

# MASSACHUSETTS LAW REVIEW

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# MASSACHUSETTS LAW REVIEW

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# A SMARTER PATH TO PUBLIC SAFETY

By Hon. James F. McHugh III (ret.)

For more than half a century, we have been locking people up at a pace that surpasses every other nation on earth. We probably began that process when, after a tumultuous period of civil unrest throughout the country, President Lyndon Johnson declared a “war on crime” in March 1965.<sup>1</sup> The process clearly gained momentum six years later when President Richard Nixon declared a “war on drugs.”<sup>2</sup> Ultimately that war would strike with particular force on minority communities, especially with the disparate penalties for possession and distribution of crack as opposed to powdered cocaine.<sup>3</sup>

Neither declaration was accompanied by goals that allowed politicians, law enforcement officials, members of the public or anyone else to determine when the wars had been won, so on they raged. As they did, prosecutors throughout the nation, either leading or reflecting popular passion, began to demand tougher and tougher sentences for all sorts of offenses. They also used the pulpits their offices provided to seek and obtain higher office where they transformed their sentencing demands into statutes and public policies. A major example was the 1994 Violent Crime Control and Law Enforcement Act,<sup>4</sup> which not only created new federal crimes with stiff sentences and dramatically increased sentences for many existing crimes, but also provided federal funding for construction of state prisons in states that took similar approaches. Emily Bazelon describes that process in detail in her new book titled, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*, that Peter T. Elikann<sup>5</sup> reviews later in these pages.

The consequences were dramatic. During the 50 years from 1925 through 1975, and notwithstanding a slight spike in the late 1930s, the incarceration rate in the United States had remained relatively flat at about .2 percent of the male population. Over the next 35 years, however, it rose by more than 400 percent to almost 1 percent.<sup>6</sup> Today, about 1.3 million people are held in state prisons,



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another 600,000 in local jails and another 220,000 in federal facilities. Of the 600,000 in local jails, only about 150,000 are serving sentences following conviction of a crime. The rest are awaiting trials or other dispositions, permanent or interlocutory, including release on bail.<sup>7</sup> Beyond the simple fact of incarceration, the national “churn” rate is enormous with residents of the United States spending at least some time in jail 10.6 million times each year.<sup>8</sup> And while those policies and practices have had devastating impacts on many minority communities,<sup>9</sup> there is little evidence that they have contributed to the overall decrease in crime the nation has experienced in recent years.<sup>10</sup>

Even with that reduction in crime, our incarceration rates far surpass those found anywhere else in the world. On a per capita basis, the United States incarcerates about 140 percent of the individuals incarcerated in Cuba, the next closest country, and 480 percent of those incarcerated in the United Kingdom, the next closest European country.<sup>11</sup> Indeed, on a per capita basis, 37 of our states incarcerate more people than Cuba.<sup>12</sup>

1. Elizabeth Hinton, “Why We Should Reconsider the War on Crime,” *TIME* (March 20, 2015), <http://time.com/3746059/war-on-crime-history/>. All hyperlinks last accessed on May 1, 2019. President Johnson made his declaration during the same month in which he delivered his now famous voting rights speech to a joint session of Congress. President Johnson’s Special Message to the Congress: The American Promise, LBJ PRESIDENTIAL LIBRARY, <http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise>.

2. Adam Augustyn, “War on Drugs: United States History,” *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/topic/war-on-drugs>.

3. Jim Abrams, “Congress passes bill to reduce disparity in crack, powder cocaine sentencing,” *WA POST* (July 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072802969.html>.

4. U.S. Dep’t of Justice, “Violent Crime Control and Law Enforcement Act of 1994: Fact Sheet” (1994), available at <https://www.ncjrs.gov/txtfiles/bills.txt>.

5. Peter T. Elikann is a member of the Editorial Board of the *Massachusetts Law Review* and is a lawyer concentrating in the defense of criminal cases.

6. [https://commons.wikimedia.org/wiki/File:U.S.\\_incarceration\\_rates\\_1925\\_onwards.png](https://commons.wikimedia.org/wiki/File:U.S._incarceration_rates_1925_onwards.png). When females are added to the count, the corresponding figures for total population are approximately .1% and .21%. *Id.*

7. Wendy Sawyer & Peter Wagner, “Mass Incarceration: The Whole Pie,” 2019, PRISON POLICY INITIATIVE (March 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

8. *Id.*

9. See Dr. Oliver Roeder, Lauren-Brooke Eisen & Julia Bowling, “What Caused the Crime Decline?,” BRENNAN CENTER FOR JUSTICE (Feb. 12, 2015), [https://www.brennancenter.org/sites/default/files/publications/What\\_Caused\\_The\\_Crime\\_Decline.pdf](https://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf). (describing crime and incarceration rates in United States).

10. See Dorothy E. Roberts, “The Social and Moral Cost of Mass Incarceration in African American Communities,” *PENN LAW: LEGAL SCHOLARSHIP REPOSITORY* (2004) available at [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1582&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1582&context=faculty_scholarship) (explaining ramifications of mass incarceration of African Americans); Eli Hager, “The Mass Incarceration Mystery,” *THE MARSHALL PROJECT* (Dec. 15, 2017), <https://www.themarshallproject.org/2017/12/15/a-mass-incarceration-mystery> (acknowledging decrease in incarceration rates of African Americans).

11. Peter Wagner & Wendy Sawyer, “States of Incarceration: The Global Context 2018,” PRISON POLICY INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>.

12. *Id.*

Imprisoning that many people is enormously costly. Nationwide, we spend about \$33,000 annually to house prisoners in state systems<sup>13</sup> and about \$32,000 to house them in federal prison.<sup>14</sup> Those are just the out-of-pocket costs. Imprisonment often removes wage earners from family units, and leads to increased demand for publicly funded social services. Both the direct and collateral costs have a particularly heavy impact on African-American communities. While African-Americans comprise 13 percent of the U.S. population, they constitute nearly 40 percent of the prison population in the United States.<sup>15</sup> Locking people up because they are unable to post the required bail can have a particularly devastating effect on those who are ultimately acquitted. In addition to wages lost while they are in custody, their extended absence from the workplace often causes them to lose the jobs they were holding when arrested.

Beyond all of that, it is becoming clear that incarceration rarely cures the underlying problems of poverty, addiction, mental illness, personality disorders, and other forces that led to imprisonment in the first place. On the contrary, incarceration may exacerbate those problems, leaving discharged inmates less capable to effectively deal with vicissitudes of post-prison life than they were to deal with life before conviction.

There is also the ongoing problem of a criminal record. An individual's record of conviction, imprisonment or even arrest is nearly indelible, and can often add layer upon layer of difficulty to efforts to find gainful employment.<sup>16</sup> Those difficulties can add weight to the demand for public services, or can drive individuals back to a kind of anti-social conduct that led to their imprisonment in the first place, thus continuing a cycle of extensive human and fiscal cost.

Over the last several years, recognition of the direct and indirect costs of the criminal justice system as it currently operates has become apparent both to policymakers and to the public. That increased awareness has led to reform efforts throughout the nation. For example, last fall voters in Florida passed referendum measures that restored voting rights to convicted felons and approved retroactive application of changes to Florida law that either lessened penalties for certain crimes or decriminalized conduct that had led

to arrests or convictions.<sup>17</sup> Voters in Ohio, Michigan, Utah, North Dakota, and Missouri considered measures that would eliminate or substantially reduce penalties for possession of marijuana.<sup>18</sup> Voters in Louisiana eliminated long-standing provisions in state law that permitted convictions in criminal cases by non-unanimous juries and were widely acknowledged to be a substantial force in placing Louisiana at the very top of the nation's per capita rate of imprisonment.<sup>19</sup> Recent polling of voters in Oklahoma, which is among national leaders in per capita incarceration, shows substantial sentiment for reducing prison population through education, decriminalizing certain crimes, and other measures.<sup>20</sup> Equally important, prosecutors throughout the nation have begun to win popular approval for policies, practices and procedures designed, not to toughen the consequences of criminal conduct, but to deal with that conduct in a manner that reduces rates of incarceration, creates incentives for socially acceptable behavior, and provides support for those engaged in efforts to alter their lifestyles in positive ways.<sup>21</sup>

The reform sentiment underlying those changes also exists at the federal level and led to passage of the First Step Act which President Trump signed into law in December 2018.<sup>22</sup> The legislation, though modest in its reach, made changes to federal sentencing and custodial laws and practices. Many of those changes focused on facilitating earlier and more successful re-entry into society by federal prisoners. Almost half of those prisoners are serving sentences for drug-related crimes.<sup>23</sup> The act includes prospective and retroactive reductions and modifications to many mandatory minimum sentences for drug offenses. The legislation also created a recidivism risk-needs assessment protocol applicable to all federal prisoners. The protocol requires prison officials to use the resulting assessments to determine the programs that are made available to prisoners while in custody. In turn, prisoners who successfully complete those programs will be entitled to serve parts of their sentence in some form of pre-release custody outside of a prison setting. The legislation also prohibits use of solitary confinement for any juvenile in federal custody.

Over the last half-century, Massachusetts has been something of an outlier in the rush to lock more people up. To be sure, there have been contrary moments. In the early 1970s, the prison system,

13. "Trends in prison population and spending: 2010–2015," Table 3, VERA INSTITUTE OF JUSTICE, <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-population-and-spending>.

14. Kathleen M. Kenney, "Annual Determination of Average Cost of Incarceration," FEDERAL REGISTER (July 19, 2016), <https://www.federalregister.gov/documents/2016/07/19/2016-17040/annual-determination-of-average-cost-of-incarceration>.

15. Wendy Sawyer and Peter Wagner, "Mass Incarceration: The Whole Pie 2019," PRISON POLICY INITIATIVE (March 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

16. "Understanding Policies that Impact Employment Opportunities for People Who Have Criminal Records," CSG JUSTICE CENTER, <https://csjusticecenter.org/nrcr/employment-opportunities-for-people-with-criminal-records/>.

17. "Florida amendments election results: What passed, what failed," FLORIDA TODAY (Nov. 6, 2018, 4:51 PM), <https://www.floridatoday.com/story/news/2018/11/06/amendments-florida-election-results/1907046002/>.

18. Matt Ferner, "Millions of Voters Could Be About To Significantly Reform The Criminal Justice System," THE HUFFINGTON POST (Nov. 6, 2018, 5:45 AM), [https://www.huffpost.com/entry/criminal-justice-reform-election-midterms\\_n\\_5bd7a47fe4b0de6eecd16af](https://www.huffpost.com/entry/criminal-justice-reform-election-midterms_n_5bd7a47fe4b0de6eecd16af).

19. German Lopez, "Louisiana votes to eliminate Jim Crow jury law with Amendment 2," VOX (Nov. 6, 2018, 10:41 PM), <https://www.vox.com/policy-and-politics/2018/11/6/18052540/election-results-louisiana-amendment-2-unanimous-jim-crow-jury-law>.

20. Matt Trotter, "Big Criminal Justice Reform Efforts Still on Many Oklahoma Voters' Minds," PUBLIC RADIO TULSA (Nov. 5, 2018), <https://www.publicradiotulsa.org/post/big-criminal-justice-reform-efforts-still-many-oklahoma-voters-minds>.

21. Emily Bazelon & Miriam Krinsky, "There's a Wave of New Prosecutors. And They Mean Justice," NY TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer>, *see* Ben Austen, "In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits — of His Office," NY TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html>.

22. Ben Harrington & Nathan James, "Federal Correctional Reform and the First Step Act of 2018," CONGRESSIONAL RESEARCH SERVICE (Dec. 28, 2018), <https://fas.org/sgp/crs/misc/IF10573.pdf>.

23. Wendy Sawyer & Peter Wagner, "Mass Incarceration: The Whole Pie 2019," PRISON POLICY INITIATIVE (March 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

and particularly the maximum-security prison at Cedar Junction, was in chaos.<sup>24</sup> The Willie Horton phenomenon during the 1988 presidential campaign, and widespread concern over the ravages of illegal drugs in urban centers, led to a “get tough” approach in Massachusetts. This approach was epitomized by 1990 gubernatorial candidate William Weld’s promise to “reintroduce prisoners to the joys of busting rocks.”<sup>25</sup> As a result, the Massachusetts prison population tripled during the 1980s and 1990s.<sup>26</sup> Nevertheless, during the 20-year period from 1997 through 2016, the Massachusetts prison population decreased by 19 percent even as the national prison population was rising by 21 percent.<sup>27</sup> Over the last 10 years, the national rate fell by about 8 percent, but the Massachusetts rate fell by more than 24 percent.<sup>28</sup> On a per capita basis, Massachusetts has, for many years, incarcerated among the fewest people in the nation. After a 10-year decline of nearly 30 percent, last year Massachusetts incarcerated fewer people per capita than any other state.<sup>29</sup>

Moreover, at the county level, Massachusetts has long had the benefit of creative programs designed to provide those who are incarcerated with some of the skills they need for successful re-entry.<sup>30</sup> And thoughtful judges in the Massachusetts federal and state courts have energetically championed and led creative, labor-intensive programs designed to provide the help and structure many who find themselves enmeshed in the criminal justice system need to emerge from it successfully. At the state level, those programs include drug, veterans, homeless, and mental health courts.<sup>31</sup> Their federal counterparts deal with drugs,<sup>32</sup> prisoner re-entry,<sup>33</sup> and at least the potential for diversion into a non-criminal disposition.<sup>34</sup>

Still, many Massachusetts leaders, law enforcement professionals, and others, were convinced that incarceration rates and costs were too high and that programmatic support for successful re-entry upon release from custody was too low. As the result of an extended, collaborative effort among citizens groups, legislators and interested law enforcement officials, last year Massachusetts enacted legislation providing for a series of major reforms in key areas of the criminal justice system.<sup>35</sup> The extensive and detailed legislation made significant changes to a number of key components of the then-existing criminal justice framework.

Several of those changes had a direct impact on incarceration and the likelihood of incarceration. Bail reform provisions modeled on and expanding the Supreme Judicial Court’s (SJC) decision in *Brangan v. Commonwealth*<sup>36</sup> were designed to ensure that, to the fullest extent practicable, bail amounts were set at a level a defendant could afford. Mandatory minimum sentences for a number of low-level drug offenses were removed in the hope that low-level offenders, who themselves are often drug-dependent, would be able to get the treatment they needed instead of winding up with minimal support in a jail or prison. For those who were incarcerated, the legislation imposed restrictions on solitary confinement, which research has shown can and often does have a devastating impact on the confined person’s mental health.<sup>37</sup>

To prevent involvement of very young children in the criminal justice system, the minimum jurisdictional age for juvenile delinquency was raised from seven to 12.<sup>38</sup> Provisions for diversion out of the formal criminal justice system, which had been available in

24. Anjali Cadambi, “U.S. prisoners take control of Walpole Prison,” 1973, GLOBAL NONVIOLENT ACTION DATABASE (Oct. 18, 2010), <https://nvdatabase.swarthmore.edu/content/us-prisoners-take-control-walpole-prison-1973>.

25. Michael Jonas, “Weld’s views ‘developing’ on criminal justice reform,” COMMONWEALTH MAG. (Jun. 9, 2016), <https://commonwealthmagazine.org/criminal-justice/welds-views-developing-on-criminal-justice-reform/>.

26. Benjamin Forman & John Larivee, “Crime, Cost, and Consequences: Is It Time to Get Smart on Crime?,” MASSINC (March, 2013), [https://2gaiae1lifzt2tsfgr2vil6c-wpengine.netdna-ssl.com/wp-content/uploads/2013/03/Crime\\_Cost\\_Consequences\\_MassINC\\_Final1.pdf](https://2gaiae1lifzt2tsfgr2vil6c-wpengine.netdna-ssl.com/wp-content/uploads/2013/03/Crime_Cost_Consequences_MassINC_Final1.pdf).

27. *Massachusetts Department of Correction Prison Population Trends: 2017*, MA DEPT. OF CORRECTION (March, 2018), [https://www.mass.gov/files/documents/2018/09/28/PrisonPopTrends\\_2017\\_Final.pdf](https://www.mass.gov/files/documents/2018/09/28/PrisonPopTrends_2017_Final.pdf). Nationally, prison population increased by 43 percent from 1995 through 2009 while the Massachusetts prison population fell slightly. *Id.*

28. Jacob Kang-Brown, Eital Schattner-Elmaleh & Oliver Hinds, “People in Prison in 2018,” VERA INSTITUTE OF JUSTICE (April, 2019), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/people-in-prison-in-2018/legacy\\_downloads/people-in-prison-in-2018-updated.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/people-in-prison-in-2018/legacy_downloads/people-in-prison-in-2018-updated.pdf). About 23 percent of the Massachusetts prison population is serving mandatory life sentences, the sixth highest in the nation. Ashley Nellis, *Still Life: America’s Increasing Use of Life and Long-Term Sentences*, THE SENTENCING PROJECT (May 3, 2017), <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/>.

