>123</sup> *Id.* §§ 160.50(1)(d)(iii)-(vi), 160.55(1)(d)(iii)-(vi).

<sup>124</sup> Katherine B. v. Cataldo, 833 N.E.2d 698, 703 (N.Y. 2005).

<sup>125</sup> *Id.* at 702.

<sup>126</sup> *See* People v. F.B., 63 N.Y.S.3d 314, 318 (App. Div. 2017) (discussing other cases in which courts rejected prosecutors’ attempts to unseal records based on exceptions to section 160.55(1)(d)(ii)).

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unsealing in two narrow circumstances, and law enforcement may not access sealed records without first demonstrating to the court that access is sufficiently justified.

B. *Legislative Intent*

The strength of the protections under these sealing statutes is even more apparent when one examines the legislative intent animating these laws. Section 160.50 passed with wide support in 1976 after a previously failed attempt to promulgate a similar statute that would have required expunging protected records.<sup>127</sup> As I will show later, this law was designed to protect privacy and the presumption of innocence and it drew support because it advanced those interests. It further promised to stem racial disparities in the collateral consequences of criminal justice involvement.

In approving section 160.50, the Governor of New York said the central purpose of the bill is to “protect the rights of individuals against whom criminal charges have been brought, but which did not ultimately result in a conviction.”<sup>128</sup> In an oft-quoted passage, he wrote that “[t]his legislation is consistent with the presumption of innocence, which simply means that no individual should suffer adverse consequences merely on the basis of an accusation, unless the charges were ultimately sustained in a court of law.”<sup>129</sup>

The New York Legislature reflected these same sentiments in supporting the legislation. The Senate and Assembly justified the bill as needed to preserve the right to privacy and prevent any negative consequences from an unproven criminal accusation. Senator Joseph R. Pisani, who introduced the bill in the Senate, wrote in support of the legislation that “[t]he enactment of this bill into law will serve to safeguard the good names of a countless number of our fellow men who have looked to our courts for justice.”<sup>130</sup> He went on to say that the bill would “serve to protect them against unfair records which will serve only to blight their futures in many ways . . . [and] its remedies give no man more than that to which he is justly entitled after having been brought to the bar of justice.”<sup>131</sup>

The Senate bill similarly noted that its purpose was “to protect the rights of individuals, when criminal actions against them have been terminated in their favor.”<sup>132</sup> The bill sought “to remove the punitive collateral consequences of an

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<sup>127</sup> 1976 N.Y. Sess. Laws 2451 (McKinney).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Letter from Joseph R. Pisani, N.Y. State Sen., to Hon. Judah Gribetz, Counsel to the Governor, N.Y. (June 16, 1976), N.Y. Bill Jacket, 1976 ch. 877.

<sup>131</sup> *Id.*

<sup>132</sup> Governor’s Program Bill, N.Y. Bill Jacket, 1976 ch. 877.

arrest where such person has been accorded treatment other than conviction.”<sup>133</sup> The justification for the bill was that “the status of individuals who are arrested but not convicted should be preserved and not blemished or tainted just because such individuals were put to the task of compliance with legal machinery which is of necessity a matter of record.”<sup>134</sup> And the Senate Recommendation in support of the bill said specifically that the requirement of sealing official records would serve “to protect the privacy of the individual concerned.”<sup>135</sup> The Senate voted overwhelmingly—ninety-eight to forty-six—to approve.<sup>136</sup>

The expungement requirement of the prior version of this legislation received criticism from prosecutors and law enforcement agencies as unworkable and against the public interest.<sup>137</sup> As a result, the 1976 version replaced the expungement requirement with a sealing requirement, and it passed with notable support from prosecutors. The New York State Division of Criminal Justice Service advised the Governor to approve the bill,<sup>138</sup> and the District Attorneys Association of the State of New York voted to recommend that the Governor approve it.<sup>139</sup> The New York State Office of Court Administration<sup>140</sup> and the Attorney General expressed “no legal objection.”<sup>141</sup>

Advocates in New York applauded the bill both for its protection of fundamental rights and for its potential to curb racial disparities that flowed unequally from criminal justice system contacts. The New York Civil Liberties Union characterized the law as “one of the most important legislative acts of [the] session,” and said it “acknowledges the great harm and injustice that inevitably flows from the maintenance, dissemination, and inquiry into records

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<sup>133</sup> Memorandum Introduced by Sen. Pisani & Assemb. Fink, N.Y. Bill Jacket, 1976 ch. 877.

<sup>134</sup> *Id.*

<sup>135</sup> Senate Recommendation 6/7/76 (July 2, 1976), N.Y. Bill Jacket, 1976 ch. 877.

<sup>136</sup> Cover, N.Y. Bill Jacket, 1976 ch. 877.

<sup>137</sup> 1976 N.Y. Sess. Laws 2451 (McKinney) (noting that prior bill “generated strong opposition by the Office of Court Administration and prosecutors as infeasible and detrimental to law enforcement”); Letter from Joseph R. Pisani to Hon. Judah Gribetz, *supra* note 130 (noting that prior bill called “for expungement of the arrest and prosecution record,” which would mean “destruction of all official records of arrest and prosecution”).

<sup>138</sup> Memorandum from Div. of Criminal Justice Servs., N.Y. State Exec. Dep’t, to Hon. Judah Gribetz, Counsel to the Governor, N.Y. (June 29, 1976), N.Y. Bill Jacket, 1976 ch. 877.

<sup>139</sup> Letter from B. Anthony Morosco, Legislative Sec’y, Dist. Attorneys Ass’n, to Hon. Judah Gribetz, Counsel to the Governor, N.Y. (June 17, 1976), N.Y. Bill Jacket, 1976 ch. 877.

<sup>140</sup> Letter from Michael R. Juviler, N.Y. State Office of Court Admin., to Hon. Judah Gribetz, Counsel to the Governor, N.Y. (June 14, 1976), N.Y. Bill Jacket, 1976 ch. 877.

<sup>141</sup> Memorandum from Louis J. Lefkowitz, Att’y Gen., to Hon. Judah Gribetz, Counsel to the Governor, N.Y. (June 18, 1976), N.Y. Bill Jacket, 1976 ch. 877 (“I find no legal objection to this bill.”).

of arrests not followed by convictions.”<sup>142</sup> The Community Service Society supported the bill “because it protects the rights of the individual and is the logical application of the principle that all persons are presumed innocent until proven guilty.”<sup>143</sup> The New York Urban Coalition urged approval of the bill and said it “merely applies the principle that all persons are presumed innocent until proven guilty.”<sup>144</sup> The New York State Division of Human Rights also approved of the bill because it protected the presumption of innocence and might stem the “unjust” and “disproportionately burdensome effect” of the use of arrest records in the employment context on “racial minorities.”<sup>145</sup>

Law enforcement did not appear to approve of the new legislation, and its passage despite law enforcement criticism is telling. A letter from then New York City Mayor Abraham D. Beame, a Democrat who held office for three years during the City’s financial crisis,<sup>146</sup> provides insight into law enforcement criticisms of the law.<sup>147</sup> In his letter, Mayor Beame includes a two-paragraph quote from the NYPD.<sup>148</sup> Therein, the NYPD argued that it was unwise to extend the benefits of the sealing statute to anyone who had a prior criminal conviction.<sup>149</sup> The NYPD suggested that anyone who has been convicted of a crime has “demonstrated a criminal proclivity” and should not be given “the chance to start anew after an initial encounter with the criminal justice system.”<sup>150</sup> The NYPD also complained that implementation of the sealing

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<sup>142</sup> Letter from Barbara Shack, Legislative Dir., N.Y. Civil Liberties Union, to Hon. Judah Gribetz, Counsel to the Governor, N.Y. (June 21, 1976), N.Y. Bill Jacket, 1976 ch. 877.

<sup>143</sup> Letter from Eliot D. Hawkins, Cmty. Serv. Soc’y, to Hon. Judah Gribetz, Counsel to the Governor, N.Y. (July 8, 1976), N.Y. Bill Jacket, 1976 ch. 877.

<sup>144</sup> Letter from Arthur H. Barnes, President, N.Y. Urban Coal., to Hon. Judah Gribetz, Counsel to the Governor, N.Y. (June 16, 1976), N.Y. Bill Jacket, 1976 ch. 877.

<sup>145</sup> Letter from Weiner H. Kramarsky, Comm’r of Div. of Human Rights, N.Y. State Exec. Dep’t, to Hon. Judah Gribetz, Counsel to the Governor, N.Y. (June 16, 1976), N.Y. Bill Jacket, 1976 ch. 877.

<sup>146</sup> Robert D. McFadden, *Abraham Beame Is Dead at 94; Mayor During 70’s Fiscal Crisis*, N.Y. TIMES, Feb. 11, 2011, at A1.

<sup>147</sup> Letter from Abraham D. Beame, Mayor of N.Y.C., to Hon. Judah Gribetz, Counsel to the Governor, N.Y. (July 15, 1976), N.Y. Bill Jacket, 1976 ch. 877.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (“The provision that the records would be made available to a law enforcement agency upon motion, is impractical and unwise.”).

<sup>150</sup> *Id.* Notably, it seems antithetical to a system of justice in a democracy to categorize certain people as having a propensity to commit crime, especially based on unproven criminal allegations. Arguments about supposed criminal proclivity also have a racialized underpinning. This was on display in the stop and frisk litigation in New York. Before the trial in the stop and frisk case, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), the NYPD’s data expert sought to dismiss racial disparities in stops based in part on an argument about criminal propensity. The expert argued that race is “the best proxy” for the “share of the population by race” that is engaged in suspicious conduct. *Id.* at 585. In finding

statute would be “unduly burdensome.”<sup>151</sup> It warned that “[s]peedy investigations produce the best results and requiring police officers to get court orders to look at records may hinder the investigations.”<sup>152</sup> While this Article does not include a complete historical analysis of the sealing statute, it seems likely that this criticism was known to members of the Legislature when they voted on the bill, particularly given that the Mayor’s letter with the NYPD’s position predates the bill’s passage by almost two weeks.<sup>153</sup> This criticism and the fact of passage suggest that the sealing statute does not permit law enforcement to use sealed arrests in the ordinary course of investigation, despite that such use may facilitate law enforcement investigations.

An unofficial letter from the New York Attorney General after the promulgation of the sealing statute bolsters this conclusion. In 1983, police agencies in Onondaga County sought guidance on maintaining arrest records, including arrestee name, address, and information about the arrest and prosecution, in a centralized computer system under the sealing statute.<sup>154</sup> The Attorney General’s Office responded to the inquiry by first addressing the legislative intent behind the sealing statute, which it said was “intended to place a successful defendant in the same position he occupied prior to arrest”<sup>155</sup> and “to remove all indicia of an arrest [that] does not result in criminal conviction.”<sup>156</sup> “The purpose of the sealing requirement,” they wrote, “is to protect a defendant from having an arrest record when the ultimate result of prosecution was exoneration.”<sup>157</sup> Because of this purpose, and because the legislature expressly provided that law enforcement must seek a court order before accessing arrest records, the Attorney General’s Office concluded that police agencies “may retain on computer the name and address of an exonerated defendant as a means of identifying and providing access to ‘paper’ records relating to the arrest and prosecution which have been sealed . . . , provided such data is withheld from users of the system except where retrieval is authorized”

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the NYPD liable for targeting African Americans and Latinos for stops, Judge Shira A. Scheindlin of the Southern District of New York held that “[r]ather than being a defense *against* the charge of racial profiling, however, this is a defense *of* racial profiling.” *Id.* at 587. Even putting aside the likely disparate impact that using arrest data would have on people of color, this “proclivity” argument should be recognized as the racial dog whistle.

<sup>151</sup> Letter from Abraham D. Beame to Hon. Judah Gribetz, *supra* note 147.

<sup>152</sup> *Id.*

<sup>153</sup> Compare Cover, N.Y. Bill Jacket, 1976 ch. 877 (showing bill “approved” on July 27, 1976), with Letter from Abraham D. Beame to Hon. Judah Gribetz, *supra* note 147.

<sup>154</sup> Informal Opinion No. 83-78, N.Y. Att’y Gen., 1983 WL 167436, at \*1 (Dec. 29, 1983) (“These records include the name and address of the arrestee as well as information pertaining to the arrest and prosecution.”).

<sup>155</sup> *Id.* (citing *People v. Anderson*, 411 N.Y.S.2d 830 (Sup. Ct. 1978)).

<sup>156</sup> *Id.* (citing *People v. Flores*, 393 N.Y.S.2d 664 (Crim. Ct. 1977)).

<sup>157</sup> *Id.* (citing *People v. Anonymous*, 416 N.Y.S.2d 994 (Crim. Ct. 1979)).

by the statute,<sup>158</sup> that is, when the court has granted an ex parte police agency request for unsealing.<sup>159</sup>

The remaining critics of the 1976 legislation whose positions appear in the bill jacket are from outside the law enforcement or criminal justice arena. The New York State Education Department disapproved of the bill, urging that it “would very seriously handicap the efforts of the Regents of the Department to protect school children and members of the public from immoral or unethical teachers or professional practitioners.”<sup>160</sup> Similarly, news agencies complained that the sealing statute would impede public inspection of arrest records and suggested that it might violate the First Amendment. Notably, while some courts have held that automatic sealing does violate free speech interests,<sup>161</sup> New York courts have held otherwise,<sup>162</sup> and New York’s sealing statute has now been in force for more than forty years.

### C. *Court Interpretation of the Sealing Statute*

In the four decades since the promulgation of the sealing statute, federal and state courts have repeatedly opined on its interpretation. Courts have been inconsistent: In some respects, courts have bolstered the protections afforded by the sealing statute; in others, courts have rolled back protections. A review of the precedents interpreting the legislative intent, the scope of the statute’s protections, and the availability of civil rights claims under 42 U.S.C. § 1983 (“section 1983”) based on sealing statute violations offers a warning about potential weaknesses in sealing statute provisions, and a roadmap to potential legal challenges that could shore up existing laws.

#### 1. *Court Interpretation of Legislative History*

The legislative history behind the sealing statute, as detailed above, evinces an intent to provide strong protections to people accused but not convicted of crimes against disclosure or use of covered information, despite that doing so

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<sup>158</sup> *Id.* at \*2.

<sup>159</sup> *See* N.Y. CRIM. PROC. LAW § 160.50(1)(d)(ii) (McKinney 2018) (stating that such records shall be made available to person accused and to prosecutor in any proceeding in which person accused has moved for order pursuant to section 170.56 or 210.46 or law enforcement agency upon ex parte motion).

<sup>160</sup> Letter from Robert D. Stone, State Educ. Dep’t, to Hon. Judah Gribetz, Counsel to the Governor, N.Y. (June 21, 1976), N.Y. Bill Jacket, 1976 ch. 877.

<sup>161</sup> *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 510 (1st Cir. 1989) (concluding that “blanket restriction on access to the records of cases ending in an acquittal, a dismissal, a nolle prosequi, or a finding of no probable cause, is unconstitutional, even if access is not denied permanently”).