29. *Id.*

30. *See, e.g.*, “A Forward-Looking Jail,” <http://hcsdma.org/wp-content/uploads/2015/09/A-FORWARD-LOOKING-JAIL.pdf> (describing Hampden County Correctional Center); *Young Offender Unit opens at Middlesex Jail & House of Correction*, MIDDLESEX SHERIFF’S OFFICE (Feb. 6, 2018, 5:49 PM), <https://www.middlesexsheriff.org/middlesex-jail-house-correction> (introducing new juvenile offender unit); *see also* “In the Merrimack Valley, a vital experiment in criminal

justice reform,” THE BOSTON GLOBE (acknowledging the impact of streetworkers on criminal justice reform), <https://www2.bostonglobe.com/opinion/editorials/2019/01/22/opinion-editorial-merrimack-valley-vital-experiment-criminal-justice-reform/TkT8G0AF0rEQB4HuznIzM/story.html>.

31. *See Specialty Courts*, COMMONWEALTH OF MA, <https://www.mass.gov/specialty-courts> (explaining Specialty Courts in Massachusetts).

32. “Court Assisted Recovery Effort,” UNITED STATES DISTRICT COURT, <http://www.mad.uscourts.gov/outreach/recovery.htm>.

33. *RESTART: Reentry: Empowering Successful Today’s And Responsible Tomorrows*, UNITED STATES PROBATION AND PRETRIAL SERVICES OFFICE, <https://www.map.uscourts.gov/restart>.

34. *R.I.S.E.*, UNITED STATES PROBATION AND PRETRIAL SERVICES OFFICE, <https://www.map.uscourts.gov/rise>.

35. St. 2018, c. 69; St. 2018, c. 72.

36. 477 Mass. 691 (2017). Recently, in *Vasquez v. Commonwealth*, 481 Mass. 747 (2019), the SJC addressed the special considerations that apply when an individual charged with murder in the first degree seeks pretrial release on bail.

37. Those provisions appear to have generated more controversy than others the legislation contains. *See* Margaret Monsell, “The ‘wolf’ of solitary confinement,” COMMONWEALTH MAG. (Mar. 23, 2019), <https://commonwealthmagazine.org/opinion/the-wolf-of-solitary-confinement/> (describing side effects of solitary confinement); Sarah Betancourt, “New rules on solitary confinement coming under fire,” COMMONWEALTH MAG. (Feb. 20, 2019), <https://commonwealthmagazine.org/criminal-justice/new-rules-on-solitary-confinement-coming-under-fire-2/> (explaining issues with solitary confinement); Adrian Walker, “There was a consensus to reduce solitary confinement. But it hasn’t translated into action,” THE BOSTON GLOBE (Feb. 26, 2019, 7:26 PM) <https://www2.bostonglobe.com/metro/2019/02/26/there-was-consensus-reduce-solitary-confinement-but-hasn-translated-into-action/v4Ytxvy4fZ6xukk0ZfjIRK/story.html> (acknowledging lack of action in reducing use of solitary confinement).

38. St. 2018, c. 69, §§ 72-74, 77-79.

limited form under Massachusetts General Laws (G.L.) chapter 276A, were greatly broadened and now make some form of diversion available in greater variety to more people. The new law also broadens the criteria for completely expunging criminal records<sup>39</sup> and makes major changes to portions of the statute that deal with Criminal Offender Record Information (CORI),<sup>40</sup> information that so often makes it so difficult for many people to find post-conviction employment.

All of those changes are important. However, the changes to diversion, and the way CORI is handled, have enormous potential for dramatically changing the consequences of involvement in the criminal justice system. For that reason, they are explored in detail later in this issue. In “The Recent Evolution of Diversion Law in Massachusetts,” Georgia K. Critsley<sup>41</sup> examines the evolution of diversionary programs in the commonwealth, beginning with the legislature’s 1974 enactment of G.L. chapter 276A, which provided a limited array of diversionary programs for individuals between the ages of 17 and 24. The article goes on to describe the creation of diversionary programs for veterans and juveniles and closes with an exploration of the restorative justice programs that the new legislation contains. Those programs are important because their successful application not only avoids the possibility of imprisonment but the possibility of a criminal record in its entirety. Beyond that, the restorative justice programs hold the promise of better outcomes for those involved in the criminal justice system, both for the offender, and for those whom the offender’s conduct has harmed.

Notwithstanding increased availability of diversion, many individuals will continue to proceed through the standard criminal

justice system. Whether incarceration ensues, the possibility of creating a criminal record may still make it difficult or impossible to obtain gainful employment. In “Sealing and Expungement After Massachusetts Criminal Justice Reform,” Pauline Quirion<sup>42</sup> describes the manner in which CORI has been treated historically in Massachusetts statutes and the changes to those statutes that the recent legislation provides. As she explains in detail, not only does the legislation reduce the period of time an individual must wait before he or she is eligible to have a criminal record sealed, but it also imposes new restrictions on who can see unsealed records. It also provides greatly enhanced opportunities to have an individual’s interaction records with the criminal justice system expunged entirely so that no trace of that interaction remains. The likely positive impact those changes will have on the availability of post-conviction employment is enormous.

Nationally, and here in Massachusetts, we are at an inflection point in our approach to criminal justice. Enthusiasm for the “lock everybody up” approach of the last half-century has rapidly diminished over the last 10 years and has given way to approaches that in the long run are less expensive and more productive. As on many other occasions, Massachusetts has enthusiastically embraced these new approaches. Time, of course, will tell which of the approaches work and how well they do so. Further changes and modifications will likely ensue. However, the calibrated, outcome-driven approach that the recent legislation embraces clearly has widespread support and promises to continue the drive along a smarter path to public safety.

39. MASS. GEN. LAWS c. 276, §§ 100E-100U (2019).

40. MASS. GEN. LAWS c. 6, §§ 167, 172 (2019).

41. Georgia K. Critsley is the Senior Government Affairs Counsel at Massachusetts Trial Court. Any views expressed herein are those of the author herself and are not the views of any organization with which she works or is affiliated.

42. Pauline Quirion is the Director, CORI and Re-entry Project for Greater Boston Legal Services. Any views expressed herein are those of the author herself and are not the views of any organization with which she works or is affiliated.

# FIRST AND LAST CONTACT: THE RECENT EVOLUTION OF DIVERSION LAW IN MASSACHUSETTS

By Georgia K. Critsley

## I. INTRODUCTION

On March 8, 1965, President Lyndon B. Johnson announced the establishment of the President's Commission on Law Enforcement and Administration of Justice (Commission) as part of a new law, the Law Enforcement Assistance Act.<sup>1</sup> The charge of the Commission was to "probe . . . fully and deeply into the problems of crime in our nation."<sup>2</sup> Included in the charge was the following question: "What correctional programs are most promising in preventing a first offense from leading to a career in crime?"<sup>3</sup>

The Commission issued its report, "The Challenge of Crime in a Free Society,"<sup>4</sup> two years later; however, the Law Enforcement Assistance Act of 1965 had already provided a direct role for the federal government in "local police operations, court systems, and state prisons for the first time in American history."<sup>5</sup> This has been identified as one of the root causes of mass incarceration.<sup>6</sup>

Despite the Commission's recommendation that offenders be "released or diverted to noncriminal methods of treatment and control,"<sup>7</sup> or diversion before charge,<sup>8</sup> when appropriate, a very different, increasingly punitive policing approach became the norm, drastically increasing the number people in the United States under some form of correctional control.<sup>9</sup> Massachusetts was no exception.<sup>10</sup> In the last three decades, incarceration has risen at a faster rate in Massachusetts than in the nation overall and tough on crime policies have driven incarceration rates up to exceptionally high levels in Boston's communities of color.<sup>11</sup>

Fifty years after the Commission's recommendations, Massachusetts, like many other states, is moving away from "tough on crime" approaches.<sup>12</sup> This movement is indicative of the growing recognition that overly punitive criminal justice policies, far from



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contributing to public safety, actually cause harm and result in social and fiscal costs.<sup>13</sup> Diverting individuals away from the criminal justice system is one way to minimize this harm.<sup>14</sup>

This article outlines the rapid evolution of Massachusetts diversion law over the past eight years. The first section discusses the history of young adult diversion and its recent expansion to all eligible individuals regardless of age. The second section examines the legislative history of veterans diversion, recent case law, and subsequent legislative amendments to the original statutory provisions. The third section focuses on the history of juvenile diversion in its various common law forms and its codification in 2018. The fourth section discusses restorative justice and its recent codification.

1. "Special Message to the Congress on Law Enforcement and the Administration of Justice," 1 PUB. PAPERS 263 (March 8, 1965) (<https://quod.lib.umich.edu/p/ppotpus/4730960.1965.001>, retrieved Dec. 1, 2018).

2. *Id.* at 269.

3. *Id.* at 269-70.

4. PRESIDENT'S COMMISSION ON L. ENFORCEMENT AND ADMIN. OF JUST., *The Challenge of Crime in a Free Society*, 1 (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>.

5. Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* 1-2 (2016).

6. *Id.*

7. PRESIDENT'S COMMISSION ON L. ENFORCEMENT AND ADMIN. OF JUST., *The Challenge of Crime in a Free Society*, 134 (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>.

8. *Id.* at 133.

9. See Hinton, *supra* note 5, at 22; see also *One in 31 The Long Reach of American Corrections*. The Pew Center on the States, 1-7, Washington D.C. March 2009, <https://www.pewtrusts.org/en/research-and-analysis/reports/2009/03/02/>

one-in-31-the-long-reach-of-american-corrections ("1 in every 31 adults, or 3.2 percent, is under some form of correctional control. The rates are drastically elevated for men (1 in 18) and blacks (1 in 11) and are even higher in some high-crime inner-city neighborhoods.").

10. See Benjamin Foreman & John Larivee, *Crime, Cost, and Consequence: Is It Time to Get Smart on Crime?* (2013) [https://massinc.org/wp-content/uploads/2013/03/Crime\\_Cost\\_Consequences\\_MassINC\\_Final1.pdf](https://massinc.org/wp-content/uploads/2013/03/Crime_Cost_Consequences_MassINC_Final1.pdf).

11. *Id.* at 12.

12. See, e.g., St. 2010, c. 256, § 72 (an Act reforming the administrative procedures relative to criminal offender information and pre- and post-trial release); St. 2012, c. 192, § 30 (an Act relative to sentencing and improving law enforcement tools).

13. David Garland, *Introduction: The Meaning of Mass Imprisonment*, MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1-3 (David Garland ed., 2001).

14. William Brownsberger, *Diversion in the Criminal Justice Reform Package*, WILL BROWNSBERGER FOR STATE SENATOR, (May 1, 2018), <https://willbrownsberger.com/diversion-in-the-criminal-justice-reform-package>.

## II. EXPANSION OF YOUNG ADULT DIVERSION

In 1974, the legislature created Massachusetts General Laws (G.L.) chapter 276A, a new chapter governing diversion titled “An Act establishing a district court procedure to divert selected offenders from the district courts to programs of community supervision and service.”<sup>15</sup> Statutory diversion initially applied only to individuals between the ages of 17 and 22 years old.<sup>16</sup> This law targeted young adults because the legislature intended “to provide rehabilitation to those whose criminal habits had not become ‘fixed.’”<sup>17</sup>

The law authorized district courts and the Boston Municipal Court to dismiss or continue without a finding the criminal case of a person who met certain requirements.<sup>18</sup> To be eligible, the defendant had to meet age requirements, have no previous adult convictions except minor traffic violations, and have no “outstanding warrants, continuances, appeals or criminal cases pending before any courts of the commonwealth or any other state or of the United States.”<sup>19</sup> The law required that the defendant present the recommendation of a program stating that he or she would benefit from participation in the program.<sup>20</sup> Eligible criminal charges included misdemeanors and felonies punishable by imprisonment and charges over which a district court or the Boston Municipal Court could exercise final jurisdiction.<sup>21</sup> In addition to limiting the age of persons eligible for diversion, section 4 of G.L. c. 276B excluded certain offenses, including sex offenses,<sup>22</sup> the second and subsequent offenses of assault and battery on a person over 60 years of age,<sup>23</sup> assault and battery with a dangerous weapon on a person over 60 years of age,<sup>24</sup> armed assault on a person over 60 years of age with the intent to rob or murder,<sup>25</sup> unarmed robbery of a person over 60 years of age,<sup>26</sup> and larceny from a person over 60 years of age.<sup>27</sup>

On Sept. 18, 2013, Gov. Deval L. Patrick signed, “An Act Expanding Juvenile Jurisdiction” into law, which raised the age for adult criminal jurisdiction from 17 to 18 years old, placing

17-year-olds under the jurisdiction of the juvenile court.<sup>28</sup> This legislative change narrowed the age of individuals eligible for young adult diversion to individuals between 18 and 22 years old.<sup>29</sup>

On April 13, 2018, Gov. Charles D. Baker signed chapter 69 of the Acts of 2018, “An Act Relative to Criminal Justice Reform” (CJRA)<sup>30</sup> into law which significantly changed the adult diversion law by making it available to all individuals, regardless of their age.<sup>31, 32</sup>

Though the number of diversion-eligible individuals increased, the legislation also narrowed the offenses eligible for diversion to: any offense not eligible to be treated as a civil infraction under G.L. c. 277, § 70C;<sup>33</sup> any offense contained in G.L. c. 265, with the exception of assault and battery;<sup>34</sup> any offense contained in G.L. c. 268, with the exception of picketing a court with the intent to obstruct justice<sup>35</sup> and disrupting court proceedings;<sup>36</sup> any offense for which the penalty of incarceration is greater than five years; any offense for which there is a minimum term of incarceration; any offense that may not be continued without a finding of guilt;<sup>37</sup> and any offense that may not be placed on file.<sup>38</sup> Perhaps most significantly, the CJRA also eliminated the requirement that probation certify and approve diversion programs,<sup>39</sup> which made formal diversion available to the district courts and the Boston Municipal Court.<sup>40</sup>

The CJRA also added language that requires a judge to hear from the victim and the prosecution following the receipt of the report.<sup>41</sup> Requiring victim input into the disposition of a criminal case is consistent with the rights of victims as set forth in G.L. c. 258B, § 3; however, the new language of G.L. c. 276A, § 5 requires only that the judge provide an opportunity for the victim’s recommendation.<sup>42</sup> In contrast, G.L. c. 258B, § 3 provides victims with the right to present “an oral and written victim impact statement at sentencing or the disposition of the case against the defendant about the effects of the crime on the victim and as to a recommended sentence.”<sup>43</sup>

15. St. 1974, c. 781.

16. See St. 1974, c. 781.

17. Commonwealth v. Morgan, 476 Mass. 768, 779 (2017).

18. MASS. GEN. LAWS c. 276A, § 2 (1974).

19. MASS. GEN. LAWS c. 276A, § 2 (1974).

20. MASS. GEN. LAWS c. 276A, § 2 (1974).

21. MASS. GEN. LAWS c. 276A, § 2 (2012).

22. This law initially was inapplicable to defendants charged with violations of any of the offenses in MASS. GEN. LAWS c. 123A, § 3. MASS. GEN. LAWS c. 276A, § 3 (1974). This section, which contained a list of sex offenses, was repealed, by St. 1990, c. 150, § 304. This act repealed MASS. GEN. LAWS c. 123A, §§ 3-6 and resulted in the suspension of new sexually dangerous person civil commitments until 1999. See St. 1990, c. 150, § 304; see also In re Dutil, 437 Mass. 9, 12 (2002).

23. MASS. GEN. LAWS c. 265, § 15A (a) (1974).

24. MASS. GEN. LAWS c. 265, § 15B (a) (1974).

25. MASS. GEN. LAWS c. 265, § 18 (a) (1974).

26. MASS. GEN. LAWS c. 265, § 19 (a) (1974).

27. MASS. GEN. LAWS c. 265, § 25 (a) (1974).

28. St. 2013, c. 84; see also Emily Niedzwiecki, Seri Irazola, Ph.D., Caitlin Churchill & Michael Field, *Massachusetts Juvenile Diversion Assessment Study*, 2015.

29. St. 2013, c. 84, § 32 amended section 2 of chapter 276A of the MASS. GEN. LAWS by striking out “the word ‘seventeen’ and inserting in place thereof, in each instance, the following figure: 18.”

30. See St. 2018, c. 69.

31. St. 2018, c. 69, § 197.

32. “An Act Relative to Criminal Justice Reform” demonstrates this continued focus on young adults as a special group by establishing in §183 young adult probation officers so that criminal justice involved young adults “may benefit from age appropriate guidance, targeted interventions and a greater degree of individual attention.” St. 2018, c. 69, § 183. This Act also establishes a task force to examine and study the treatment and impact of individuals ages 18 to 24 in the court system and correctional system. St. 2018, c. 69, § 221.

33. See MASS. GEN. LAWS c. 277, § 70C (2018).

34. MASS. GEN. LAWS c. 265, § 13A (a) (2018).

35. MASS. GEN. LAWS c. 268, § 13A (2018).

36. MASS. GEN. LAWS c. 268, § 13C (2018).

37. See, e.g., MASS. GEN. LAWS c. 94C, § 32H (2018).

38. See, e.g., MASS. GEN. LAWS c. 90, § 24V (2018).

39. St. 2018, c. 69, § 198.

40. Diversion by the district courts and Boston Municipal Court pursuant to G.L. c. 276A ha[d] previously not been available as there were no certified and approved programs to which to divert a defendant as required by G.L. c. 276A, §§ 1, 2 and 8.

41. See St. 2018, c. 69, § 199, codifying MASS. GEN. LAWS c. 276A, § 5 (2018).

42. MASS. GEN. LAWS c. 258B, § 3(p) (2018).

43. MASS. GEN. LAWS c. 258B, § 3(p) (2018); see also ABA, PRETRIAL RELEASE, NOTICE TO VICTIMS OF CRIME, STANDARD 10-61. (“As part of the pretrial release process, the judicial officer should direct the appropriate office or agency to provide victim(s) of the crime with notice of any crime charged, any conditions imposed on the defendant.”).

With the exception of veterans diversion, the mechanics of diversion remain largely intact despite the changes brought by the CJRA.<sup>44</sup> G.L. c. § 276B requires probation officers to screen each defendant at arraignment in order to enable the judge to consider the defendant for diversion to a program.<sup>45</sup> The judge may then allow a 14-day continuance for assessment by the personnel of a program to determine if the defendant would benefit from such program.<sup>46</sup>

Section 3 also confers upon a judge the authority to override the statutory eligibility requirements set forth in section 2,<sup>47</sup> but not without the prosecution's input.<sup>48</sup> Should a defendant fail to meet the eligibility requirements for diversion, a judge may still allow "a 14-day continuance for assessment."<sup>49</sup> However, "[i]n arriving at such a decision the opinion of the prosecution should be taken into consideration."<sup>50</sup> Unlike the new requirement of victim input in section 5, a judge is not required to hear from the victim at this stage in the diversion proceedings.<sup>51</sup>

If a continuance is granted, the defendant is assessed by a program,<sup>52</sup> which shall provide to the judge a written assessment with the program's recommendation as to whether the defendant would benefit from diversion to the program, and a plan of services.<sup>53</sup> After receiving the report, approving the program, and hearing the recommendation of the prosecution and the victim, the judge then determines whether the defendant will be diverted to the program.<sup>54</sup> If the defendant "agrees to abide by the terms and conditions contained in the plan of services approved by the judge,"<sup>55</sup> the judge shall stay the criminal case for 90 days so that the defendant may participate in programming.<sup>56</sup> If a judge decides "that the interest of justice would best be served by a hearing of the facts,"<sup>57</sup> the judge may continue the case without a finding for 90 days.<sup>58</sup> It is important to note that this would require a colloquy by the judge followed by an admission of sufficient facts by the defendant.<sup>59</sup>

While the judge must provide an opportunity for the prosecution to make a recommendation regarding diversion, the judge may dismiss the case over the commonwealth's objection.<sup>60</sup> Perhaps as a check on this authority, the legislature included language in the CJRA specifying that "[d]iversion of a district court charge[ ] under this chapter shall not preclude a subsequent indictment on the same charges in superior court."<sup>61</sup> This amendment expressly authorizes the prosecution to proceed in superior court against the defendant on a charge with superior court jurisdiction, even with the diversion of the defendant in district court.<sup>62</sup> This option is not available to the prosecution on an offense over which the superior court has no jurisdiction.<sup>63</sup> It also is not available if the judge continues the case without a finding since jeopardy would have attached with the defendant's admission of sufficient facts.<sup>64</sup>

The CJRA made no changes to the provisions of section 5 of G.L. c. 276A that operate to protect the due process rights of a defendant who is recommended for diversion.<sup>65</sup> These provisions include requiring the defendant to consent in writing to the terms and conditions of a stay of the proceedings and to execute a waiver of the right to a speedy trial.<sup>66</sup> The defendant's consent must be with the advice of counsel.<sup>67</sup>

Once the stay of proceedings has expired, G.L. c. 276A, § 7 governs the actual disposition of a diversion-related case.<sup>68</sup> After reviewing the report submitted by the program director, the judge may dismiss the original charges if the report indicates that the defendant successfully completed the program.<sup>69</sup> The judge also can order an additional stay of the proceedings to allow the defendant to continue participation in the program.<sup>70</sup> Finally, section 7 also permits a judge to continue the case without a finding or resume the criminal proceedings based on the contents of the program director's report.<sup>71</sup>

44. The evolution of veterans' diversion is discussed in Part II *infra*.

45. MASS. GEN. LAWS c. 276A, § 3 (2018).

46. MASS. GEN. LAWS c. 276A, § 3 (2018).

47. A judge may do so on his own initiative or upon request of the defendant. MASS. GEN. LAWS c. 276A, § 3 (2018).

48. MASS. GEN. LAWS c. 276A, § 3 (2018).

49. MASS. GEN. LAWS c. 276A, § 3 (2018).

50. MASS. GEN. LAWS c. 276A, § 3 (2018).

51. MASS. GEN. LAWS c. 276A, § 3 (2018); *see also infra* note 302 and accompanying text (discussion of a victim's right to be heard on disposition).

52. MASS. GEN. LAWS c. 276A, § 5 (2018).

53. MASS. GEN. LAWS c. 276A, § 5 (2018).

54. The judge may make this final determination for defendants who qualify for diversion under section 2, as well as defendants who were ineligible for diversion under section 2 but were granted a continuance pursuant to section 3. MASS. GEN. LAWS c. 276A, § 5 (2018).

55. MASS. GEN. LAWS c. 276A, § 5 (2018).

56. MASS. GEN. LAWS c. 276A, § 5 (2018).

57. MASS. GEN. LAWS c. 276A, § 5 (2018).

58. MASS. GEN. LAWS c. 276A, § 5 (2018); *see also* MASS. R. CRIM. P. 12 (c).

59. 30A Mass. Practice § 24:17; *see also* Commonwealth v. Haskell, 76 Mass. App. Ct. 284, 289 (2010) ("It cannot be gainsaid that before a guilty plea or an admission to sufficient facts is accepted, a judge must conduct a colloquy with

the defendant to determine whether the plea is voluntary and intelligent.").

60. *See* Commonwealth v. Morgan, 476 Mass. 768, 780-81 (2017) (discussing where the Legislature has granted specific authority to dismiss or continue a case without a finding, a judge may dismiss a complaint over the objection of the Commonwealth). *But see* Commonwealth v. Moore, 93 Mass. App. Ct. 73, 76-77 (2018) (a judge may not dismiss an adult criminal case pre-arraignment over the objection of the Commonwealth).

61. MASS. GEN. LAWS c. 276A, § 4 (2018).

62. *See* MASS. GEN. LAWS c. 276A, § 4 (2018). If the charge was disposed of with a continuance without a finding and thus a recitation of and admission to the underlying facts, this provision raises potential double jeopardy issues. *See also* Luk v. Commonwealth, 421 Mass. 415, 419 (1995) ("The double jeopardy clause of the Fifth Amendment to the United States Constitution protects against ... multiple punishments for the same offense.").

63. *See* MASS. GEN. LAWS c. 276A, § 4 (2018).

64. *See Haskell*, 76 Mass. App. Ct. at 289.

65. *See* MASS. GEN. LAWS c. 276A, § 5 (2018).

66. MASS. GEN. LAWS c. 276A, § 5 (2018).

67. ABA, PRETRIAL RELEASE, NOTICE TO VICTIMS OF CRIME, Standard 10-5.4(b).

68. MASS. GEN. LAWS c. 276A, § 7 (2018).

69. MASS. GEN. LAWS c. 276A, § 7 (2018).

70. MASS. GEN. LAWS c. 276A, § 7 (2018).

71. MASS. GEN. LAWS c. 276A, § 7 (2018).

### III. VETERANS DIVERSION

#### A. VALOR

In response to a growing recognition that military service-related trauma could lead to criminal behavior and subsequent court involvement, Massachusetts enacted “An Act Relative to Veterans’ Access, Livelihood, Opportunity and Resources” (VALOR) in 2012.<sup>72</sup> VALOR provided qualifying military veterans with the alternative of treatment in lieu of criminal prosecution.<sup>73</sup> Signed into law after American military engagements in Afghanistan and Iraq, VALOR was intended to “support and help veterans transition when they return home to Massachusetts.”<sup>74</sup> This new law amended G.L. c. 276A, the young adult diversion statute, to authorize the diversion of qualifying veterans and active armed forces members from district and Boston Municipal Court criminal charges.<sup>75</sup> “As with young adults, the [l]egislature recognized that, for veterans and active duty members of the military, the conventional path, leading to a permanent criminal record, fails to ‘address [their] needs’ or to provide ‘the appropriate resolution,’ and that, if enabled to address the unique challenges they face, veterans could be strong candidates for rehabilitation.”<sup>76</sup>

In 2012, Massachusetts also established the first veterans treatment court,<sup>77</sup> which is intended to serve veterans who are struggling with addiction, mental health issues and/or other co-occurring disorders. This specialty court session involves ongoing probation supervision and weekly interaction with the court with input from a multidisciplinary team of professionals led by the judge.<sup>78</sup> Veterans treatment court takes one to two years to complete and “focuses on high risk/high needs veterans facing serious charges where there is a nexus between their current problem and their military experience.”<sup>79</sup>

Participation in a veterans treatment court differs from participation in a veterans diversion program. A veteran may qualify for veterans treatment court regardless of discharge status.<sup>80</sup> To qualify for veterans diversion, the defendant must meet the General Law’s definition of “veteran,” which requires that the individual have been honorably discharged.<sup>81</sup> Veterans diversion is targeted at individuals charged with minor offenses who have had minimal contact with the criminal justice system.<sup>82</sup> Defendants participating in a veterans diversion program are not supervised, whereas veterans treatment court participants are intensively supervised.<sup>83</sup>

The law regarding the diversion of veterans has dramatically evolved over the course of nearly six years. Since the enactment of VALOR, the legislature has amended it, repealed parts of it, and replaced it with a new version, An Act Relative to Veterans’ Benefits, Rights, Appreciation, Validation and Enforcement (BRAVE).<sup>84</sup> BRAVE simultaneously narrowed the universe of both individuals and criminal offenses eligible for veterans’ diversion.<sup>85</sup>

In its original version, the VALOR Act added sections 10 and 11 to G.L. c. 276A to allow the diversion of individuals with military service, regardless of age.<sup>86</sup> To be eligible for VALOR diversion, a defendant first had to meet the requirement of military status,<sup>87</sup> which was to be determined by probation.<sup>88</sup> The defendant also could not have any previous state or federal convictions in any criminal court proceeding after having reached the age of 18 years and could not have any outstanding warrants or open cases pending in any court.<sup>89</sup> Similar to young adult diversion, eligible criminal charges for VALOR include any offense for which a term of imprisonment could be imposed and over which a district court or the Boston Municipal Court could exercise jurisdiction.<sup>90</sup>

72. See St. 2012, c. 108, § 16, codifying MASS. GEN. LAWS c. 276A, §§ 10-11; William B. Brown, “From War Zones to Jail: Veteran Reintegration Problems,” 8 JUST. POL’Y J. 1, 4 (2011); see also Claudia Arno, “Proportional Response: The Need for More — And More Standardized — Veterans’ Courts,” 48 U. MICH. J. L. REFORM 1039 (2015).

73. MASS. GEN. LAWS c. 276A, § 10 (2012).

74. Press Release, “Mass. Gov. Office, Governor Patrick Signs VALOR Act to Increase Opportunities for Veterans” (quoting Massachusetts Speaker of the House Robert DeLeo) (May 31, 2012).

75. Commonwealth v. Morgan, 476 Mass. 768, 769 (2017).

76. *Id.* at 779-80.

77. See Press Release, “Mass. Supreme Judicial Court, Vets to Graduate from Norfolk Veterans Treatment Court in Dedham” (Nov. 8, 2016).

78. See Information Packet, “The Norfolk County Veterans Treatment Court,” <https://www.mass.gov/files/documents/2016/08/on/veterans-treatment-court-dedham-info-sheet.pdf> (retrieved November 27, 2018).

79. Hon. Eleanor C. Sinnott, “Boston Veterans Treatment Court: A Team Dynamic,” 60 BOSTON BAR JOURNAL 5 (2016).

80. See Information Packet, “The Norfolk County Veterans Treatment Court,” <https://www.mass.gov/files/documents/2016/08/on/veterans-treatment-court-dedham-info-sheet.pdf> (retrieved Nov. 27, 2018).

81. MASS. GEN. LAWS c. 4, § 7, cl. 43rd (2018) provides in part: “Veteran” shall mean (1) any person, (a) whose last discharge or release from his wartime service as defined herein, was under honorable conditions ...”

82. MASS. GEN. LAWS c. 276A, § 2 (2018) (to be eligible for diversion under this chapter, a defendant cannot have had any previous adult convictions except for traffic violations for which no term of imprisonment may have been imposed).

83. The level of supervision received by the veterans treatment court participants would be counter-indicated for low-level offenders participating in veterans diversion. “Research has revealed that certain intensive programs work very well with high-risk offenders but actually can increase recidivism rates among low-risk offenders.” “Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders,” THE PEW CENTER ON THE STATES, WASHINGTON D.C. Sept. 2011; see also “21 Principles for the 21<sup>st</sup> Century Prosecutor,” BRENNAN CENTER FOR JUSTICE, Dec. 2018 (recommending that diversion program match the risk and needs of the individual, placing lower risk people into programs with a “lighter touch”); Hon. Eleanor C. Sinnott, “Boston Veterans Treatment Court: A Team Dynamic,” 60 BOS. BAR J. 5 (2016).

84. St. 2018, c. 218.

85. See St. 2018, c. 69, § 198; St. 2018, c. 218, § 33.

86. MASS. GEN. LAWS c. 276A §§ 10, 11 (2018).

87. VALOR eligibility required that be a veteran, as defined in said clause Forty-third of said section 7 of said chapter 4, on active service in the armed forces of the United States, as defined in said clause Forty-third of said section 7 of said chapter 4, or have a history of military service in the armed forces of the United States. MASS. GEN. LAWS c. 276A, § 10 (2012).

88. In assigning probation this task, the legislature relied upon the powers and duties accorded to probation officers set forth in G.L. c. 276, § 85. Practically speaking, the determination of a defendant’s military status would have to take place on the day of arraignment which is when the defendant would first come into contact with a probation officer. MASS. GEN. LAWS c. 276, § 85 (2012).

89. A defendant could have been convicted of traffic violations if no incarceration was imposed. MASS. GEN. LAWS c. 276, § 10 (2012).

90. MASS. GEN. LAWS c. 276A, § 10 (2012); see also MASS. GEN. LAWS c. 276A, § 2 (2012).

Once found eligible, a defendant could move for a 14-day continuance to seek an assessment from a veterans organization,<sup>91</sup> which would include treatment options available to the defendant.<sup>92</sup> The court was required to inquire about the nature of the charges and to consider the opinion of the commonwealth on the merits of granting or denying the continuance before deciding whether to allow the continuance.<sup>93</sup> In its reference to the court's decision making authority, the legislature clearly intended to allow judges to exercise their discretion on whether to offer such a continuance.<sup>94</sup> Judges also were authorized to grant a continuance sua sponte for a "VALOR assessment" without a motion from the defendant.<sup>95</sup>

Upon being granted a 14-day continuance, the defendant was directed to probation "for the purpose of coordinating an assessment program with the appropriate agency."<sup>96</sup> VALOR accounted for potential mental health issues that a veteran might experience<sup>97</sup> by requiring that a written report prepared by a qualified psychiatrist, clinical psychologist or physician, in consultation with the veterans organization, be submitted to the court to assist in sentencing or diversion where a defendant demonstrated symptomatology suggestive of a mental illness.<sup>98</sup> At the next court date after the 14-day period had ended, the court would consider the veterans organization's written report in deciding how to proceed.<sup>99</sup> A judge also could consider recommendations of any licensed mental health professional who had treated or diagnosed the defendant.<sup>100</sup>

Assuming the provisions of G.L. c. 276A, § 5 applied to veterans diversion at this stage,<sup>101</sup> the judge would "make a final determination as to the eligibility of the defendant for diversion to the program."<sup>102</sup> If the veteran qualified for diversion and agreed to abide by the terms of the service plan that the judge approved, the judge could stay the case for 90 days to allow the veteran to participate in programming.<sup>103</sup> A judge could also decide "that the interest of justice would best be served by a hearing of the facts, after which the

case may be continued without a finding for 90 days."<sup>104</sup>

In *Commonwealth v. Morgan*, the Supreme Judicial Court (SJC) decided the question of what offenses were eligible for diversion under VALOR and what dispositions were available.<sup>105</sup> In *Morgan*, a veteran who had received a continuance without a finding (CWO) on a previous operating under the influence charge (OUI) was charged with and arraigned on a subsequent OUI as a second offense.<sup>106</sup> The defendant's attorney sought diversion pursuant to VALOR after learning that her client was a veteran.<sup>107</sup> Following the defendant's receiving treatment during a 90-day continuance, his attorney moved for dismissal of all charges or, alternatively, a CWO.<sup>108</sup>

The court ultimately held that under VALOR, a judge had discretion to enter a CWO or a dismissal on a second offense OUI.<sup>109</sup> The court reasoned that sections added by VALOR to G.L. c. 276A<sup>110</sup> could not be read in isolation from the provisions of section 7 in the same chapter.<sup>111</sup> Using rules of statutory construction, the court then concluded that a dismissal or continuance without a finding, available to a defendant under section 7, should also be available to a veteran under VALOR.<sup>112</sup>

In its decision, the *Morgan* court notably considered the legislative intent behind the enactment of VALOR and the characteristics of veterans as a group with distinctive needs.<sup>113</sup> The court noted that by enacting VALOR, the legislature recognized that the conventional criminal justice process that leads to a permanent criminal record fails to address veterans' needs or provide an appropriate outcome.<sup>114</sup>

The court in *Morgan* provided detailed guidance regarding the exercise of judicial discretion in deciding whether a veteran should be diverted.<sup>115</sup> It noted that a judge still retains discretion over the ultimate disposition of the case even after a defendant's successful completion of VALOR-related treatment and programming.<sup>116</sup> The

91. This assessment could be conducted by the United States Department of Veterans Affairs, the state's department of veterans services or another federal or state agency with suitable knowledge of and experience in veterans affairs. MASS. GEN. LAWS c. 276A, § 11 (2012).