<sup>162</sup> *People v. McLoughlin*, 473 N.Y.S.2d 904, 904-06 (App. Term 1983) (“Nor does the refusal to divulge the information to the press abridge protections guaranteed under the First Amendment.”).

might nominally impede law enforcement or public safety concerns. It is not surprising then that New York courts have repeatedly emphasized the sealing statute's broad intent to protect against any adverse consequences or stigma from sealed arrests.<sup>163</sup> In an oft-quoted case interpreting the legislative intent behind the sealing statute, *People v. Patterson*,<sup>164</sup> the New York Court of Appeals advanced just this interpretation, opining that the sealing statute sought to remove all stigma from an arrest that terminated in the accused person's favor:

[T]he Legislature's objective in enacting CPL 160.50 and the related statutes concerning the rights of exonerated accuseds was to ensure that the protections provided be "consistent with the presumption of innocence, which simply means that no individual should suffer adverse consequences merely on the basis of an accusation, unless the charges were ultimately sustained in a court of law." Indeed, the over-all scheme of the enactments demonstrates that the legislative objective was to remove any "stigma" flowing from an accusation of criminal conduct terminated in favor of the accused, thereby affording protection (i.e., the presumption of innocence) to such accused in the pursuit of employment, education, professional licensing and insurance opportunities.<sup>165</sup>

*Patterson* thus speaks of three goals behind the sealing statute: (1) protecting the presumption of innocence; (2) preventing stigma flowing from being the target of a criminal prosecution; and (3) ensuring that a criminal prosecution that terminated in a person's favor does not interfere with that person's

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<sup>163</sup> See *N.Y. State Comm'n on Judicial Conduct v. Rubenstein*, 16 N.E.3d 1156, 1163 (N.Y. 2014) (citing *People v. Patterson*, 587 N.E.2d 255, 257 (N.Y. 1991)); *Katherine B. v. Cataldo*, 833 N.E.2d 698, 701 (N.Y. 2005) ("The sealing requirement was designed to lessen the adverse consequences of unsuccessful criminal prosecutions by limited access to official records and papers in criminal proceedings which terminate in favor of the accused."); *Doe v. Dist. Att'y of Nassau*, 632 N.Y.S.2d 414, 416 (Sup. Ct. 1995) ("The purpose of CPL 160.50 is 'to insure that one who is charged but not convicted of an offense suffers no stigma as a result of having once been the subject of an unsustained accusation.'" (quoting *Kalogris v. Roberts*, 586 N.Y.S.2d 806, 806 (App. Div. 1992) (citing *Hynes v. Karassik*, 393 N.E.2d 1015, 1017 (N.Y. 1979))). The sealing requirement is intended to be "broad" in order to serve its "primary purpose of averting adverse consequences to the accused in unsuccessful criminal prosecutions." *Harper v. Angiolillo*, 680 N.E.2d 602, 606 (N.Y. 1997). In *Lino v. City of New York*, 958 N.Y.S.2d 11 (App. Div. 2012), the First Department expressly rejected a limited interpretation of the sealing statute, holding that even a risk of stigma is sufficient to invoke the statute's protections. *Id.* at 15 ("It is undisputed that the Legislature enacted CPL sections 160.50 and 160.55 to remove any stigma related to *accusations* of criminal conduct." (citing *Patterson*, 587 N.E.2d at 257)).

<sup>164</sup> 587 N.E.2d 255 (N.Y. 1991).

<sup>165</sup> *Id.* at 257 (citation omitted).

“employment, education, professional licensing and insurance opportunities.”<sup>166</sup> These three goals are consistent with the legislative history discussed above.

Yet in the decades since the promulgation of these statutes, some federal and state courts in New York have suggested that the sealing statute is only intended to protect “employment, education, licensing, and insurance.”<sup>167</sup> The best example of narrowing is in *D.S. v. City of Peekskill*.<sup>168</sup> In *Peekskill*, the plaintiff brought a section 1983 claim against several entities for the disclosure of records sealed pursuant to section 160.50.<sup>169</sup> The court dismissed the case for failure to state a claim, holding that section 160.50 did not protect a constitutional right and therefore a violation of that statute did not support a section 1983 claim.<sup>170</sup> In so holding, the court reviewed the legislative purpose in enacting section 160.50.<sup>171</sup> Though the *Patterson* court centered the statutory goals of preventing stigma and the presumption of innocence in its analysis of statutory intent, the *Peekskill* court did not mention either of those goals in its analysis.<sup>172</sup> Instead, *Peekskill* characterized the sealing statute as seeking to prevent “certain adverse consequences,”<sup>173</sup> and as providing “a measure of protection” that is “limited.”<sup>174</sup> It further opined that section 160.50 protects formerly accused people “in their ‘pursuit of employment, education, professional licencing [sic] and insurance opportunities.’”<sup>175</sup> The rest of its statutory analysis focused on only these harms, and the court ultimately held that “any liberty interest protected by the sealing statute is limited to protection of the accused from discrimination in the context of employment, education, professional licencing [sic] and insurance opportunities.”<sup>176</sup>

## 2. Court Interpretation of the Information Protected

Sections 160.50 and 160.55 protect photographs—including mug shots—and fingerprints.<sup>177</sup> “[E]very photograph . . . and photographic plate or proof, and all palmprints and fingerprints” must be destroyed by any agency that received

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<sup>166</sup> *Id.*

<sup>167</sup> *See, e.g.,* *Grandal v. City of New York*, 966 F. Supp. 197, 201 (S.D.N.Y. 1997) (citing *Patterson*, 587 N.E.2d at 257).

<sup>168</sup> No. 12-cv-04401, 2014 WL 774671 (S.D.N.Y. Feb. 27, 2014).

<sup>169</sup> *Id.* at \*1.

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

<sup>171</sup> *Id.*

<sup>172</sup> *See id.* at \*3-7.

<sup>173</sup> *Id.* at \*3.

<sup>174</sup> *Id.* at \*4.

<sup>175</sup> *Id.* (quoting *People v. Patterson*, 587 N.E.2d 255, 257 (N.Y. 1991)).

<sup>176</sup> *Id.* at \*6 (citing *Grandal v. City of New York*, 966 F. Supp. 197, 201 (S.D.N.Y. 1997) (citing *Patterson*, 587 N.E.2d at 257)).

<sup>177</sup> N.Y. CRIM. PROC. LAW §§ 160.50(1)(a), 160.55(1)(a) (McKinney 2018).

them or returned to the person accused.<sup>178</sup> Law enforcement agencies must take the additional step of notifying all agencies to which they forwarded photographs, palmprints, and fingerprints, and request that each such agency either destroy or return them.<sup>179</sup> There are some exceptions to these protections,<sup>180</sup> but even in those situations where sealing takes effect, the records are simply sealed and not destroyed.<sup>181</sup>

Both statutes also protect “official records . . . relating to the arrest or prosecution.”<sup>182</sup> “There is almost no guidance on the issue of what constitutes a record or document that is official.”<sup>183</sup> The statute itself does not define what constitutes official material.<sup>184</sup> Court decisions interpreting the statute have opined that there are no bright-line rules for determining whether a particular record is official, and “such records and papers are not always subject to easy identification and may vary according to the circumstances of a particular case.”<sup>185</sup>

Courts have held that official documents exclude “documents that are created in the regular course of business, created prior to the commencement of the criminal proceeding, are innocuous on their face, and were not generated in furtherance of the prosecution of the criminal proceeding.”<sup>186</sup> Records that are part of the police agency or prosecutor’s file are more likely subject to the statute.<sup>187</sup> “Official records” is “broad and inclusive” and “should be read to include” records that were “integral to . . . arrest and prosecution.”<sup>188</sup> A “dispositive factor” in determining whether a record is “official” for purposes of

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.* §§ 160.50(1)(b), 160.55(1)(b).

<sup>180</sup> For example, under section 160.55(1)(a), photographs from arrests on certain domestic violence related charges are exempted. *Id.* § 160.55(1)(a).

<sup>181</sup> *See, e.g., id.* §§ 160.50(1)(a), 170.56(4) (providing together that photographs and fingerprints in certain dispositions involving marijuana charges will be sealed rather than destroyed).

<sup>182</sup> *Id.* §§ 160.50(1)(c), 160.55(1)(c).

<sup>183</sup> 34B NEW YORK JURISPRUDENCE 2D CRIMINAL LAW: PROCEDURE § 3765 (2016) (citing *People v. Roe*, 628 N.Y.S.2d 997 (Sup. Ct. 1995)).

<sup>184</sup> *See Harper v. Angiolillo*, 680 N.E.2d 602, 604 (N.Y. 1997) (stating that statute is silent on nature of official material).

<sup>185</sup> *Id.*

<sup>186</sup> *Pritzker v. City of Hudson*, 26 F. Supp. 2d 433, 441 (N.D.N.Y. 1998) (citing *People v. McGurk*, 645 N.Y.S.2d 923, 924 (App. Div. 1996)) (holding that military records created prior to criminal proceedings in ordinary course of military affairs need not be sealed).

<sup>187</sup> *See McGurk*, 645 N.Y.S.2d at 924 (holding that Medicaid documents used as evidence in successful prosecution need not be sealed because they “are not records of the prosecutor, the court or a police agency”).

<sup>188</sup> *In re Dondi*, 472 N.E.2d 281, 284 (N.Y. 1984) (per curiam).

the statute “is the relationship between the . . . record and the resulting arrest and/or prosecution.”<sup>189</sup>

While this standard seems straightforward enough, its application has led to incongruous results. For example, some courts have held that officer memo books are not official records within the meaning of the sealing statutes.<sup>190</sup> This makes some sense as officer memo books in New York City are used to record all of an officer’s activities during a shift, whether or not that activity related to arrests. These books—also called “activity logs,” which are increasingly not books at all but electronic smartphone entries—might sometimes record information related to criminal investigation, although they also serve purposes wholly unrelated to investigation. For example, these logs provide an important mechanism for internal review of the lawfulness of officer conduct. Indeed, as part of the reforms to the NYPD’s unlawful use of the stop and frisk practice, established in the lawsuit *Floyd v. City of New York*,<sup>191</sup> supervisors are required to review memo book entries to assess officer compliance with the Constitution.<sup>192</sup> It is not difficult, then, to conceptualize memo book entries as produced in the ordinary course of business and not as part of an arrest or prosecution. But it is also true that sometimes these memo book entries are a contemporaneous record of an arrest or criminal investigation, and they can and do often provide the basis for the charging instrument. It is therefore not surprising that other courts have treated memo books entries as “official records.”<sup>193</sup>

Similarly, the New York appellate courts came to seemingly opposite conclusions in determining whether tape recordings needed to be sealed under section 160.50. In *Hynes v. Karassik*,<sup>194</sup> an attorney had been the subject of a prosecution for allegedly seeking to pay a bribe to expedite approval of his nursing home development.<sup>195</sup> The court held that a recording of the attorney speaking to an operator at a nursing home that was introduced during trial was

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<sup>189</sup> *Doe v. Dist. Att’y of Nassau*, 632 N.Y.S.2d 414, 417 (Sup. Ct. 1995); *see also* *Hynes v. Karassik*, 405 N.Y.S.2d 242, 243 (App. Div. 1978) (opining that indictment is clearly official record), *aff’d*, 393 N.E.2d 1015 (N.Y. 1979).

<sup>190</sup> *See, e.g., In re T.P.*, 29 N.Y.S.3d 748, 750 (Fam. Ct. 2016) (holding that “officer’s memo book is not a document intended to be sealed pursuant to” sealing statute).

<sup>191</sup> 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

<sup>192</sup> *See* Recommendation Regarding Stop Report Form at 2-3, 7, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), ECF No. 527 (explaining that patrol supervisors must review officer’s stop report paperwork, including activity log, after any stop and frisk to ensure it was based on appropriate level and type of suspicion).

<sup>193</sup> Cases on file with author.

<sup>194</sup> 393 N.E.2d 1015 (N.Y. 1979).

<sup>195</sup> *Id.* at 1016.

not an official record subject to sealing.<sup>196</sup> It appears that the recording was made during the course of investigation, though that is not entirely clear.<sup>197</sup>

Later, in *In re Dondi*,<sup>198</sup> the court held that a recording of the defendant speaking to an officer was an official record that had to be sealed.<sup>199</sup> The *Dondi* court recognized *Karassik* as “some authority” supporting the contention that tapes “made during the course of the investigation” are not subject to sealing.<sup>200</sup> The court opined, though, that “on the facts of this case, it is clear that the tapes were subject to the sealing order.”<sup>201</sup> The *Dondi* court further opined that section 160.50’s “broad and inclusive” language “should be read to include a tape recording that was integral to both appellant’s arrest and his prosecution.”<sup>202</sup>

Notably, the *Karassik* court seems to suggest that the tape in that case was made “in the course of an investigation,” while the *Dondi* court emphasized that the tape was integral to arrest and prosecution. When considered in the context of cases holding that records created in the ordinary course of business are not official records, *Karassik* and *Dondi* can be understood as decided on that line: The more it appears the record was created during the regular course of investigative activities, the less likely the record will be subject to sealing; the more it appears a record was a part of an arrest and prosecution, the more likely it will be deemed an “official record.”

### 3. Court Interpretation of What Protection Is Required

Once it is established that the information or records are subject to the sealing statute, it remains to be determined what, precisely, criminal justice agencies must do to protect the information. Here, another provision of New York’s CPL offers compelling guidance.

At the same time the Legislature promulgated section 160.50, it enacted section 160.60.<sup>203</sup> With unequivocal language, this provision aims to “restore[]” an accused person in whose favor a proceeding terminated “to the status he occupied before the arrest and prosecution.”<sup>204</sup> Under section 160.60, an arrest or prosecution resulting in favorable termination not only automatically seals; it

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<sup>196</sup> *Id.* at 1018.

<sup>197</sup> See *Hynes v. Karassik*, 405 N.Y.S.2d 242, 243 (App. Div. 1978) (“[O]ur understanding [is] that a tape recording made in the course of an investigation does not become an official record required to be sealed under the section simply because it is marked in evidence as an exhibit in the course of a criminal trial.”).

<sup>198</sup> 472 N.E.2d 281, 284 (N.Y. 1984).

<sup>199</sup> *Id.* at 284 (finding tape recordings subject to “broad and inclusive” language of sealing statute).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> See generally N.Y. Bill Jacket, 1976 ch. 877.

<sup>204</sup> N.Y. CRIM. PROC. LAW § 160.60 (McKinney 2018).

is automatically “deemed a nullity.”<sup>205</sup> The provision animates the legislative intent to remove the stain of an unsuccessful arrest or prosecution, requiring that “[t]he arrest or prosecution shall not operate as a disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession, or calling.”<sup>206</sup> And it reiterates the privacy protections within the sealing statute, providing that “[e]xcept where specifically required or permitted by statute or upon specific authorization of a superior court, no such person shall be required to divulge information pertaining to the arrest or prosecution.”<sup>207</sup> Thus, while the sealing statute does not expressly define what it means to “seal,” section 160.60 can be understood as providing a guiding principle by which to determine the required action: Sealing requires such steps to ensure that a person accused but not proven guilty of a crime is treated by the criminal justice system as though the arrest and prosecution never happened, except under a narrow set of specifically enumerated circumstances.<sup>208</sup>

The few courts that have grappled with the question of what sealing requires bear this conclusion out. In *Brown v. Passidomo*,<sup>209</sup> the petitioner in an Article 78 proceeding had a conviction for a violation of the traffic law reversed and dismissed on appeal. “According to the usual procedure employed by [the Commissioner of the Department of Motor Vehicles],” the notation of reversal follows the notation of conviction on an individual’s operating record.<sup>210</sup> Pursuant to statute, the Commissioner was required to forward to any insurer, upon request, a list of a person’s traffic violation convictions.<sup>211</sup> Further, the petitioner was investigated for an offense of driving with a suspended license; there was a period—between conviction and appeal—when the petitioner could have committed such a violation, but without the notation of conviction, the insurance companies would not know that.<sup>212</sup> Based on these other statutes, the Commissioner argued that he was required to maintain the notation of conviction and that he was required to forward that notation to insurers.<sup>213</sup>

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Although section 160.60 references only section 160.50, and not section 160.55, it is reasonable, and consistent with the legislative intent, to assume the meaning section 160.60 gives to the sealing requirement is equally applicable to section 160.55 given that the language related to the actions required upon sealing is virtually identical in both sealing statutes.