92. MASS. GEN. LAWS c. 276A, § 11 (2012).

93. MASS. GEN. LAWS c. 276A, § 11 (2012) provides that, "[p]rior to offering a continuance, the court shall inquire into the circumstances of the charge."

94. See MASS. GEN. LAWS c. 276A, § 11 (2012).

95. MASS. GEN. LAWS c. 276A, § 11 (2012).

96. *Id.*

97. Veterans face particular challenges from high rates of "combat-related PTSD and other mental health issues." *Morgan*, 476 Mass. at 768, 783 n.19.

98. MASS. GEN. LAWS c. 276A, § 11 (2012).

99. *Id.*

100. Section 11 also authorized a court to consider the opinion of any licensed mental health professional who had treated or diagnosed the defendant for sentencing purposes. MASS. GEN. LAWS c. 276A, § 11 (2012).

101. That a veteran's case could actually be disposed of with a dismissal or a continuance without a finding was, at this point, unclear. Unlike G.L. c. 276A, § 7 which specifically authorize a judge to dismiss or continue a case without a finding of guilt upon successful completion of a diversion program, sections 10 and 11 were silent as to disposition and whether a judge could dismiss or continue a case without a finding. See MASS. GEN. LAWS c. 276A, §§ 7, 10, 11 (2012).

102. MASS. GEN. LAWS c. 276A, § 5 (2016).

103. *Id.*

104. *Id.*

105. *Morgan*, 476 Mass. at 768.

106. *Id.* at 773. The defendant was also arraigned on charges of possession of heroin, negligent operation of a motor vehicle, and leaving the scene of property damage. *Id.* at 771.

107. *Id.*

108. *Id.* at 772. The case was, pursuant to VALOR, continued for 90 days while the defendant received treatment including detoxification, PTSD counseling, counseling, and other substance use disorder treatment. *Id.* at 771.

109. *Id.* at 785.

110. See MASS. GEN. LAWS c. 276A, §§ 10-11 (2012).

111. *Commonwealth v. Morgan*, 476 Mass. 768, 773 (2017).

112. *Id.*

113. *Id.* at 779-80.

114. *Id.*

115. The court, in a footnote, stated that a "judge considering a report that a military defendant could benefit from such a program must weigh that report, any statement by the commonwealth, and the judge's own observations, and determine, in the exercise of his or her discretion, whether to allow a stay or a continuance so that the military defendant can participate in the treatment program." *Id.* at 784, n. 23.

116. "Even after successful completion of that program, the judge retains discretion over the ultimate disposition of the matter; the statute provides only that a judge 'may' dismiss the original charges upon successful completion." *Id.* at 784.

court addressed the separation of powers argument raised by the commonwealth and concluded that because the pretrial diversion statute specifically authorizes a judge to dismiss a case or continue it without a finding, there was no Article 30 violation.<sup>117</sup>

While the SJC decided what post-arraignment dispositions were available under VALOR, it did not address whether a judge had the authority to dismiss a case pre-arraignment with a VALOR diversionary disposition. The court appeared to address this issue in *Commonwealth v. Newton N.*, albeit indirectly, when it considered whether a judge was authorized to dismiss a delinquency complaint supported by probable cause prior to arraignment if the judge determined that such a dismissal would serve the best interests of the child and the interests of justice.<sup>118</sup> Echoing *Morgan*, the court in *Newton N.* acknowledged the “broad and exclusive discretion of the prosecutor” to proceed with a prosecution when the complaint is supported by probable cause.<sup>119</sup> It also examined whether the legislature had granted this authority under G.L. c. 119, § 53, which authorizes a judge to liberally construe the statutory provisions regarding delinquency proceedings so that juveniles are treated as children in need of aid, encouragement, and guidance, rather than criminals.<sup>120</sup> The court ultimately vacated the pre-arraignment dismissal of the delinquency complaint in question and declined to grant judges this authority, holding “the [l]egislature [had] not authorized [j]uvenile [c]ourt judges to dismiss valid delinquency complaints before arraignment over the objection of a prosecutor.”<sup>121</sup> In its decision, however, the court referred to the judicial authority conferred by VALOR,<sup>122</sup> which seems to suggest that a judge could, before arraignment, dismiss a complaint, pursuant to G.L. c. 276A, § 7, if an eligible veteran fulfilled all requirements under VALOR.<sup>123</sup>

## B. VALOR and the 2018 Criminal Justice Reform Act

The enactment of the CJRA less than a year after the *Morgan* decision significantly affected the scope of VALOR diversion<sup>124</sup> by narrowing the universe of criminal offenses eligible for diversion under G.L. c. 276A.<sup>125</sup> The amendments to G.L. c. 276A also narrowed the offenses eligible for diversion under VALOR and appeared to

conflict with the purpose of veterans diversion.<sup>126</sup> Legislators moved quickly to remedy this unintended consequence with new legislation.<sup>127</sup>

Although the CJRA narrowed the scope of veterans diversion, it also added a new section codifying pre-arraignment diversion by district attorneys for veterans, as well persons with substance use disorders or mental illness.<sup>128</sup> The legislature’s decision to add this section to G.L. c. 12, the chapter governing district attorneys’ offices and the office of the attorney general, instead of G.L. c. 276A, raises the question of whether the legislature intended “district attorney diversion” to be subject to the same restrictions as judicial diversion under c. 276A.<sup>129</sup> This question is answered by a different section of the CJRA amending G.L. c. 276A by adding language pertaining to a district attorney’s broad authority to divert.<sup>130</sup> These two sections of the CJRA make clear the legislature’s intention to give the prosecution expansive authority over diversion free from the limits of other diversion provisions.<sup>131</sup>

The codification of district attorney diversion in the CJRA raises the question of whether VALOR gives a judge the authority to dismiss a complaint against a veteran prior to arraignment.<sup>132</sup> While the CJRA amended both G.L. c. 12 and G.L. c. 276A, the legislature only included the term, “pre-arraignment,” into the provisions amending chapter 12.<sup>133</sup> This appears to indicate that a judge may not have the authority to dismiss an otherwise eligible offense prior to arraignment. This conclusion is further supported by the fact that the CJRA also codified juvenile diversion by adding a new section to G.L. c. 119.<sup>134</sup> These new provisions contain very explicit language specifying that diversion of a child take place prior to arraignment.<sup>135</sup> The legislature did not add similar language to chapter 276A.<sup>136</sup>

It is reasonable to conclude that the legislature intended for the prosecution to decide whether a veteran, as well as a person with a substance use disorder or mental illness, should be diverted prior to arraignment while giving a judge the authority to divert a veteran or other diversion-eligible individual post-arraignment.<sup>137</sup>

117. *Commonwealth v. Morgan*, 476 Mass. at 780-81.

118. *Commonwealth v. Newton N.*, 478 Mass. 747, 755 (2018).

119. *Id.*

120. *Id.* at 757.

121. *Id.*

122. In its consideration of other provisions in the General Laws that allow the dismissal of a complaint, the Court specifically referenced VALOR, using it as an example of the legislature having authorized judges “to dismiss a valid complaint over a prosecutor’s objection ‘without offending art. 30.’” *Id.* at 756, quoting *Morgan*, 476 Mass. at 780.

123. See *Newton N.*, 478 Mass. at 755-56.

124. See St. 2018, c. 69, § 198.

125. St. 2018, c. 69, § 198.

126. See *Morgan*, 476 Mass. at 769 (discussion of VALOR’s “multifaceted approach to assisting members of the military in their often-difficult return to civilian life, during which many succumb to substance abuse”); see also *Brown*, *supra* note 72, at 12-13. (discussion of the association between severe trauma experiences and alcohol consumption, especially in veterans).

127. See Shira Schoenberg, “‘Unintended consequence’ of Massachusetts criminal justice reform hurts veterans charged with drunken driving,” MASSLIVE, May 18, 2018, [https://www.masslive.com/politics/2018/05/unintended\\_consequence\\_of\\_crim.html](https://www.masslive.com/politics/2018/05/unintended_consequence_of_crim.html).

128. The CJRA added section 34 to General Laws chapter 12 requiring that district attorneys, “within their respective districts, establish pre-arraignment diversion programs which may be used to divert a veteran or person who is in active service in the armed forces, a person with a substance use disorder or a person with mental illness if such veteran or person is charged with an offense or offenses against the commonwealth. St. 2018, c. 69, § 16, codified as MASS. GEN. LAWS c. 12, § 34 (2018).

129. See St. 2018, c. 69, § 16.

130. See St. 2018, c. 69, § 201.

131. See generally *Commonwealth v. Brown*, 479 Mass. 600, 606 (2018) (when statutory language is clear and unambiguous, “it is conclusive as to the intent of the legislature.”).

132. See discussion of *Newton N.* and the inference of judicial authority to dismiss a complaint under VALOR pre-arraignment *supra*, Part III, section 2.

133. See St. 2018, c. 69, § 201.

134. See St. 2018, c. 69, § 75, codifying MASS. GEN. LAWS c. 119, § 54A (2018).

135. See, e.g., St. 2018, c. 69, § 75, codifying MASS. GEN. LAWS c. 119, § 54A (b) (2018); see also *infra* notes 264-269 and accompanying text (discussion of juvenile diversion pre-arraignment language).

136. See St. 2018, c. 69, §§ 196-201.

137. Such a reading is consistent with the SJC’s discussion of the wide discretion of the prosecution in deciding whether to prosecute a case. *Commonwealth v. Cheney*, 440 Mass. 568, 574 (2003); see *supra*, note 128 and accompanying text.

### C. BRAVE

On Aug. 8, 2018, less than five months after the enactment of “An Act Relative to Criminal Justice Reform,” the governor signed into law “An Act Relative To Veterans Benefits, Rights, Appreciation, Validation and Enforcement (BRAVE).”<sup>138</sup> In addition to providing veterans with employment protections, tax exemptions, burial expenses and medical care, BRAVE amended VALOR’s diversion provisions by narrowing the eligibility requirements for diversion that VALOR established in 2012, and partly mitigating the impact of “An Act Relative to Criminal Justice Reform” on justice-involved veterans.<sup>139</sup>

BRAVE amended G.L. c. 276B, § 3 by expanding the amount of time for a defendant to be assessed by the United States Department of Veterans Affairs or other veterans-related government agency from 14 days to 30 days and adding language requiring probation to determine if the defendant had previously been diverted as a veteran for a first offense OUI.<sup>140</sup>

Most significantly, BRAVE amended G.L. c. 276A, §4 to authorize diversion for a veteran charged with a first-time OUI offense while imposing additional eligibility requirements.<sup>141</sup> To be eligible for diversion, a veteran could have no previous arrest or charge of OUI.<sup>142</sup> This requirement would apply to a defendant who was previously charged with OUI and whose case was continued without a finding pursuant to G.L. c. 90, § 24E.<sup>143</sup> This provision appears to address the SJC’s decision in *Morgan*, in which the court held that a veteran charged with a second and subsequent OUI following a continuance without a finding on his first OUI was eligible for diversion.<sup>144</sup> It also appears to apply to individuals who had a previous OUI dismissed, were acquitted of an OUI, or who had a *nolle*

*prosequi* entered on an OUI.<sup>145</sup>

The amendments to section 4 also required that a defendant charged with a first offense OUI diversion be “clinically diagnosed with a traumatic brain injury, substance abuse disorder or serious mental illness<sup>146</sup> in connection with the veteran’s military service or the person’s active duty.”<sup>147</sup> This section raises the question of how to treat a veteran at his or her first court appearance, where the defendant might otherwise be eligible for diversion and may suffer from one of the listed disorders, but has not been clinically diagnosed.<sup>148</sup> A judge in this situation could continue the arraignment to allow the defendant to seek an evaluation to determine if he suffers from a qualifying disorder.<sup>149</sup>

The amendments to section 4 are silent as to how a veteran charged with a first-offense OUI should demonstrate the existence of a clinical diagnosis for the enumerated disorders.<sup>150</sup> Potentially, as is permitted under G.L. 123, § 35, live testimony of a clinician or physician could be presented even though BRAVE does not require an evidentiary hearing.<sup>151</sup> A veteran could also offer medical records, and a letter from a clinician or physician also may be sufficient.<sup>152</sup> A judge possesses the authority to continue the arraignment to give the defendant time to collect the necessary documentation or prepare testimony.<sup>153</sup>

### IV. JUVENILE DIVERSION

From its inception, the juvenile court system was created as a means of diverting juveniles away from “the destructive punishments of the [adult] criminal justice system”<sup>154</sup> and to encourage rehabilitation.<sup>155</sup> The rationale for a separate track of court proceedings was the “diminished culpability”<sup>156</sup> of children and their

138. See St. 2018, c. 218.

139. St. 2018, c. 218, § 35.

140. St. 2018, c. 218, § 33 provides in part: “The probation officers or an official designee shall also confirm the defendant’s status as a veteran or as a person on active service in the armed forces of the United States and shall determine if the defendant has previously been diverted pursuant to clause (ii) of subsection (c) of section 4.”

141. St. 2018 c. 218 § 33.

142. St. 2018 c. 218 § 33.

143. See MASS. GEN. LAWS c. 90, § 24E (2018).

144. St. 2018, c. 218, §35 contains additional language that appears to respond directly to *Morgan* by requiring the court to “consider the opinion of the prosecution in determining whether to divert a veteran or person on active service to a program pursuant to clause (ii).” *Morgan*, 476 Mass. at 768; see *supra* notes 105-17 and accompanying text (discussion of *Morgan* decision).

145. A “*nolle prosequi*” is “[a] legal notice that a lawsuit or prosecution has been abandoned.” BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014).

146. In this section, the legislature defined “serious mental illness” as a current or recent diagnosis by a qualified mental health professional of at least 1 of the following disorders described in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders: (i) schizophrenia and other psychotic disorders; (ii) major depressive disorders; (iii) all types of bipolar disorders; (iv) a neurodevelopmental disorder, dementia or other cognitive disorder; (v) any disorder commonly characterized by breaks with reality or perceptions of reality; (vi) all types of anxiety disorders; (vii) trauma and stressor related disorders; or (viii) severe personality disorders.

St. 2018, c. 218, § 35, codified as MASS. GEN. LAWS c. 276A, § 4(a) (2018).

147. St. 2018, c. 218, § 35, codified as MASS. GEN. LAWS c. 276A, § 4(c)(ii)(B)

(2018).

148. Research indicates that there are a number of veterans suffering from the disorders listed in BRAVE but who have not been diagnosed. See *e.g.*, Terri Tanielian & Lisa H. Jaycox, eds., *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery*, RAND Corporation, Santa Monica CA, 2008 (researchers found in cohort of military service members, 57 percent who reported a probable traumatic brain injury had not been evaluated by a physician).

149. The SJC has held that “the decision whether to continue an arraignment following an initial appearance and, if so, for how long, rests in the sound discretion of the judge.” *Commonwealth v. Humberto H.*, 466 Mass. 562, 575 (2013).

150. St. 2018, c. 218, § 35.

151. A hearing conducted pursuant to MASS. GEN. LAWS c. 123, § 35 (2018), where a judge must decide whether a respondent in a proceeding under this section has a substance or alcohol disorder and whether there is a likelihood of serious harm as a result of the person’s alcoholism or substance abuse, medical testimony.