<sup>209</sup> 486 N.Y.S.2d 986 (Sup. Ct. 1985).

<sup>210</sup> *Id.* at 988.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 989 (explaining respondent’s argument that Department of Motor Vehicles must keep records of convictions for purpose of potentially proving individuals are driving with suspended licenses).

<sup>213</sup> *Id.* at 988 (noting respondent’s argument that their actions were “required” by several Vehicle and Traffic Laws).

The court disagreed and held that the Commissioner's notation of conviction and the dissemination of that information both violated the sealing statute. The court opined that "the purpose of Section 160.50 as manifested in the legislative history and case law since its enactment is to 'protect a defendant from having an arrest record haunt him when the ultimate result of the prosecution was exoneration.'"<sup>214</sup> "Given this purpose," the court reasoned, "it could not have been the intent of the legislature to order the seal of court records . . . but allow an agency such as [the Department of Motor Vehicles] to keep such records for . . . the purpose of proving" a driver of a suspended license offense.<sup>215</sup> The court noted that "[e]ven if this use of the conviction for further prosecutorial purposes is proper, Section 160.50(1) specifies certain procedures for the unsealing of the record," which first require an application to the court.<sup>216</sup> In order to "achieve application of the statute consistent with legislative intent," the court held, "the record of conviction in the computer" must be "expung[ed]."<sup>217</sup> The court further opined that the sealing statute "requires the removal of a besmirchment of Petitioner's driving record which was not there prior to his arrest and prosecution."<sup>218</sup> The court therefore ordered the Commissioner "to expunge all records, be they manual or computer, relating to" the conviction.<sup>219</sup> This case suggests that the police departments in New York must not retain notation of arrests that resolved in a person's favor in generally accessible databases.

Notably, in *People v. Gallina*,<sup>220</sup> the court differentiated between "sealed" and "confidential."<sup>221</sup> In construing a Youthful Offender statute, which is similar to section 160.50 but requires records to be kept "confidential," as opposed to "sealed," the court held that "[t]his is not a meaningless distinction" in that "[c]onfidential" implies a less sweeping prohibition than "sealed" and its use implies that internal use" of records is proper.<sup>222</sup> This supports the proposition that sealing does not simply mean keeping the information within an agency.

Moreover, section 160.60 bolsters the argument that maintaining information about the fact of arrest, date of arrest, and charges violates the sealing requirement. It is elucidating, in assessing this argument, to consider section 160.60 in its entirety. Entitled "Effect of termination of criminal actions in favor of the accused,"<sup>223</sup> it provides:

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<sup>214</sup> *Id.* (quoting *People v. Anonymous*, 416 N.Y.S.2d 994, 995 (Crim. Ct. 1979)).

<sup>215</sup> *Id.* at 989.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 990.

<sup>219</sup> *Id.* at 991.

<sup>220</sup> 488 N.Y.S.2d 249 (App. Div. 1985).

<sup>221</sup> *Id.* at 250-51.

<sup>222</sup> *Id.* at 251.

<sup>223</sup> N.Y. CRIM. PROC. LAW § 160.60 (McKinney 2018).

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Upon the termination of a criminal action or proceeding against a person in favor of such person, as defined in subdivision two of section 160.50 of this chapter, the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution.<sup>224</sup>

The specific mention of the arrest, the requirement that the arrest be “deemed a nullity,” and the direction that the accused person shall be “restored” to pre-arrest status, together strongly suggest that a database maintaining arrest information used for investigation and prosecution purposes violates the statute.

In *People v. A*,<sup>225</sup> the court relied heavily on section 160.60 in directing police agencies to refrain from using arrests related to charges that had been dismissed against the defendants.<sup>226</sup> The court opined that “[t]o use any such records or papers would place any agency or official in violation of a [sealing] order and thus make them a law breaker.”<sup>227</sup> The court then also held that section 160.50 required the FBI, which also had the records, to “purge[]” those files upon the court’s order.<sup>228</sup> This case would support an argument that a police agency must delete such records from general investigation and surveillance databases and not retain notations of arrest and charges that have resolved in the defendant’s favor in those databases.

*Lino v. City of New York*<sup>229</sup> provides further support for this contention. In *Lino*, the plaintiffs challenged the inclusion of their names and addresses in the stop and frisk database.<sup>230</sup> The stop and frisk database contained information from uploaded reports that officers had to complete after conducting a stop.<sup>231</sup> Not all stops resulted in arrests, but the plaintiffs in *Lino* were stopped and then issued summonses.<sup>232</sup> Those summonses later terminated in their favor.<sup>233</sup> The court found that the alleged inclusion of the names and addresses in the database was a sufficient violation of the sealing statute to permit the case to move forward.<sup>234</sup> In the settlement following this decision, the NYPD agreed to delete all personal identifying information from the stop and frisk database, refrain

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<sup>224</sup> *Id.*

<sup>225</sup> 415 N.Y.S.2d 919 (Crim. Ct. 1978).

<sup>226</sup> *Id.* at 920 (quoting section 160.60 as “clear” evidence that records pertaining to arrest and charges are “official records” that must be sealed).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 921.

<sup>229</sup> 958 N.Y.S.2d 11 (App. Div. 2012).

<sup>230</sup> *Id.* at 13.

<sup>231</sup> *Id.* (explaining NYPD’s procedure for logging information about officers’ stop and frisk encounters).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 15.

from entering that information, and to issue a directive to NYPD personnel to effectuate these agreements.<sup>235</sup>

#### 4. Court Interpretation of the Availability of Civil Rights Claims

As established in prior sections, the two values underpinning New York’s sealing statute are privacy and the presumption of innocence.<sup>236</sup> One need look no further than the law itself to see this: The statute returns a person “to the status he occupied before arrest and prosecution,” and restores the person to a status of innocence and prohibits “divulge[nce] [of] information pertaining to the arrest or prosecution.”<sup>237</sup> It is therefore not surprising that litigants have challenged violations of New York’s sealing statute in federal courts under section 1983, asserting privacy and due process claims. What is surprising is the inconsistent way in which the federal district courts in New York have interpreted those claims. The federal courts’ analysis of the constitutional dimensions of the sealing statute’s protections—or, more accurately, the lack of such dimensions—provides an important view of the tensions between the interests animating the sealing statute and the failure of our jurisprudence to apply those interests in the context of civil rights litigation. In this Section, I explore the decisions on section 1983 challenges to sealing statute violations and where some decisions seem to have gone wrong.

Early federal and state decisions found that a violation of section 160.50 implicated constitutional rights.<sup>238</sup> In *Dondi*, an attorney faced disciplinary proceedings based, in part, on sealed records.<sup>239</sup> On appeal, the New York Court of Appeals held that “[t]here is no question that appellant suffered a violation of his right to due process by the improper access to the sealed records.”<sup>240</sup> It is hard to imagine clearer language that a violation of section 160.50 could support a section 1983 claim.

In *Anderson v. City of New York*,<sup>241</sup> decided the year after *Dondi*, NYPD officers twice used a photo sealed under section 160.50 in a photo array that led

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<sup>235</sup> Stipulation & Order of Settlement & Discontinuance, *Lino v. City of New York*, No. 10/106579 (N.Y. App. Div. filed May 24, 2010).