152. Producing medical documentation to the court raises a question as to its confidentiality; this information should be accompanied by a motion to impound. See TRIAL COURT RULE VIII (as amended Rule 2) (Mass. Impoundment Proc. Rules and Handbook 2015). Additionally, while MASS. GEN. LAWS c. 123, § 35 (2018) sets forth requirements for the admissibility of medical records, it is unlikely that they would apply at this preliminary stage of the proceedings.

153. See *Humberto H.*, 466 Mass. at 576.

154. Franklin E. Zimring, “The Common Thread: Diversion in Criminal Justice,” 88 CAL. L. R. 2477, 2479 (2000).

155. See *id.* at 2480.

156. See R.L. Ireland, JUVENILE LAW, § 1.3 at 18 (2d ed. 2006, January 2018 update).

amenability to rehabilitation.<sup>157</sup> The goal of the juvenile justice system was “to act in the best interests of children by encouraging and helping them to become law-abiding and productive members of society, and not to label and treat them as criminals.”<sup>158</sup>

Research indicates that formal processing through the juvenile justice system does not deter youth from subsequent delinquency; in fact, system processing [has been] found to increase delinquency.<sup>159</sup> The mere fact of court involvement and the perception of being a criminal carries a stigma from which a child should be protected.<sup>160</sup> The existence of a juvenile court record as the result of being charged with a criminal offense carries lasting negative consequences.<sup>161</sup> Even in the absence of a statutory scheme, diverting juveniles away from formal juvenile court proceedings has become a common practice, occurring at various stages during the charging and prosecution of a juvenile offense.<sup>162</sup> Though a child’s misbehavior may be unlawful, it may often be more appropriately “resolved within a school, family or clinical mental health setting.”<sup>163</sup>

### A. Diversion by Clerk-Magistrates and District Attorneys

Clerk-magistrates have the inherent statutory authority to divert both juveniles and adults at the pre-arraignment stage.<sup>164</sup> G.L. c. 218, § 35A gives a clerk-magistrate, in receipt of an application for complaint, the authority to hear from the accused or show cause as to why the complaint should not issue and decide accordingly.<sup>165</sup> “The implicit purpose of [these show cause hearings] is to enable the clerk-magistrate to screen a variety of minor criminal or potentially criminal matters out of the criminal justice system through a

combination of counseling, discussion, or threat of prosecution.”<sup>166</sup> The non-issuance of a complaint following a show cause hearing has been referred to as a “[d]iversion-like resolution.”<sup>167</sup> The legislature limited this authority, for both juveniles and adults, to misdemeanors where the individual is not under arrest, felonies where the individual is not under arrest at the request of a law enforcement officer, and felony complaints from private parties.<sup>168</sup>

Clerk-magistrate diversion practices vary across the commonwealth.<sup>169</sup> A clerk-magistrate in one court may refer a juvenile to the district attorney’s office for participation in a diversion program.<sup>170</sup> In other courts, law enforcement officials and a clerk-magistrate may decide to “put certain low-level cases on hold for six months to one year. During that time, youth are required to stay out of trouble and participate in some form of community programming, such as community service.”<sup>171</sup> In other jurisdictions, diversion case workers participate in the clerk-magistrate hearing where all parties, including the defendant, case worker, law enforcement officer, and clerk-magistrate, discuss the case and make a joint determination regarding diversion.<sup>172</sup>

Prior to 2018, district attorneys also diverted juveniles away from further court processing pursuant to their inherent authority to decide whether to proceed with a prosecution.<sup>173</sup> The SJC has noted its reliance on this expansive prosecutorial authority, suggesting that it is preferable for district attorneys to exercise this discretion, when appropriate, and not proceed on delinquency complaints when prosecution would not “serve the best interests of the child and the interests of justice.”<sup>174</sup>

157. *Commonwealth v. Connor C.*, 432 Mass. 638, 646 (2000).

158. *Connor C.*, 432 Mass. at 645–46 (2000); *see also* MASS. GEN. LAWS c. 119, § 53 (2018) (since its enactment in 1906, section 53 of Massachusetts General Laws chapter 119 has mandated that children be treated, “not as criminals, but as children in need of aid, encouragement and guidance.”).

159. *Niedzwiecki*, *supra* note 28, at 6.

160. *Humberto H.*, 466 Mass. at 576.

161. *See, e.g., id.* at 573 (discussing the fact that the juvenile’s name and delinquency charge become part of the juvenile Court Activity Record Information (CARI) record and recognizing that the creation of such a court record may have an impact on the decision whether to subsequently charge a juvenile with a crime); *see also* MASS. GEN. LAWS c. 6, § 172B (2018) (authorizes the Massachusetts Department of Children and Families to obtain juvenile arrest or “conviction” data to evaluate any and all foster homes and adoptive homes, whether with public or private agencies); MASS. GEN. LAWS c. 6, § 172F (2018) (authorizes the Massachusetts Department of Early Education and Care to obtain juvenile arrest or “conviction” data to evaluate “any residence, facility, program, system or other entity licensed under chapter 15D whether public or private, or any non-relative, in-home child care provider that receives federal or state funding”); and MASS. GEN. LAWS c. 6, § 172G (2018) (requires operators of children’s camps to obtain juvenile data associated with criminal charges in the juvenile court for employees and volunteers); *see also* Georgia K. Critsley & Agapi Koulouris, *What Access Do Employers Have to CORI?* (1st ed. 2012).

162. *See* Daniel P. Mears, Joshua J. Kuch, Andrea M. Lindsey, Sonja E. Siennick, George P. Pesta, Mark A. Greenwald & Thomas G. Blomberg, “Juvenile Court and Contemporary Diversion Helpful, Harmful or Both?” 15 CRIMINOLOGY & PUB. POL’Y, 960–61 (2016) (discussing diversion as a mainstay of juvenile courts and its increased use).

163. *Commonwealth v. Orbin O.*, 478 Mass. 759, 766 (2018).

164. *See, e.g.,* MASS. GEN. LAWS c. 218, § 35A (2018).

165. MASS. GEN. LAWS c. 218, § 35A (2018); *see also Orbin O.*, 478 Mass. at 764 (discussion of legislature’s “recognition that circumstances will exist when, notwithstanding the existence of probable cause, a complaint should not issue and that, in such circumstances, a clerk-magistrate has discretion to refuse to issue complaints.”)

166. *Eagle-Tribune Pub. Co. v. Clerk-Magistrate of Lawrence Div. of Dist. Court*, 448 Mass. 647, 650 (2007), quoting F.E. Snyder, “Crime and Community Mediation — The Boston Experience: A Preliminary Report on the Dorchester Urban Court Program,” 1978 WIS. L. REV. 737, 746–47 (1978); *see also* *Commonwealth v. Penza*, No. 16-P-293, 2017 WL 499395 (Feb. 7, 2017).

167. *Penza*, slip op. at \*1.

168. MASS. GEN. LAWS c. 218, §35A (2018).

169. *See Niedzwiecki*, *supra* note 28, at 23.

170. *Id.* at iii.

171. *Id.*

172. *Id.* at 24.

173. *Newton N.*, 478 Mass. at 755 (“[t]he decision to proceed with the prosecution rests in the broad and exclusive discretion of the prosecutor.”); *see also* *Commonwealth v. Wilbur W.*, 479 Mass. 397, 409 (2018) (discussing the wide, but not unbridled, discretion of a district attorney to prosecute a person); *Commonwealth v. Kardas*, 93 Mass. App. Ct. 620, 624 (2018) (“the executive power affords prosecutors wide discretion in deciding whether to prosecute a particular defendant, and that discretion is exclusive to them. . .”).

174. *Newton N.*, 478 Mass. at 757 (“[w]e rely upon prosecutors to exercise their sound discretion in deciding whether to proceed with the arraignment of a juvenile, even where there is probable cause, and consider whether prosecution will and not move forward on a delinquency.”).

Most Massachusetts district attorneys' offices have established juvenile pretrial diversion programs.<sup>175</sup> A 2015 assessment of district attorneys' pretrial juvenile diversion practices found that 10 out of 11 district attorneys' offices used juvenile diversion "in some capacity," but practices varied throughout the state.<sup>176</sup> The Berkshire County District Attorney's Office, which did not have its own pretrial diversion program, reported that juvenile cases were disposed of through informal diversion "through a coordinated effort between law enforcement and the courts."<sup>177</sup>

## B. Judicial Diversion

Judges have always been accorded "broad discretion to protect the best interests of children consistent with the interests of justice" even without explicit statutory authority to divert juveniles from juvenile court proceedings.<sup>178</sup> This discretion stems from the "principal aim and underlying philosophy of [the] juvenile court system . . . [that it] is not a punitive scheme strictly akin to the adult criminal justice system. Rather, it is primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders."<sup>179</sup> In *Commonwealth v. Humberto H.*, the SJC found that allowing juvenile court judges to hear a motion to dismiss a delinquency complaint at the pre-arraignment stage could protect a child from "the potential adverse consequences of a CARI [Court Activity Record Information]<sup>180</sup> record." The *Humberto H.* court noted

175. See, e.g., MIDDLESEX COUNTY DISTRICT ATT'YS OFF., *Juvenile Diversion Program*, <https://www.middlesexda.com/beyond-courtroom/pages/juvenile-diversion-program>; CAPE AND ISLANDS DISTRICT ATT'YS OFF., *Juvenile Diversion Program*, <https://www.mass.gov/service-details/juvenile-diversion>, retrieved Dec. 10, 2018; ESSEX DISTRICT ATT'YS OFF., *Juvenile and Youthful Diversion*, <https://www.mass.gov/service-details/juvenile-and-youthful-diversion>, retrieved Dec. 10, 2018; and PLYMOUTH COUNTY DISTRICT ATT'YS OFF., *The Diversion Program*, <https://plymouthda.com/resources/the-diversion-unit/>, retrieved Dec. 10, 2018.

176. See *Niedzwiecki*, *supra* note 28, at 26-27 (discussing differences in conditions of diversion among district attorneys' offices).

177. See *id.* at 30, 64; see also "Less Crime for Less Money, Citizens for Juvenile Justice," 6-7, Boston, Mass., November 2016, [https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5900a85b15d5db05c604a712/1493215328401/Diversion\\_White\\_Paper.pdf](https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5900a85b15d5db05c604a712/1493215328401/Diversion_White_Paper.pdf), retrieved Feb. 28, 2019.

178. *Humberto H.*, 466 Mass. at 576. This discretion stems from the "principal aim and underlying philosophy of [the] juvenile court system . . . [that it] is not a punitive scheme strictly akin to the adult criminal justice system. Rather, it is primarily rehabilitative, cognizant of the inherent differences between juvenile and adult offenders." *Commonwealth v. Magnus M.*, 461 Mass. 459, 461 (2012).

179. *Commonwealth v. Magnus M.*, 461 Mass. 459, 461 (2012) (a juvenile court judge may continue a delinquency case without a finding even after a jury verdict of delinquency and over the objection of the district attorney).

180. "The Court Activity Record Information (CARI), available to probation officers, is data that reflects any court appearances or dispositions in criminal cases, juvenile proceedings, or civil restraining order cases. CARI should be distinguished from Criminal Offender Record Information (CORI) summaries that the Department of Criminal Justice Information Services (DCJIS) provides to employers, the public, and other CORI requesters." Pauline Quirion, *Sealing Juvenile Records*, (1st ed. 2012). See *supra*, note 161 (discussion of statutory authorization to disclose juvenile delinquency records in certain instances).

181. 466 Mass. at 576.

182. See *id.* at 575-76; see also *Newton N.*, 478 Mass. at 747; *Commonwealth v. Moore*, 93 Mass. App. Ct. 73 (2018) (the Appeals Court declined to extend *Humberto H.* to permit the pre-arraignment dismissal of an adult case on a motion to dismiss).

183. In this case, the lower court judge identified "the extensive evidence of [the juvenile's] deranged mental state" and the juvenile's age to support allowing the

that "[p]rotecting a child from the stigma of being perceived to be a criminal and from the collateral consequences of a delinquency charge is important even where the complaint is supported by the evidence."<sup>181</sup> The court, however, did not go so far as to authorize pre-arraignment dismissal where probable cause existed to support the complaint.<sup>182</sup> Five years later, in *Commonwealth v. Newton N.*, the SJC took up the issue of whether a judge could dismiss a delinquency complaint before arraignment where the complaint was supported by probable cause.<sup>183</sup> The court in *Newton N.* declined to extend its holding in *Humberto H.* to permit the dismissal prior to arraignment of a complaint supported by probable cause, finding that the prosecution has exclusive discretion to proceed with the prosecution of a case absent specific statutory language permitting such a dismissal.<sup>184</sup>

In its passage of the CJRA in 2018, the legislature addressed the issues raised in *Humberto H.* and *Newton N.* by authorizing judges to allow juvenile diversion prior to arraignment.<sup>185</sup> The newly added section, G.L. c. 119, § 54A, provided broad judicial discretion to divert but also included eligibility limitations. Diversion would not be available to a juvenile indicted as a youthful offender<sup>186</sup> and would not be available to those charged with certain criminal offenses,<sup>187</sup> including any offense punishable by more than five years of incarceration<sup>188</sup> or a minimum sentence of incarceration.<sup>189</sup>

juvenile's motion to dismiss, finding that dismissal was in the best interest of the child and in the interest of justice. *Newton N.*, 478 Mass. at 750.

184. See *id.* at 754-57; see *infra* notes 185-86 and accompanying text (discussion of *Newton N.* and Article 30 considerations).

185. St. 2018, c. 69, § 75, codified as MASS. GEN. LAWS c. 119, § 54A (2018) provides that "[a] juvenile court shall have jurisdiction to divert from further court processing a child who is subject to the jurisdiction of the juvenile court as the result of an application for complaint brought pursuant to section 54.").

186. A "youthful offender" is

a person who is subject to an adult or juvenile sentence for having committed, while between the ages of 14 and 18, an offense against a law of the commonwealth which, if he were an adult, would be punishable by imprisonment in the state prison, and (a) has previously been committed to the department of youth services, or (b) has committed an offense which involves the infliction or threat of serious bodily harm in violation of law, or (c) has committed a violation of paragraph (a), (c) or (d) of section ten or section ten E of chapter 269; provided that, nothing in this clause shall allow for less than the imposition of the mandatory commitment periods provided in section 58 of chapter 119.

MASS. GEN. LAWS c. 119, § 52 (2018).

187. This new section excludes, except for subsection (a) of section 13A of chapter 265 and sections 13A and 13C of chapter 268, "offenses in sections 22F, 24, 24D, 24G, 24L, and 24N of chapter 90, sections 8, 8A, and 8B of chapter 90B, chapter 119A, chapter 209, chapter 209A, chapter 265, section 25 of chapter 266, sections 1, 2, 3, 6, 6A, 6B, 8B, 13, 13A, 13B, 13C, 14, 14B, 15, 15A, 16, 17, 18, 19, 20, 23, 28, 31 and 36 of chapter 268, chapter 268A, sections 10, 10A, 10C, 10D, 10E, 11B, 11C, 11E, 12, 12A, 12B, 12D and 12E of chapter 269 and sections 1, 2, 3, 4, 4A, 4B, 6, 7, 8, 12, 13, 16, 28, 29A and 29B of chapter 272." MASS. GEN. LAWS c. 119, §52 (2018), as amended by St. 2018, c. 273, §24.

188. It is worth noting that the juvenile in *Newton N.* was charged with two felonies, breaking and entering into a building in the nighttime with the intent to commit a felony and breaking and entering into a vehicle in the nighttime with the intent to commit a felony, which would have rendered him ineligible for diversion had the CJRA's juvenile diversion provisions been in effect. 478 Mass. at 748.

189. See St. 2018, c. 69, § 75, codified as MASS. GEN. LAWS c. 119, § 54A (g) (2018).

The new section, which gives broad discretion to judges in juvenile court, establishes a juvenile diversion process which is distinguishable in many ways from the procedural steps of adult diversion.<sup>190</sup> The process commences with a pre-arraignment request by a juvenile, through his or her attorney, for a 14-day continuance to allow the juvenile to undergo an assessment conducted by probation to determine suitability for diversion.<sup>191</sup> In contrast to adult diversion, a juvenile court judge may forgo a probation assessment and accept a determination of suitability directly from a diversion program or even order diversion without an assessment if the court finds that sufficient information is available.<sup>192</sup> The new provisions also do not require a juvenile judge to hear from the prosecution and victim when considering whether to divert a juvenile.<sup>193</sup> The omission of this requirement appears to facilitate the diversion of children away from further involvement with the court system.<sup>194</sup>

The new law authorizes a judge to divert an eligible juvenile over the prosecution's objection and provides the district attorney with the ability to subsequently indict a juvenile on the same charge in superior court.<sup>195</sup> This provision in the context of juvenile diversion does not raise the same issue of subjecting an individual to double jeopardy because juvenile diversion takes place prior to arraignment and does not involve an admission of facts by the juvenile.<sup>196</sup> The broad discretion granted to judges by this new law is evident not only in the ability to divert without an assessment, but also in the conferred authority to stay a case of a juvenile eligible for diversion for less than 90 days if "the judge determines that the interest of justice would best be served by a lesser period of time."<sup>197</sup> In contrast, a judge does not have the authority under G.L. c. 276A, § 5 to shorten the 90-day stay when diverting an eligible adult.<sup>198</sup>

At the end of the initial 90-day stay, either the probation officer or program director must submit a report to the judge.<sup>199</sup> The report will indicate whether the child has successfully completed the program or whether an extension of the stay is needed.<sup>200</sup> The judge may dismiss the complaint if the child successfully completes the program.<sup>201</sup>

If the report recommends an extension of the stay, the new law again provides judges with expansive discretion.<sup>202</sup> A judge may consider the report as well as "any other relevant evidence [and] take such action as the judge deems appropriate, including the dismissal of the complaint, the granting of an extension of the stay of proceedings or the resumption of proceedings."<sup>203</sup> A judge does not have similar statutory authority to dismiss a complaint if an adult participant has not yet successfully completed a diversion program.<sup>204</sup>

Should the juvenile be charged with a new offense during the 90-day stay, the court may bring the child before the court and provide the juvenile the opportunity to be heard.<sup>205</sup> If the judge finds probable cause to believe a new offense was committed, the judge may terminate the stay and return the case for further juvenile court processing, including arraignment.<sup>206</sup> Even if probable cause is found, the judge may still continue the case on a diversion track.<sup>207</sup> The new law does not afford the prosecution a right to be heard on the issues of probable cause or whether the original complaint should proceed.<sup>208</sup>

The CJRA also grants broad diversionary authority to district attorneys.<sup>209</sup> The law gives a prosecutor the authority to divert any juvenile notwithstanding the limitations of section 54A on judicial diversion.<sup>210</sup> Such diversion may occur with or without the permission of the court.<sup>211</sup>

190. See St. 2018, c. 69, § 75.

191. St. 2018, c. 69, § 75

192. *Id.* Allowing a judge to order diversion without an assessment eliminates the necessity of the child returning to court for another court date thus decreasing the potential harm caused by further court processing. See *Niedzwiecki, supra* note 28 at 6.

193. The CJRA added the requirement that the judge hear from the victim. See st. 2018, c. 69, § 199, codified as MASS. GEN. LAWS c. 276A, § 5 (2018).

194. See st. 2018, c. 69, § 199, codified as Mass. Gen. Laws c. 276A, § 5 (2018); see also *Humberto H.*, 466 Mass. at 575; *infra* at note 223 and accompanying text (discussion of CARI and CORI).

195. MASS. GEN. LAWS c. 119 § 52A (2018); see also MASS. GEN. LAWS c. 276A, § 4 (2018); *supra* notes 61-64 and accompanying text (discussion of subsequent indictment of diverted adult).

196. MASS. GEN. LAWS c. 119, § 52A (g) (2018).

197. *Id.*

198. See MASS. GEN. LAWS c. 276A, § 5 (2018).

199. See MASS. GEN. LAWS c. 119 § 52A (f) (1) (2018).

200. The stay may not be extended for longer than an additional 90 days. MASS. GEN. LAWS c. 119 § 52A (f)(1) (2018).

201. See MASS. GEN. LAWS c. 119 § 52A (f)(1) (2018).

202. See MASS. GEN. LAWS c. 119 § 52A (f)(1) (2018).

203. MASS. GEN. LAWS c. 119 § 52A (f)(2) (2018).

204. See MASS. GEN. LAWS c. 276A, § 5 (2018).

205. St. 2018, c. 69, § 75, codified as MASS. GEN. LAWS c. 119, § 52A (e) (2018) provides:

The following shall not be admissible against the child in any proceedings: (i) a request for assessment; (ii) a decision by the child not to enter a program; (iii) a determination by probation or by a program that the child would not benefit from diversion; and (iv) any

statement made by the child or the child's family during the course of assessment. Any consent by a child to a stay of proceedings or any act done or statement made in fulfillment of the terms and conditions of a stay of proceedings shall not be admissible as an admission, implied or otherwise, against the child in that court proceeding.

206. See st. 2018, c. 69, § 75, codified as MASS. GEN. LAWS c. 119, § 52A (e) (2018).

207. See *Commonwealth v. Dalton*, 467 Mass. 555, 558 (2014) ("The use of the word "may" in a statute is generally permissive, reflecting the [l]egislature's intent to grant discretion or permission to make a finding or authorize an act.")

208. See st. 2018, c. 69, § 75, codified as MASS. GEN. LAWS c. 119, § 52A (e) (2018)

209. See st. 2018, c. 69, § 75, codified as MASS. GEN. LAWS c. 119, § 52A (d) (2018).

210. MASS. GEN. LAWS c. 119, § 52A (d) (2018) provides:

The following shall not be admissible against the child in any proceedings: (i) a request for assessment; (ii) a decision by the child not to enter a program; (iii) a determination by probation or by a program that the child would not benefit from diversion; and (iv) any statement made by the child or the child's family during the course of assessment. Any consent by a child to a stay of proceedings or any act done or statement made in fulfillment of the terms and conditions of a stay of proceedings shall not be admissible as an admission, implied or otherwise, against the child if the stay of proceedings was terminated and proceedings were resumed on the original complaint. A statement or other disclosure or a record thereof made by a child during the course of assessment or during the stay of proceedings shall not be disclosed at any time to a commonwealth or other law enforcement officer in connection with the investigation or prosecution of any charges against the child or a codefendant.

211. See MASS. GEN. LAWS c. 119, § 52A (d) (2018).

The new law includes due process protections for children who are eligible for diversion.<sup>212</sup> These provisions are virtually identical to the protections built into section 5 of chapter 276A.<sup>213</sup> They require that a child consult with counsel before consenting to a stay of the proceedings.<sup>214</sup> These provisions also provide confidentiality protection for statements made by a child during the diversion process.<sup>215</sup> Statements made during the course of the assessment and acts done or statements made in the course of fulfilling the diversionary terms and conditions cannot be used against the child as an admission if diversion is terminated and the case is returned to a prosecution track.<sup>216</sup>

The CJRA also amends the definition of “delinquent child” so that juvenile court jurisdiction extends now to children between the ages of 12 to 18 years old.<sup>217</sup> The amendments to the definition of “delinquent child” also added language to prohibit a child from being adjudicated delinquent for “a civil infraction, a violation of any municipal ordinance or town by-law or a first offense of a misdemeanor for which the punishment is a fine, imprisonment in a jail or house of correction for not more than 6 months or both such fine and imprisonment.”<sup>218</sup> While these new provisions do not specifically decriminalize offenses that fall into these categories, they have been interpreted as having the same effect.<sup>219</sup>

### C. Juvenile Records

In its discussion of the importance of protecting a child from the creation of a CARI record, the court in *Humberto H.* referenced its lack of authority to expunge records and based its decision, in part, on the absence of statutory provisions with respect to expungement.<sup>220</sup> The new statutory juvenile diversion provisions specifically

address the court’s dilemma in *Humberto H.* to ensure that a CARI is never created should the juvenile receive diversion.<sup>221</sup> The new law prohibits a child from being arraigned while the case is continued for the 14-day assessment period.<sup>222</sup> It also prohibits any entry into the criminal offender record information (CORI) system.<sup>223</sup>

The CJRA also addressed the concerns expressed by the *Humberto H.* court by authorizing judges to order expungement of offenses committed by a defendant while a juvenile or young adult.<sup>224</sup> While these provisions are narrow and eligibility is limited,<sup>225</sup> it is the first statutorily authorized expungement in Massachusetts, with the exception of the provisions of G. L. c. 258D, § 7 which authorize the expungement of records related to wrongful convictions.<sup>226</sup>

### V. RESTORATIVE JUSTICE

The 2018, the Criminal Justice Reform Act created a new chapter in the General Laws that establishes a statutory framework for restorative justice programs as a means of diversion in adult and juvenile criminal proceedings.<sup>227</sup> Restorative justice traditions date back millennia to indigenous cultures all over the world.<sup>228</sup> Restorative justice practices emerged in Canada, Europe and the United States in the 1970s as an alternative to the adversarial approach of the criminal justice system.<sup>229</sup>

In a traditional criminal justice paradigm, victims in a criminal case may not feel they are part of the justice process even though they have suffered the harm.<sup>230</sup> In Massachusetts, the “Victim Bill of Rights” sets forth certain “rights” intended to provide victims a meaningful role in the criminal justice system, including the right for a victim to present an impact statement at sentencing “about the effects of the crime on the victim and as to a recommended

212. St. 2018, ch. 69, §75, codified as MASS. GEN. LAWS c. 119, § 52A (c) (2018).

213. MASS. GEN. LAWS c. 119, § 52A (c) (2018) provides:

The following shall not be admissible against the child in any proceedings: (i) a request for assessment; (ii) a decision by the child not to enter a program; (iii) a determination by probation or by a program that the child would not benefit from diversion; and (iv) any statement made by the child or the child’s family during the course of assessment. Any consent by a child to a stay of proceedings or any act done or statement made in fulfillment of the terms and conditions of a stay of proceedings shall not be admissible as an admission, implied or otherwise, against the child if the stay of proceedings was terminated and proceedings were resumed on the original complaint. A statement or other disclosure or a record thereof made by a child during the course of assessment or during the stay of proceedings shall not be disclosed at any time to a commonwealth or other law enforcement officer in connection with the investigation or prosecution of any charges against the child or a codefendant.

See *supra*, notes 65-67 and accompanying text (discussion of due process protections for adult diversion).

214. St. 2018, c. 69, § 75, codified as MASS. GEN. LAWS c. 119, § 52A (c)(2) (2018).

215. See MASS. GEN. LAWS c. 119, § 52A (c) (2018).

216. See MASS. GEN. LAWS c. 119, § 52A (c)(3) (2018).

217. The juvenile court jurisdiction previously extended to children aged 7 to 18 years old. MASS. GEN. LAWS c. 119, § 52 (2017).

218. See St. 2018, c. 69, § 72, codified as MASS. GEN. LAWS c. 119, § 52 (2018).

219. See MUNICIPAL POLICE TRAINING, “Legal Update Criminal Justice Reform Bill,” (Spring 2018) (discussing the CJRA decriminalizing first-offense misdemeanors for which punishment is no more than six months’ incarceration or

a fine. [https://www.mass.gov/files/documents/2018/05/15/FINAL%20CRIMINAL%20JUSTICE\\_0.pdf](https://www.mass.gov/files/documents/2018/05/15/FINAL%20CRIMINAL%20JUSTICE_0.pdf) (retrieved Dec. 10, 2018).

220. The juvenile in question had specifically requested that the judge, in addition to dismissing the delinquency complaint, expunge the CARI record. *Humberto H.*, 466 Mass. at 576-77; see also *Commonwealth v. Gavin G.*, 437 Mass. 470 (2002); *Commonwealth v. Tina Boe*, 456 Mass. 337 (2010).

221. See MASS. GEN. LAWS c. 119, § 52A (c)(4) (2018).

222. MASS. GEN. LAWS c. 119, § 52A (b) (2018) provides: “If a case is continued pursuant to this subsection, the child shall not be arraigned and an entry shall not be made into the criminal offender record information system.”

223. See MASS. GEN. LAWS c. 119, §52A (b) (2018). The CORI database contains information regarding criminal offenses which is transmitted from the CARI by the commissioner of probation pursuant to statute. MASS. GEN. LAWS c. 6, § 168A (b) (2018); see *supra* note 181 (definition of CARI).

224. See st. 2018, c. 69 § 195.

225. St. 2018, c. 69, § 195, codified as MASS. GEN. LAWS c. 276, §§ 1001-100J (2018).

226. See MASS. GEN. LAWS c. 258D, § 7.

227. See st. 2018 c. 69 § 202.

228. Denise C. Breton, “Digging Deeper: Challenges for Restorative Justice,” JUSTICE AS HEALING: INDIGENOUS WAYS, 410-411 (Wanda D. McCaslin ed., 2005).

229. Howard Zehr, *The Little Book of Restorative Justice* 92 (2015); Denise C. Breton, “Digging Deeper: Challenges for Restorative Justice,” JUSTICE AS HEALING: INDIGENOUS WAYS, 410 (Wanda D. McCaslin ed., 2005).

230. Heather Strang & Lawrence W. Sherman, “Repairing the Harm: Victims and Restorative Justice,” 2003 UTAH L. REV. 15, 16 (2003) (“A major complaint of victims is that they are not encouraged to feel part of justice proceedings in their case”).

sentence.”<sup>231</sup>

In contrast to the traditional criminal justice model, the restorative justice process represents a deliberate shift away from an offender-based focus to one that looks at repairing the harm suffered by an individual, a community or both.<sup>232</sup> Restorative justice brings together the parties who have experienced the harm and the parties who have caused the harm so that they can “collectively identify and address harms, needs and obligations, in order to heal and put things right as possible.”<sup>233</sup> The definition of “restorative justice” in G.L. c. 276B reflects this shift in focus by specifically including victims and community members, making them an integral part of the process<sup>234</sup> and permitting restorative justice in cases where the prosecutor and victim consent.<sup>235</sup>

The term “restorative justice” encompasses different and “overlapping theoretical foundations”<sup>236</sup> and different practices and models.<sup>237</sup> G.L. c. 276B, § 1 accommodates these different models by providing for programming that is not overly circumscribed.<sup>238</sup> Restorative justice programs “may include the parties to a case, their supporters and community members or one-on-one dialogues between a victim and an offender.”<sup>239</sup>

These models generally fall into three categories: victim offender conferences, family group conferences, and circles.<sup>240</sup> The victim offender conference model brings together the victim and offender after each has met with trained facilitators.<sup>241</sup> The victim and offender then meet in a conference with a trained facilitator who guides the process.<sup>242</sup> “The victim is able to tell the offender about the crime’s physical, emotional, and financial impact; receive answers to lingering questions about the crime and the offender; and be directly involved in developing a restitution plan for the offender to pay back

any financial debt to the victim.”<sup>243</sup>

The family group conferencing model expands the number of participants in the process.<sup>244</sup> This model involves the people most affected by the harm or offense — the victim, the offender, and the family, friends and key supporters of both.<sup>245</sup> The inclusion of the offender’s supporters is especially crucial to this model because of its focus on supporting the offender “in taking responsibility and changing behavior.”<sup>246</sup> These parties come together with a trained facilitator to discuss how they and others have been harmed and how that harm might be repaired.<sup>247</sup> They then decide the resolution of the criminal or delinquent incident.<sup>248</sup>

The circle model brings together victims and their supporters, offenders and their supporters, and members of the community.<sup>249</sup> A facilitator runs the circle, and all participants have the opportunity to speak.<sup>250</sup> The inclusion of community members generally makes the circle discussions more expansive than a victim offender or family group conference because participants may discuss the impact of the harm committed on the community.<sup>251</sup>

Most restorative justice practices are “led by trained facilitators who guide the process.”<sup>252</sup> The facilitator encourages all participants to work towards a reparation agreement, which is a common thread of restorative justice.<sup>253</sup> Restoration, which is a key tenet of restorative justice, is the idea that the party that has suffered the harm must be restored or made whole to the extent possible. In the criminal justice system, a victim can be made “whole” through an order of restitution or monetary compensation.<sup>254</sup> Restorative justice contemplates a more holistic definition of being made whole<sup>255</sup> and encompasses the potential for apology, forgiveness, and “regain[ing] . . . a sense of safety and security and a reduction in fear.”<sup>256</sup>

231. MASS. GEN. LAWS c. 258B, § 3(p) (2012); *see* Commonwealth v. McGonagle, 478 Mass. 675 (2018) (upholding constitutionality of judge’s consideration of a victim impact statement which included a recommended sentence); *see also* Commonwealth v. Doucette, 81 Mass. App. Ct. 740, 743(2012) (family of a manslaughter victim was entitled to make a victim impact statement at sentencing or disposition).

232. Mary Ellen Reimund, “The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice,” 53 DRAKE L. REV. 667, 668 (2005); *see also* Tina S. Ikpa, “Balancing Restorative Principles and Due Process Rights in Order to Reform the Criminal Justice System,” 24 WASH. U. J.L. AND POL’Y, 301, 303 (2007).

233. Zehr, *supra* note 229, at 47-48.

234. “Restorative justice is defined by MASS. GEN. LAWS c. 276B, § 1 (2018) as a voluntary process whereby offenders, victims and members of the community collectively identify and address harms, needs and obligations resulting from an offense, in order to understand the impact of that offense; provided, however, that an offender shall accept responsibility for their actions and the process shall support the offender as the offender makes reparation to the victim or to the community in which the harm occurred.