<sup>236</sup> See *supra* Sections II.A-C.

<sup>237</sup> N.Y. CRIM. PROC. LAW § 160.60 (McKinney 2018).

<sup>238</sup> See, e.g., *Anderson v. City of New York*, 611 F. Supp. 481, 494 (S.D.N.Y. 1985) (concluding that plaintiff stated cause of action under section 1983 for violation of his civil rights when police used his photograph from prior arrest in identification array after being ordered to return it to him); *In re Dondi*, 472 N.E.2d 281, 285 (N.Y. 1984) (finding that attorney’s “right to due process” was violated when previously sealed disciplinary records were accessed inappropriately).

<sup>239</sup> *In re Dondi*, 472 N.E.2d at 282-83.

<sup>240</sup> *Id.* at 285.

<sup>241</sup> 611 F. Supp. 481 (S.D.N.Y. 1985).

to the plaintiff's arrest and prosecution.<sup>242</sup> The second use and display of the sealed photo was specifically criticized by the criminal court,<sup>243</sup> but the court nonetheless held that it did not warrant application of the exclusionary rule in the proceeding.<sup>244</sup> The *Anderson* court had to answer the separate question of whether such a use was sufficient to warrant trial on a claim for municipal liability under section 1983.<sup>245</sup>

The United States District Court for the Southern District of New York held that section 160.50 "creates a liberty interest in reputation or privacy" based on the legislative history.<sup>246</sup> The court rejected the conclusion that the Supreme Court's decision in *Paul v. Davis*<sup>247</sup> required a different result, because the *Paul* case did not involve a state statutory scheme that specifically sought to protect a liberty and privacy interest, while the *Anderson* case did.<sup>248</sup> Relying on procedural due process doctrine providing that a state can create liberty interests by imposing mandatory process requirements to guard implicit constitutional rights,<sup>249</sup> the district court held that section 160.50 "protects [the] plaintiff's reputation and privacy interests by controlling the physical location of the photographs and fingerprints."<sup>250</sup> Because the plaintiff alleged that the NYPD had inadequate procedures for protecting those rights, such as properly returning or disposing of photographs in compliance with section 160.50, and had deliberately disregarded a court's order to return or destroy photographs,<sup>251</sup> the court held that the plaintiff provided sufficient evidence to preclude summary judgment in favor of the City on the issue of municipal liability.<sup>252</sup>

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<sup>242</sup> *Id.* at 484-85.

<sup>243</sup> *Id.* at 485.

<sup>244</sup> *Id.* at 486.

<sup>245</sup> *Id.* at 493 (concluding defendants "have not sustained their burden on [municipal liability] point to entitle them to summary judgment").

<sup>246</sup> *Id.* at 488.

<sup>247</sup> 424 U.S. 693, 712 (1976) (holding that reputation is neither liberty nor property interest constitutionally guaranteed against state deprivation).

<sup>248</sup> *Anderson*, 611 F. Supp. at 489 ("In the present case, section 160.50 was implemented specifically to protect liberty and privacy rights. This makes all the difference.").

<sup>249</sup> *Id.* at 489-90 (citing *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983)).

<sup>250</sup> *Id.* at 490.

<sup>251</sup> *Id.* at 493-94 (reviewing plaintiff's arguments about inadequacy of NYPD's procedures and stating that "NYPD was on notice that it had not complied with the court order at the time of the first suppression motion").

<sup>252</sup> *Id.* at 494 (holding that "plaintiff has raised a number of questions about 'deliberate indifference,' 'gross negligence,' or 'acquiescence in a prior pattern of misconduct'" that suffice to support claim of municipal liability); *see also id.* at 492 (opining that there is "no question" that failure to put into place any system for ensuring compliance with section 160.50 "can be the basis of a due process claim").

Importantly, the New York Court of Appeals decision in *People v. Patterson*—holding that a violation of the sealing statute did not warrant application of the exclusionary rule—did not diminish the holdings in *Anderson* and *Dondi* that a violation of section 160.50 can support a section 1983 claim. The *Patterson* court was presented with the question of whether to apply the exclusionary rule in a criminal case,<sup>253</sup> which is a distinct question from whether a section 1983 claim exists.<sup>254</sup> Although the *Patterson* court opined that the Legislature did not intend to create a constitutional right in promulgating section 160.50,<sup>255</sup> it also recognized “support” for “the view that the Legislature intended to provide a civil remedy for violation of the provisions of CPL 160.50.”<sup>256</sup> Even more to the point, it specifically recognized that “we have held that an individual’s right to due process is violated by improper access to records sealed pursuant to CPL 160.60,”<sup>257</sup> and that its ruling was consistent with that holding.<sup>258</sup>

Rather than turning on a constitutional question, the decision in *Patterson* turned on the appropriateness of applying the extreme measure of suppression. Because “the violation had no bearing on the reliability of the identification process and no relevance to the determination of defendant’s guilt or innocence at his trial,” the court held that suppression under the facts presented “would impermissibly expand the exclusionary rule.”<sup>259</sup> The *Patterson* court made clear that its decision hinged on concerns about the ramifications of allowing sealing statute violations to upend criminal proceedings and was “consistent with the underlying premise of the *Dondi* decision.”<sup>260</sup> The *Patterson* decision should thus be understood as narrowly holding that a violation of section 160.50 does not require application of the exclusionary rule; it should not be understood as precluding a procedural due process claim premised on violations of section 160.50.

A string of federal district court cases that postdated *Anderson*, however, came to the opposite conclusion. These federal cases can be understood as limited to their facts, rather than an outright bar to procedural due process claims

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<sup>253</sup> *People v. Patterson*, 587 N.E.2d 255, 256 (N.Y. 1991) (holding that “[a]lthough CPL 160.50 was violated, that violation did not infringe upon any constitutional right of the [criminal] defendant *sufficient to warrant invocation* of the exclusionary rule” (emphasis added)).

<sup>254</sup> *See Davis v. United States*, 564 U.S. 229, 237-38 (2011) (explaining that, even where constitutional violation exists, exclusionary rule will not apply unless benefits from deterring future misconduct outweigh social costs).

<sup>255</sup> *Patterson*, 587 N.E.2d at 257.

<sup>256</sup> *Id.* (citing *People v. Anderson*, 411 N.Y.S.2d 830 (Sup. Ct. 1978)).

<sup>257</sup> *Id.* at 258 (citing *In re Dondi*, 472 N.E.2d 281 (N.Y. 1984)).

<sup>258</sup> *Id.* at 258 n.2.

<sup>259</sup> *Id.* at 258.

<sup>260</sup> *Id.* at 258 n.2.

under section 1983. Indeed, that is the only way to resolve those cases with *Patterson*'s express recognition that a violation of the sealing statute can give rise to a due process claim. I explore these cases below.

A decision from the United States District Court for the Southern District of New York, rendered three decades after *Anderson* and nearly four decades after the promulgation of the sealing statute, is one of the most cited decisions in this string. In *D.S. v. City of Peekskill*, the court dismissed without prejudice a section 1983 claim against a municipality for violations of section 160.50.<sup>261</sup> The *Peekskill* court appears to have broadened *Patterson*'s holding, opining that the *Patterson* court "made clear that [section] 160.50 does not protect a constitutional liberty interest."<sup>262</sup> Of course, as explained earlier, the *Patterson* court did not so hold: It was presented with a wholly different question; it expressly recognized the existence of due process claims premised on sealing statute violations; and it supportively cited *Anderson*'s recognition of a section 1983 claim based on deprivations of due process.