235. MASS. GEN. LAWS c. 276B, § 2 (2018) provides that: “[a] juvenile or adult defendant may be diverted to a community-based restorative justice program pre-arraignment or at any stage of a case with the consent of the district attorney and the victim.”

236. Annalise Buth & Lynn Cohn, “Looking at Justice Through a Lens of Healing and Reconnection,” 13 NW J. L. & SOC. POL’Y 1 (2017).

237. James Coben & Penelope Harley, “Intentional Conversations about Restorative Justice, Mediation and the Practice of Law,” 25 HAMLINE J. PUB. L. & POL’Y 235, 240 (2004).

238. MASS. GEN. LAWS c. 276B, § 1 (2018) provides that “[p]rograms may

include the parties to a case, their supporters and community members or 1-on-1 dialogues between a victim and an offender.”

239. MASS. GEN. LAWS c. 276B, § 1 (2018).

240. Zehr, *supra* note 229 at 60; *see also* Gordon Bazemore & Mark Umbreit “A Comparison of Four Restorative Conferencing Models” OJJDP Juv. JUST. BULL. (2001).

241. Zehr, *supra* note 229, at 60.

242. *Id.*

243. Bazemore et al., *supra* note 240, at 2.

244. Zehr, *supra* note 229, at 60.

245. Bazemore et al., *supra* note 240, at 5.

246. Zehr, *supra* note 229, at 60.

247. Bazemore et al., *supra* note 240, at 5.

248. Zehr, *supra* note 229, at 60.

249. *Id.* at 64.

250. *Id.* 64-65.

251. *Id.* at 65.

252. *Id.* at 56-57.

253. *Id.* at 57.

254. “Restitution” is “[c]ompensation for loss; [especially] full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation.” BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014).

255. Strang et al., *supra* note 230, at 25; Lawrence W. Sherman, “The Practice of Restorative Practice,” 2003 UTAH L. REV. 15 (2003).

256. *Id.* at 27-29; *see also* Dena M. Gromet, Tyler G. Okimoto, Michael Wenzel & John M. Darley, “A Victim-Centered Approach to Justice? Victim Satisfaction Effects on Third-Party Punishments,” 36 L. & HUM. BEHAV. 375 (2012).

G.L. c. 276B, § 1 integrates this tenet by including “reparation to the victim or to the community in which the harm occurred” in the statutory definition of “restorative justice.”<sup>257</sup> Though restorative justice programs operate outside of the courtroom, this provision ensures that the victim will receive monetary reparation without a court order in appropriate circumstances.<sup>258</sup> This definition also references “the needs and obligations resulting from an offense, in order to understand the impact of that offense,”<sup>259</sup> and acknowledges that a victim may require more than financial compensation to feel whole.<sup>260</sup> Those who have suffered harm may find emotional reconciliation to be more important than material or financial reparation and “that emotional harm is healed, as opposed to compensated for, only by an act of emotional repair.”<sup>261</sup>

The restorative justice process may occur prior to the filing of a criminal complaint, which could divert matters and obviate further criminal proceedings.<sup>262</sup> It is important to note, however, that the Criminal Justice Reform Act’s restorative justice provisions are not intended to supplant the underlying criminal case or the court proceedings once they have commenced.<sup>263</sup> Restorative justice diversion may occur at any stage of the proceedings, but the case must always return to court and may not be resolved through restorative justice without judicial approval.<sup>264</sup>

G.L. c. 276B, § 2 mandates dismissal of a criminal case upon successful completion of a community-based restorative justice program.<sup>265</sup> In contrast, G.L. c. 276A, § 7 authorizes a judge to dismiss a criminal charge if the defendant successfully completes the program, but it does not require a dismissal.<sup>266</sup> Unlike diversion to a restorative justice program, section 2 does not require the consent of the prosecutor and victim for a dismissal.<sup>267</sup> The case must be returned to the court for further proceedings if the defendant fails

to complete the program or is non-compliant with the program requirements.<sup>268</sup>

Not all cases are eligible for a restorative justice criminal case disposition in Massachusetts. Section 3 of G.L. c. 276B lists offenses that render a defendant ineligible for participation in a community-based restorative justice program, including sexual offenses, offenses involving a family or household member, homicide offenses, and offenses that result in serious bodily injury.<sup>269</sup> Section 3 also specifies that an offender is ineligible to participate in a community-based restorative justice program for these offenses only prior to conviction or adjudication of the offense.<sup>270</sup> A question remains as to whether section 3 operates as a complete ban on pre-disposition participation in a community-based restorative justice program, even if diversion would not be available.<sup>271</sup> An offender may participate in a post-disposition restorative justice process, however, regardless of the offense.<sup>272</sup>

Restorative justice critics have voiced concerns that restorative justice undervalues safeguards built into the criminal justice system, including the right to due process.<sup>273</sup> A defendant’s right against self-incrimination, the right to a jury trial, the right to confront and cross-examine witnesses, and the right to be represented by counsel, are implicated when participation in a restorative justice program is pre-disposition.<sup>274</sup> Critics caution that the question of coercion should be raised whenever defendants waive due process rights in exchange for resolving their cases through a more favorable process.<sup>275</sup>

G.L. c. 276B, § 2 addresses these concerns by making participation in a community-based restorative justice program voluntary.<sup>276</sup> This requirement mirrors one of the essential elements of restorative justice, that the offender’s participation be willing and voluntary.<sup>277</sup>

257. In a criminal law context, “reparation” is defined as “[r]ecompense for out-of-pocket losses caused by an offense, but not including pain and suffering.” BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014); see MASS. GEN. LAWS c. 276B, § 3 (2018).

258. MASS. GEN. LAWS c. 258B, § 3(a) (2018) provides victims with the right “to request that restitution be an element of the final disposition of a case.”

259. MASS. GEN. LAWS c. 276B, § 1 (2018).

260. *Strang et al.*, supra note 234 at 16.

261. See *id.* at 21-22.

262. MASS. GEN. LAWS c. 276B, § 2 (2018) (“A juvenile or adult defendant may be diverted to a community-based restorative justice program pre-arraignment . . . Nothing in this chapter shall be construed to prohibit pre-arraignment law enforcement-based programs and other programs.”).

263. See MASS. GEN. LAWS c. 276B, § 2 (2018).

264. MASS. GEN. LAWS c. 276B, § 2 (2018) (“A juvenile or adult defendant may be diverted to a community-based restorative justice program pre-arraignment or at any stage of a case . . . Restorative justice may be a final case disposition, with judicial approval.”).

265. MASS. GEN. LAWS c. 276B, § 2 (2018) (“If a juvenile or adult defendant successfully completes the community-based restorative justice program, the charge shall be dismissed.”).

266. MASS. GEN. LAWS c. 276A, § 7 (2018) (“If the report indicates the successful completion of the program by a defendant, the judge may dismiss the original charges pending against the defendant.”).

267. See MASS. GEN. LAWS c. 276B, § 2 (2018).

268. MASS. GEN. LAWS c. 276B, § 2 (2018) (“If a juvenile or adult defendant does not successfully complete the program or is found to be in violation of

program requirements, the case shall be returned to the court in which the defendant was arraigned in order to commence with proceedings.”).

269. “Serious bodily injury” means “bodily injury which results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.” MASS. GEN. LAWS c. 265, § 15A (d); see MASS. GEN. LAWS c. 276B, § 3 (2018).

270. MASS. GEN. LAWS c. 276B, § 3 (2018).

271. See MASS. GEN. LAWS c. 276B, § 3 (2018).

272. In Massachusetts and 30 other states, restorative justice processes are used post-disposition in serious cases such as homicides. Rebecca Beitsch, *Finding Responsibility, Reconciliation After a Crime* (2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/07/21/finding-responsibility-reconciliation-after-a-crime> (last visited Nov. 19, 2018); see generally, Roni A. Elias, “Restorative Justice in Domestic Violence Cases,” 9 DEPAUL J. FOR SOC. JUST. 67 (2015).

273. Shailly Agnihotri & Cassie Veach, “Reclaiming Restorative Justice: An Alternate Paradigm for Justice,” 20 CUNY L. REV. 323, 338 (2017); see also M. Eve Hanan, “Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation,” 46 N.M.L. REV. 123, 152 (2016).

274. Hanan, supra note 273.

275. Agnihotri et al., supra note 273, at 337 (discussing issue of coercion being of particular concern in diversion which takes place early in a criminal case and possible encroachment on the presumption of innocence).

276. MASS. GEN. LAWS c. 276B, § 2 (2018) (“Participation in a community-based restorative justice program shall be voluntary.”).

277. Jennifer J. Llewellyn & Robert Howse, “Restorative Justice – A Conceptual Framework,” L. COMMISSION OF CAN. 112 (1998) (discussing requirement that participation in a restorative justice process be voluntary).

Critics, however, question whether participation in such programs can ever be truly voluntary because the “threat of additional penalties may encourage participants to perform contrition.”<sup>278</sup> Similar due process concerns have been raised about the coercive nature of plea bargaining and determining whether a defendant’s guilty plea was voluntary.<sup>279</sup>

It is notable that G.L. c. 276A, § 5 addresses the issue of voluntariness by requiring that the defendant’s consent be in writing and with the advice of counsel “to the terms and conditions of the stay of proceedings,”<sup>280</sup> accompanied by an executed waiver to a speedy trial.<sup>281</sup> G.L. c. 276B, § 4 does not contain similar safeguards.<sup>282</sup> A judge’s role thus becomes critical in assessing whether a defendant’s decision to participate in a restorative justice process is voluntary, just as a judge must evaluate whether a plea agreement is voluntary.<sup>283</sup> To forestall such concerns, it may be advisable for a judge to conduct a colloquy to determine whether an offender’s decision is voluntary.

It has also been proposed that a defendant’s due process rights may be protected by providing the defendant with “the opportunity to opt out of the restorative process at any time to pursue her case in the traditional criminal justice system with its full panoply of rights.”<sup>284</sup> Section 2 of G.L. c. 276B allows the case to be returned to court if the offender does not complete the program.<sup>285</sup> Section 4 of G.L. c. 276B also prohibits the defendant’s participation in a community-based restorative justice program from being used as evidence against him or her or as an admission of guilt or delinquency.<sup>286</sup> Because section 4 does not qualify the word “participation,” it appears that a defendant’s non-compliance with a program cannot

be used against the defendant in later proceedings.<sup>287</sup>

Critics have also raised Fifth Amendment concerns regarding a defendant’s participation in restorative justice processes and the potential for statements made during a restorative justice process to be used against the offender.<sup>288</sup> A critical element of restorative justice is offender accountability.<sup>289</sup> It is thus anticipated and reasonable that an offender would make incriminating statements in the course of accepting responsibility.<sup>290</sup>

For this reason, another key element of the restorative justice process is confidentiality which, when assured, “guard[s] against self-incrimination and double jeopardy.”<sup>291</sup> Section 4 of G.L. c. 276B, addresses these concerns with a modified “reverse *Miranda* approach,”<sup>292</sup> and provides that an offender’s participation in the restorative justice process cannot be used against the offender, even though participation, unlike participation in a diversion program, requires the acceptance of responsibility.<sup>293</sup> This section raises questions as to the confidentiality of an offender’s statements made during the actual restorative justice process and the extent to which they are protected from disclosure.<sup>294</sup> The “reverse *Miranda*” provision in section 4 is not unlimited,<sup>295</sup> however, and two exceptions apply.<sup>296</sup> This section effectively incorporates the “independent source doctrine”<sup>297</sup> by authorizing the admission into evidence of statements made during the restorative justice process if they were obtained “through an independent source.”<sup>298</sup> The second exception allows the admission of statements made by an offender during a restorative justice process or evidence obtained as a result of these statements if they would have been inevitably discovered by lawful means.<sup>299</sup>

278. Agnihotri et al., *supra* note 273, at 338.

279. Reimund, *supra* note 232, at 684; *see, e.g.*, Commonwealth v. Bolton, 92 Mass. App. Ct. 469, 474 (2017).

280. MASS. GEN. LAWS c. 276A, § 5 (2018).

281. *Id.*

282. MASS. GEN. LAWS c. 276B, § 4 (2018).

283. *See* Commonwealth v. Furr, 454 Mass. 101, 107 (2009) (“A judge should not accept a guilty plea unless satisfied that the plea is voluntary and that the defendant understands the nature of the charges.”); *see also* Commonwealth v. Foster, 368 Mass. 100, 107 (1975) (A judge’s inquiry on a guilty plea must be “a live evaluation of whether the plea has been sufficiently meditated by the defendant with guidance of counsel, and whether it is not being extracted from the defendant under undue pressure.”)

284. Reimund, *supra* note 288, at 688.

285. MASS. GEN. LAWS c. 276B, § 2 (2018).

286. MASS. GEN. LAWS c. 276B, § 4 (2018) (“Participation in a community-based restorative justice program shall not be used as evidence or as an admission of guilt, delinquency or civil liability in current or subsequent legal proceedings against any participant.”).

287. MASS. GEN. LAWS c. 276B, § 4 (2018).

288. Reimund, *supra* note 232, at 685; *see also* Ikpa, *supra* note 236, at 311-12.

289. Zehr, *supra*, note 233, at 36.

290. *Id.* at 58-59.

291. Ikpa, note 236, at 316-17.

292. Zehr, *supra*, note 233, at 59.

293. MASS. GEN. LAWS c. 276B, § 4 (2018).

294. MASS. GEN. LAWS c. 276B, § 4 (2018).

295. It is important to note that while section 4 limits this “reverse *Miranda* provision” in some ways, it also goes beyond the criminal context and prohibits the use of information obtained during a restorative justice process in any civil proceeding. MASS. GEN. LAWS c. 276B, § 4 (2018).

296. *See* MASS. GEN. LAWS c. 276B, § 4 (2018).

297. The independent source doctrine is an exception to the exclusionary rule and allows the admission of evidence initially discovered as a consequence of an unlawful search if later acquired independently by lawful means unrelated to the initial illegality. Commonwealth v. Dejesus, 439 Mass. 616, 624 (2003).

298. MASS. GEN. LAWS c. 276B, § 4 (2018).

299. This exception is similar to the inevitable discovery doctrine, adopted in Massachusetts in 1989; an exception to the exclusionary rule, this doctrine allows illegally seized items into evidence, upon a showing by the prosecution, that would have been discovered lawfully anyway. Commonwealth v. O’Connor, 406 Mass. 112, 114 (1989); *see* MASS. GEN. LAWS c. 276B, § 4 (2018).

## VI. CONCLUSION

The many recent changes to Massachusetts diversion law point to the growing consensus that diverting cases away from the court system is a preferable outcome for many categories of offenders. Successful diversion can lead to treatment and programming while also helping individuals avoid further penetration into the criminal justice system and potential incarceration, as well as the negative consequences and stigma of a criminal record. Indeed, research shows that effective diversion programming can reduce recidivism while also addressing substance use disorders and mental illness.<sup>300</sup>

It seems that offering a path away from the criminal justice system and decreasing prosecution of criminal offenses in certain cases is the solution President Johnson sought more than 50 years ago when he recognized that a first offender's contact with the criminal justice system could be a turning point<sup>301</sup> and charged the Commission with considering how to best ensure that an offender's first contact be his last.<sup>302</sup> Should this expansion of diversion in Massachusetts prove successful in reducing recidivism, it is likely that the next challenge will be how to further expand it to reach individuals who may be well beyond their first contact with the criminal justice system but who are not beyond benefiting from this path away from the court system towards treatment and programming.

300. *No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives*, The Center for Health and Justice at TASC, 30, Chicago, Ill., Dec. 2013, [http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report\\_web.pdf](http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf), retrieved Feb. 28, 2019.

301. "Special Message to the Congress on Law Enforcement and the Administration of Justice," 1 Pub. Papers 270 (March 8, 1965), <https://quod.lib.umich.edu/p/ppotpus/4730960.1965.001>, retrieved Feb. 28, 2019.

302. *Id.*

# SEALING AND EXPUNGEMENT AFTER MASSACHUSETTS CRIMINAL JUSTICE REFORM

By Pauline Quirion

On April 13, 2018, Gov. Charlie Baker signed “An Act Relative to Criminal Justice Reform,” bipartisan legislation heralded by many legislators and other supporters as a landmark measure that would enhance public safety, promote more equitable outcomes and emphasize rehabilitation and re-integration.<sup>1</sup> The bill will affect the hundreds of thousands of people involved in the criminal justice system each year, and legions more with past criminal or juvenile cases.<sup>2</sup>

Massachusetts is not alone in its attempts to address high rates of recidivism by revisiting “tough on crime” policies enacted during the heyday of the war on drugs that ultimately failed to reduce crime.<sup>3</sup> There is little doubt that countless people are shut out of the economy due to a past criminal record.<sup>4</sup> Most employers decline to hire job applicants with even minor offenses, and black applicants fare the worst.<sup>5</sup> Stable employment, however, is associated with reduced recidivism and success after incarceration.<sup>6</sup> Across the country, groups as diverse as Right On Crime (a conservative criminal justice policy group), the American Center for Progress, and the Koch brothers, have all advocated for reforms that increase so-called “second chances” and reduce incarceration.<sup>7</sup> Many states have also expanded their criminal record-sealing laws over the last decade to reduce barriers to employment and other opportunities.<sup>8</sup>

The Massachusetts criminal justice reform bill spans more than 100 pages and represents a Herculean effort at comprehensive reform aimed at the front, middle, and back ends of the criminal



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justice system, including consequences of a criminal history.<sup>9</sup> This article examines the statutory changes that took effect on Oct. 13, 2018, related to sealing and expungement of Massachusetts state court records.