In any event, the *Peekskill* court then went on to describe the legislative intent. While it suggested a broader prohibition on section 1983 claims than *Patterson* would appear to support, it suggested a narrower legislative intent. The *Peekskill* court held that the sealing statute only sought to prevent adverse consequences in certain limited contexts,<sup>263</sup> contrary to the repeatedly broad pronouncements in the statute itself and the explicit legislative history that the intent far more expansively sought to protect privacy and the presumption of innocence. The court declined to follow *Anderson*, opining that mere statutory protections cannot create liberty interests.<sup>264</sup> Again, this is an oversimplification: Section 160.50 did not merely create statutory protections; as *Anderson* held, it created mandatory processes for protecting fundamental privacy and liberty interests that the city allegedly deliberately failed to provide.<sup>265</sup> Yet even the *Peekskill* court still suggested that a set of facts might exist to support a constitutional claim, holding that "any liberty interest protected by the sealing statute is limited

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<sup>261</sup> *D.S. v. City of Peekskill*, No. 12-cv-04401, 2014 WL 774671, at \*7 (S.D.N.Y. Feb. 27, 2014) (holding "misconduct and resulting harm [p]laintiff has alleged . . . do not rise to the same level as to merit a finding of a constitutional violation" and therefore denying request for injunctive relief).

<sup>262</sup> *Id.* at \*4.

<sup>263</sup> *Id.* (stating that sealing statute "provides a measure of protection to persons accused but not convicted of a crime in their 'pursuit of employment, education, professional licensing and insurance opportunities'" (quoting *Patterson*, 587 N.E.2d at 257)).

<sup>264</sup> *Id.* at \*5-6 (distinguishing between statutes that contain mandatory procedural language, which do not identify protectable liberty interests, and those that protect substantive interests, and concluding that New York's sealing statute covers former).

<sup>265</sup> See *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983) (noting that State may "create[] a protected liberty interest" with "repeated use of explicitly mandatory language in connection with requiring specific substantive predicates").

to protection of the accused from discrimination in the context of employment, education, professional licencing [sic] and insurance opportunities.”<sup>266</sup> This limited interpretation of section 160.50’s protection cannot be squared with the express terms of the sealing statute or its history, but this dicta presents a possible opportunity to distinguish its holding in future cases.

The Second Circuit’s decision on the *Peekskill* appeal supports the conclusion that the *Peekskill* court may have wrongly decided the constitutional question and that it should not be cited as authority for the proposition that violations of section 160.50 cannot support a claim under section 1983. In that appeal, the Second Circuit affirmed the district court’s dismissal of the complaint, but on a wholly different basis. The Second Circuit, in a summary order, held that the complaint pleaded negligent violation of a constitutional right and, for purposes of section 1983, only an intentional violation would suffice.<sup>267</sup> Though the district court’s decision was premised on a conclusion that a violation of section 160.50 did not support a section 1983 claim, the Second Circuit opined that “[w]e do not decide whether Section 160.50 creates a liberty interest protected by the Due Process Clause, or whether D.S. has alleged a basis for municipal liability.”<sup>268</sup> Although this is a non-precedential decision, it puts *Peekskill*’s central holding in doubt, and it certainly stands for the proposition that the Second Circuit has reserved judgment on whether a violation of section 160.50 can support a section 1983 claim.<sup>269</sup>

It seems that the other cases rejecting constitutional claims premised on section 160.50 violations, like *Peekskill*, applied holdings out of context and, in so doing, did not address important distinctions in legal doctrines. *Peekskill* did this principally by applying *Patterson*—a case deciding whether to suppress evidence in a criminal proceeding—to the question of whether a section 1983 claim exists. These questions are distinct and, although they might overlap, they should not be conflated. In determining whether suppression is appropriate, courts consider whether the prophylactic remedy of preventing prosecutors from

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<sup>266</sup> *Peekskill*, 2014 WL 774671 at \*6.

<sup>267</sup> *D.S. v. City of Peekskill*, 581 F. App’x 65, 66 (2d Cir. 2014) (“D.S. must plausibly allege that defendants violated his constitutional rights *intentionally*—not just negligently.”).

<sup>268</sup> *Id.* at 67 n.1.

<sup>269</sup> The Second Circuit decision in *Peekskill* postdates a prior non-precedential Second Circuit decision which opined that section 160.50 “does not create a cognizable cause of action” under section 1983. *Palacio v. Goord*, 338 F. App’x 37, 38 (2d Cir. 2009). In *Palacio*, the Second Circuit relied upon *United States v. Jakobetz*, 955 F.2d 786 (2d Cir. 1992), a suppression decision. As discussed further below, that reliance is problematic. Moreover, the Second Circuit in *Palacio* alternatively held that the plaintiff did not plead a violation of section 160.50 even if a cognizable section 1983 claim existed. *Palacio*, 338 F. App’x at 38. To the extent there is any inconsistency between these two Second Circuit holdings, it only bolsters the conclusion that the Second Circuit has not definitively answered this constitutional question.

using evidence in a criminal trial is needed to prevent future police misconduct.<sup>270</sup> The question of whether a constitutional violation occurred is relevant to whether suppression is warranted, but it is not dispositive. More importantly, suppression might not be warranted even where a constitutional violation exists.<sup>271</sup> The fact that a court decides not to apply the exclusionary rule does not mean a constitutional violation is absent.

Like *Peekskill*, however, many cases have used *Patterson* and other suppression decisions as authority for denying section 1983 claims.<sup>272</sup> For example, in *Martinez v. City of New York*,<sup>273</sup> the United States District Court for the Eastern District of New York dismissed a section 1983 claim, in part, for failure to plead a constitutional claim arising from a violation of section 160.50.<sup>274</sup> The *Martinez* court cited *Patterson* as holding that section 160.50 “does not ‘implicate constitutional considerations.’”<sup>275</sup> It then concluded that “the Second Circuit has rejected the argument that the police’s use of a photograph retained in violation of § 160.50 constitutes the violation of a constitutional right,”<sup>276</sup> citing *United States v. Jakobetz*.<sup>277</sup> The Second Circuit in *Jakobetz* upheld the district court’s refusal to apply the exclusionary rule to prevent admission of a photo array identification where the photo was obtained in violation of section 160.50 because there was no evidence in that case that police were aware that the photograph was wrongfully in their possession.<sup>278</sup> The Second Circuit opined that “[s]ince the exclusionary rule is designed to deter

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<sup>270</sup> *Davis v. United States*, 564 U.S. 229, 236 (2011) (stating that exclusionary rule is created to compel respect for constitutional guaranty); *United States v. Leon*, 468 U.S. 897, 916 (1984) (“[T]he exclusionary rule is designed to deter police misconduct . . .”).

<sup>271</sup> As the Supreme Court explained in *Davis*, the existence of a Fourth Amendment violation does not automatically lead to the application of the exclusionary rule. *Davis*, 564 U.S. at 236-38. Instead, that rule is applied only when its application would deter future misconduct and the social benefits of exclusion outweigh the social costs. *Id.*; see also *Leon*, 468 U.S. at 907 (noting that whether exclusion is appropriate requires “weighing the costs and benefits”).

<sup>272</sup> See, e.g., *Chatmon v. Mance*, No. 07-cv-09655, 2011 WL 5023243, at \*6 (S.D.N.Y. Oct. 20, 2011) (rejecting habeas petition that was premised, in part, on section 160.50 violations and opining that series of suppression decisions dictated that violation of section 160.50 does not implicate Fourteenth Amendment rights); *Grandal v. City of New York*, 966 F. Supp. 197, 201 (S.D.N.Y. 1997) (rejecting section 1983 claim in connection with use of photograph because use would not cause plaintiff “to be discriminated against in connection with licensing, employment or providing of credit or insurance”). Notably, the *Chatmon* decision was rendered by the same judge that rendered the *Peekskill* decision.

<sup>273</sup> No. 12-cv-03806, 2012 WL 4447589 (E.D.N.Y. Sept. 25, 2012).

<sup>274</sup> *Id.* at \*4.

<sup>275</sup> *Id.* (quoting *People v. Patterson*, 587 N.E.2d 255, 257 (N.Y. 1991)).

<sup>276</sup> *Id.*

<sup>277</sup> 955 F.2d 786, 790-91 (2d Cir. 1992).

<sup>278</sup> *Id.* at 802-03.

police misconduct there would be no purpose in applying the rule to this case, where there was no such misconduct.”<sup>279</sup> While the Second Circuit upheld the district court’s decision that no due process violation occurred, it also upheld the district court’s nuanced application of procedural due process standards, including consideration of whether the photo array was unduly suggestive.<sup>280</sup> This is not—except out of context—a decision that creates a bright-line rule about the actionability of constitutional claims based on section 160.50 violations.

Similarly, in *Palacio v. Goord*,<sup>281</sup> the United States District Court for the Northern District of New York dismissed a section 1983 claim premised on a violation of section 160.50 at the summary judgment stage based principally on *Patterson* and *Charles Q. v. Constantine*.<sup>282</sup> In *Charles Q.*, another suppression decision, the New York Court of Appeals simply applied *Patterson*’s holding that a violation of section 160.50 did not warrant application of the exclusionary rule.<sup>283</sup>

The *Patterson* decision contains quotes that, stripped from the rest of the opinion, appear to pronounce that a violation of section 160.50 cannot support a section 1983 claim.<sup>284</sup> However, as explained above, when those quotes are read in the context of the rest of the *Patterson* opinion, it becomes clear they do not fairly stand for that broad prohibition.<sup>285</sup> Yet there are now a string of federal decisions citing these divorced *Patterson* quotes and citing each other to reject section 1983 claims and to reject *Anderson*, which *Patterson* itself cited favorably.<sup>286</sup> These decisions should be challenged as an improper application of state precedent. Moreover, it is notable that even some of the cases that dismissed section 1983 claims also suggest that a widespread practice of section 160.50 violations would present a different constitutional question.<sup>287</sup> Federal

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<sup>279</sup> *Id.* (citation omitted).

<sup>280</sup> *Id.* at 802-03.

<sup>281</sup> No. 03-cv-00836, 2008 WL 87551 (N.D.N.Y. Jan. 7, 2008).

<sup>282</sup> *Id.* at \*4 (citing *Charles Q. v. Constantine*, 650 N.E.2d 839 (N.Y. 1995); *People v. Patterson*, 587 N.E.2d 255 (N.Y. 1991)).

<sup>283</sup> *Charles Q.*, 650 N.E.2d at 841 (implying that in light of *Patterson*, admitting tape recordings from criminal proceeding in which petitioner was acquitted does not violate his constitutional rights).

<sup>284</sup> For example, the *Patterson* court described the purpose behind the sealing statute as “remov[ing] any ‘stigma’ flowing from an accusation of criminal conduct terminated in favor of the accused, thereby affording protection . . . to such accused in the pursuit of employment, education, professional licensing and insurance opportunities.” *Patterson*, 587 N.E.2d at 257.

<sup>285</sup> See *supra* notes 253-60 and accompanying text (explaining how *Patterson* should not diminish *Anderson* and *Dondi*).

<sup>286</sup> See *supra* notes 261-83 and accompanying text.

<sup>287</sup> See, e.g., *D.S. v. City of Peekskill*, No. 12-cv-04401, 2014 WL 774671, at \*7 (S.D.N.Y. Feb. 27, 2014) (distinguishing *Anderson* on grounds that *Anderson* involved two uses of

decisions in other contexts further suggest that if you can allege an underlying constitutional deprivation and an egregious failure to take known steps to correct database problems that give rise to that deprivation, you can establish a section 1983 claim under the deliberate indifference theory of liability.<sup>288</sup> It is difficult to imagine how a deliberate and widespread practice of failing to comply with a mandatory statute aimed at protecting privacy and the presumption of innocence could fail to support a section 1983 claim.

CONCLUSION: PROTECTING AGAINST COLLATERAL PUNISHMENT  
IN THE BIG DATA AGE

Information from arrests is being used and misused in a manner that results in punishment for unproven crimes and noncriminal violations. Sealing statutes—which exist throughout the country and are on the rise<sup>289</sup>—offer a mechanism for curbing those unintended and unwarranted collateral consequences. This Article’s analysis of the incongruous interpretations ascribed to New York’s sealing statute in the forty years since its passage provides a roadmap for leveraging stronger protections against nefarious punishments flowing from big data.

To protect against the misuse of arrest data, state legislatures should promulgate sealing statutes that provide automatic protection for data from arrests. Policy advocates should bear in mind the need to clearly articulate the information protected and how law enforcement agencies must protect the information once it is sealed. These provisions should ensure that data about dismissed arrests cannot be used by law enforcement to investigate a particular person without prior court approval, and that such data cannot be maintained

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plaintiff’s photograph, while *Peekskill* presented “single episode”); *Grandal v. City of New York*, 966 F. Supp. 197, 202 (S.D.N.Y. 1997) (collecting cases that hold same).

<sup>288</sup> See Logan & Ferguson, *supra* note 1, at 578-79 (noting that several courts have allowed claims to proceed under deliberate indifference theory if governments fail to correct continuous and egregious database problems); see also *Hvorcik v. Sheahan*, 847 F. Supp. 1414, 1419-23 (N.D. Ill. 1994) (finding that sheriff’s knowledge of erroneous arrest warrants and failure to implement systems necessary to remedy those errors despite knowing of, and having access to, those systems constituted deliberate indifference sufficient to hold municipality liable for Fourth Amendment violations); *Ruehman v. Vill. of Palos Park*, 842 F. Supp. 1043, 1054 (N.D. Ill. 1993) (holding that sheriff was deliberately indifferent to constitutional violations where “undisputed evidence” showed that there were “large numbers of incorrectly listed” warrants, sheriff’s office knew, and “there was no procedure in place for eliminating incorrect listings”), *aff’d sub nom. Ruehman v. Sheahan*, 34 F.3d 525 (7th Cir. 1994).

<sup>289</sup> COLLATERAL CONSEQUENCES RES. CTR., SECOND CHANCE REFORMS IN 2017: ROUNDUP OF NEW EXPUNGEMENT AND RESTORATION LAWS 1 (2017), <http://ccresourcecenter.org/wp-content/uploads/2017/12/Second-Chance-Reforms-in-2017-CCRC-Dec-2017.pdf> [<https://perma.cc/F3EA-TCZ3>] (“Expungement of adult conviction records became available in 2017 for the first time in Montana, and 11 additional states expanded existing sealing or expungement authorities, some quite substantially.”).

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with personal identifying information in databases used for investigation and surveillance.

At the same time, lawyers in states with sealing statutes should bring lawsuits that advance interpretations of the law that require the same result. The NYPD's use of sealed arrest information in seeming contravention of a forty-year-old statute—and its contention that such use is consistent with the law—demonstrate that statutes themselves are not a panacea: Lawyers must enforce the protections promised by these statutes, and should particularly focus on enforcing sealing statutes against law enforcement agencies. Where, as in New York, there is room to correct case law that potentially narrows the protections that a sealing statute affords, lawyers should bring cases and advance arguments that broaden those protections. Further, advocates and lawyers should articulate policy and litigation campaigns in terms of privacy and the presumption of innocence.

Data about arrests should not disappear; information about arrests serves legitimate purposes, including providing public transparency about the use of police resources and allowing supervision of officer conduct. However, when used by law enforcement for investigation and surveillance, personalized data—data that identifies the person arrested along with the charges they faced, their addresses and acquaintances—effectively punishes legally innocent people simply for having interactions with the police. Because people of color often face more aggressive policing, they are more likely to suffer the consequences. Promulgating and enforcing sealing statute laws to protect against the investigative use of personalized arrest data may help to stem collateral punishment in the big data age.