## I. LEGISLATIVE HISTORY AND BACKGROUND

In 1972, and well before the widespread availability of computers, the Massachusetts legislature enacted legislation creating the Criminal History Systems Board (CHSB) to collect, maintain and disseminate criminal offender record information (CORI).<sup>10</sup> In 1971 and 1972, the legislature also enacted provisions permitting the sealing of “criminal court appearances and dispositions”

1. See Shira Schoenberg, “Gov. Charlie Baker Signs Landmark Massachusetts Criminal Justice Overhaul, Despite Concerns,” *MASS LIVE* (Apr. 13, 2018), [https://www.masslive.com/politics/2018/04/gov\\_charlie\\_baker\\_signs\\_landma.html](https://www.masslive.com/politics/2018/04/gov_charlie_baker_signs_landma.html); see, Will Brownsberger, *Criminal Justice Reform Passed*, Will Brownsberger — State Senator (April 4, 2018), <https://willbrownsberger.com/criminal-justice-reform-passed/>.

2. Massachusetts courts handled 303,026 criminal cases and 8,025 juvenile cases in fiscal year 2018. Exec. Office of the Trial Court, Mass. Trial Courts Summary of Case Filings by Type: FY2014-2018 (2018).

3. The Council for State Governments studied the Massachusetts criminal justice system and found that in 2013, two-thirds of the people released from the houses of correction, and more than half of those released from prison, were rearrested on new charges within three years. Council of State Gov’ts Justice Ctr., Justice Reinv. in Mass.: Policy Framework, (Feb. 21, 2017) Many commentators describe the war on drugs as an unmitigated failure. Mass. Bar Ass’n Drug Policy Task Force, “The Failure of the War on Drugs: Charting a New Course for the Commonwealth” (2009); Robert C. NeSmith, “Tough on Crime or Tough Luck for the Incarcerated? Exploring the Adverse Psychological Impacts of Mandatory Minimum Sentencing and Pushing for Action,” 39 *LAW & PSYCHOL. REV.* 253 (2015).

4. See Devah Pager, “The Mark of a Criminal Record,” 108 *AM. J. OF SOC.* 937, 955, 958-959 (2003).

5. *Id.*; Harry J. Holzer et al., “Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers,” 49 *J.L. & ECON.* 451, 453-454 (2006); Megan Kurlycheck et al., “Enduring Risk? Old Criminal

Records and Short Term Predictions of Criminal Involvement,” 53 *CRIME & DELINQUENCY* 64 (2007); Amy Solomon, “In Search of a Job: Criminal Records as Barriers to Employment,” 280 *NAT’L INST. JUST. J.* 42, 42-43 (2012).

6. U.S. Department of Justice, Office of the Attorney General, *The Attorney General’s Report on Criminal History Background Checks* (2006); Clare Kaplan & Len Engel, The Boston Foundation, *CORI: Opening Doors of Opportunity: A Workforce and Public Safety Imperative*, 7 (2007). See also, John H. Laub & R. J. Sampson, “Understanding Desistance from Crime,” 29 *CRIME & JUST.* 1, 18 (2001); Christy A. Visher et al., “Ex-Offender Employment Programs and Recidivism: A Meta-Analysis,” 1 *J. OF EXPERIMENTAL CRIMINOLOGY* 295 (2005).

7. See “Criminal Justice Reform,” CHARLES KOCH INSTITUTE, <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/> (last visited Nov. 18, 2018); Elain Ellerbe, *Employment is a crucial step after release from incarceration*, RIGHT ON CRIME (Sept. 25, 2018), <http://rightoncrime.com/2018/09/employment-is-a-crucial-step-after-release-from-incarceration/>; Emma Roller, “How Republicans Stopped Being ‘Tough on Crime,’” *THE ATLANTIC* (Oct. 1, 2014), <https://www.theatlantic.com/politics/archive/2014/10/how-republicans-stopped-being-tough-on-crime/455202/>.

8. See, e.g., “Collateral Consequences Resource Center, Four Years of Second Chance Reforms,” 2013-16: RESTORATION OF RIGHTS & RELIEF FROM COLLATERAL CONSEQUENCES 1 (2017).

9. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69.

10. *An Act Providing for the Establishment and Administration of Criminal Offender Record Information System*, St. 1972, c. 805, § 1 (codified at MASS. GEN. LAWS c. 6, §§ 167-168 (2019)).

through an administrative process after a 10-year waiting period, and the sealing of juvenile records after three years.<sup>11</sup> In 1973, a new provision was added to permit a court to seal a criminal case without a prior waiting period if the case ended in a *nolle prosequi*, a dismissal without prior probation, or a not guilty finding.<sup>12</sup> These CORI statutes were “intended to protect privacy and to promote the rehabilitation of criminal defendants, recognizing that ready access to a defendant’s prior criminal record might frustrate a defendant’s access to employment, housing, and social contacts necessary to that rehabilitation.”<sup>13</sup> Nevertheless, the legislature increased the decade-long waiting period for sealing of felonies to 15 years in 1974,<sup>14</sup> around the same time as enactment of the first mandatory minimum sentences for firearms offenses.<sup>15</sup>

After enactment of the first sealing laws, a long era followed of criminal justice policies emphasizing harsher penalties, such as automatic suspension of a driver’s license for any drug conviction, numerous other mandatory sentences, and less emphasis on rehabilitation.<sup>16</sup> Incarceration rates soared and the Massachusetts prison population more than tripled between 1980 and 2002.<sup>17</sup> Over time, the number of people with criminal records began to reach epidemic proportions.<sup>18</sup> In Massachusetts alone, there were an estimated 2.8 million individual criminal records on file in 2004.<sup>19</sup> The number of organizations, including employers, certified to receive CORI data from the CHSB increased more than five-fold after 1993.<sup>20</sup> Barriers to employment related to involvement in the criminal justice system was a serious problem across the country.<sup>21</sup> By some estimates, poverty rates across the country between 1980 and 2004 would have

dropped 20 percent, but for consequences of criminal records and incarceration that affect individuals and their families for many years.<sup>22</sup> Criminal background checks, especially by large employers, also increased dramatically after the Sept. 11, 2001, attacks.<sup>23</sup>

Not surprisingly, there were many attempts over the years to reduce waiting periods to seal records and other such barriers to employment.<sup>24</sup> In 2009, newly elected Gov. Deval L. Patrick filed a bill to reform CORI laws touted as an economic measure that would stimulate employment and promote public safety by reducing recidivism.<sup>25</sup> He opined that, “[a] good job is the best tool to prevent repeat offending” and later noted that “the old system often turned even a minor offense into a life sentence by permanently keeping [ex-offenders] out of a job.”<sup>26</sup>

In 2010, the legislature enacted extensive CORI reform reflecting an intent “to recalibrate the balance between protecting public safety and facilitating the reintegration of criminal defendants by removing barriers to housing and employment.”<sup>27</sup> The legislation both expanded access to official CORI records and broadened sealing provisions to permit more individuals to shield their records from public view.<sup>28</sup> The legislation reduced the waiting periods to seal convictions from 15 years to 10 years for felonies, and from 10 years to five years for misdemeanors.<sup>29</sup> Cases that ended in dismissals after a period of probation were no longer treated the same as convictions, and judges had discretion to seal these cases without a prior waiting period.<sup>30</sup> Waiting periods for cases that ended without incarceration also started on the date of a guilty finding or continuance without a finding, rather than on the later date when the case

11. *An Act Providing for the Sealing of Certain Delinquency Records in the Office of the Commissioner of Probation*, St. 1972, c. 404 (codified at MASS. GEN. LAWS c. 276, § 100B (2019)); *An Act Relative to Files in the Office of the Commissioner of Probation*, St. 1971, c. 686 (codified at MASS. GEN. LAWS c. 276, § 100A (2019)).

12. *An Act Relative to the Sealing of Files in Certain Criminal Cases*, St. 1973, c. 322 (codified at MASS. GEN. LAWS c. 276, § 100C (2019)). This section also provides for automatic sealing of cases that ended in a finding of not guilty. Probation officers stopped sealing these cases automatically after a federal court held that this automatic sealing was unconstitutional absent prior notice to the public, a hearing, and findings of fact as to why the individual’s interest in sealing outweighed the public’s constitutionally protected interest in keeping the record open. *Globe Newspaper v. Pokaski*, 868 F.2d 497, 502-10 (1st Cir. 1989); see *Commonwealth v. Doe*, 420 Mass. 142, 151 (1995), abrogated by *Commonwealth v. Pon*, 469 Mass. 296 (2014). Years later, in *Commonwealth v. Pon*, the Supreme Judicial Court held that petitioners seeking to seal records through the courts under this statute no longer had to prove “that the value of sealing ... clearly outweighs the constitutionally-based value of the record remaining open to society.” *Pon*, 469 Mass. at 313. The court stated that the practice of holding hearings on cases that ended in a not guilty finding was reasonable if it was modified to adopt the lowered standard of “good cause” until such time as either the legislature revisits the language of the statute or the issue of automatic sealing of cases ending in not guilty dispositions comes before the court. *Id.* at 313, n.24.

13. *Globe Newspaper Co. v. Dist. Att’y for Middle Dist.*, 439 Mass. 374, 384 (2003).

14. *An Act Relative to the Sealing of Files*, St. 1974, c. 525 (codified as amended at MASS. GEN. LAWS c. 276, § 100A (2019)).

15. See *An Act Imposing an Additional Penalty Upon Persons Who Use or Possess Firearm While in the Commission of Felony*, St. 1974, c. 830 (codified at MASS. GEN. LAWS c. 269, § 18B (2019)); *An Act Requiring Minimum Mandatory Jail Sentence of One Year, Without Suspension, Probation, or Parole, for the Unlicensed or Unauthorized Carrying of Firearms, Rifles, or Shotguns, Loaded or Unloaded,*

*and Strengthening the Laws Related Thereto*, St. 1974, c. 649 (codified at MASS. GEN. LAWS c. 269, § 10 (2019)); see also Patrice Brymner, “Mandatory Minimum Drug Sentencing Under Sentencing Guidelines Proposals,” CRIMINAL JUSTICE POLICY COAL. (July 2004).

16. Shira Schoenberg, “Massachusetts repeals automatic license suspension for drug crimes,” MASS LIVE (Mar. 30, 2016), [https://www.masslive.com/politics/index.ssf/2016/03/massachusetts\\_repeals\\_automati.html](https://www.masslive.com/politics/index.ssf/2016/03/massachusetts_repeals_automati.html); see Ben Forman & John Larivee, *Crime, Cost and Consequences: Is it Time to Get Smart on Crime?*, 16 (Mar. 2013).

17. Lisa Brooks et al., URBAN INSTIT. JUSTICE POLICY CTR., “Prisoner Reentry in Massachusetts,” 3 (2005).

18. See Kaplan, *supra* note 6, at 7.

19. *Id.*

20. *Id.* at 11, 13.

21. Ben Forman, *supra* note 16, at 19.

22. See Robert H. Defina & Lance Harrison, “The Impact of Mass Incarceration on Poverty” 59 CRIME & DELINQUENCY 562 (2013); Bruce Western, *Punishment & Equality*, 127 (2006).

23. Kurlychek, *supra* note 5, at 64.

24. See Gregory Massing, “CORI Reform- Providing Ex-Offenders with Increased Opportunities Without Compromising Employers’ Needs,” 55 Bos. B. J. 21, 21 (2011).

25. *Commonwealth v. Pon*, 469 Mass. 296, 307 n.20 (2014).

26. Massing, *supra* n. 24, at 21.

27. *Pon*, 469 Mass. at 307.

28. *An Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information and Pre- and Post-trial Supervised Release*, St. 2010, c. 256, § 128 (codified at MASS. GEN. LAWS c. 276, § 100A (2019)).

29. *Id.*

30. MASS. GEN. LAWS c. 276, § 100C (2019).

was finally resolved.<sup>31</sup> The 2010 law included a “ban the box” provision aimed at reducing automatic rejection of any job applicant with a record.<sup>32</sup> “Ban the box” requires most employers to refrain from asking about criminal records on an initial job application although they can inquire about such records at a later interview.<sup>33</sup> This provides applicants with a chance to make a case as to why they are good candidates for a position.

The 2010 legislative reform also was “a conciliation of the interests of law enforcement agencies, crime victim advocacy groups and businesses.”<sup>34</sup> Additional provisions included: (1) granting police and criminal justice agencies immediate access to all sealed CORI data; (2) opening up access to CORI obtained from the state to all employers and landlords; (3) creating a new agency, the Department of Criminal Justice Information Services, to oversee CORI dissemination; (4) prohibiting sealing of sex offenses committed by anyone ever registered as Level 2 and 3 sex offender; (5) treating convictions for a violation of an abuse or harassment prevention order as felonies for the purpose of sealing records; and (6) barring liability of an employer for negligent hiring if the employer relied on an official CORI report, even if it is erroneous, within 90 days of receiving the report.<sup>35</sup>

## II. CORI REFORM IN 2018

Following enactment of CORI reform in 2010, a growing number of legislators, attorneys, community groups, and other individuals expressed the view that reductions in the waiting periods to seal records and other reforms did not go far enough.<sup>36</sup> In a post-Ferguson world where the fairness of the legal system is more frequently called into question, there was also greater awareness that people of color are disproportionately involved in the criminal justice system.

31. MASS. GEN. LAWS c. 276, §§ 100A, 100C (2019).

32. St. 2010, c. 265, § 101 (codified at MASS. GEN. LAWS c. 151B, § 4.9 1/2 (2019)). “Ban the box” has exceptions for law enforcement and occupations where statutes prohibit the hiring of applicants convicted of certain offenses.

33. *Id.*

34. Massing, *supra* n. 24, at 21.

35. *An Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information And Pre and Post-Trial Supervised Release*, St. 2010, c. 256, §§ 8, 21, 129, 133. The new waiting periods to seal cases took effect much later on May 4, 2012. *Id.* at §145.

36. See John C. Drake, “Advocates of limiting crime-record use fault Patrick bill,” BOS. GLOBE, May 23, 2008; “Lift Up or Lock Up?,” CAPE COD TIMES, (Jan. 9, 2018), <https://www.capecodtimes.com/opinion/20180109/lift-up-or-lock-up>.

37. “State by State Data,” THE SENTENCING PROJECT, <http://www.sentencing-project.org/the-facts/#map> (last visited June 24, 2019). The Council for State Governments similarly indicated that blacks and Hispanics combined were 54 percent of the Massachusetts prison population in 2014, but only 16 percent of the Massachusetts resident population. Steve Allen et al., Council for State Gov’t Justice Ctr., Working Group Meeting 1: review of justice reinvestment process and proposed scope of work 22 (2016).

38. See Bos. Bar Ass’n Criminal Justice Reform Working Grp., “No Time to Wait: Recommendations for a Fair and Effective Criminal Justice System” 2–4 (2017) [hereinafter BBA Report]; “Report of the Massachusetts Bar Association Criminal Justice Reform Working Group,” 5 (May 1, 2017) [hereinafter MBA Report]. In 2016, the Massachusetts judiciary also launched efforts to examine why incarceration rates were higher for African-Americans and to ensure that people “are not punished for being poor.” Shira Schoenberg, “Massachusetts

Massachusetts has a low incarceration rate compared to many other states, but its incarceration rate in 2014 was more than seven times higher for blacks than for whites, and more than four times higher for Hispanics than whites.<sup>37</sup> Recent advocacy for criminal justice reform in Massachusetts has taken the form of a call by many organizations for strategies that address racial disparities in the criminal justice system and criminalization of poverty.<sup>38</sup>

By 2017, another legislative campaign was well under way to reduce misdemeanor waiting periods to three years and felony waiting periods to seven years, to increase the felony-larceny threshold to \$1,500, and to bring about much more comprehensive criminal justice reform.<sup>39</sup> During the last legislative session, Sen. William Brownsberger, Sen. Sonia-Chang Diaz, and Reps. Elizabeth Malia, Mary Keefe and Chynah Tyler filed bills that included provisions to further reduce criminal record sealing waiting periods and to address gaps in the CORI law that created barriers to employment and other opportunities.<sup>40</sup> Most of the CORI-related provisions included in their bills became part of the bill signed by Gov. Baker in 2018.<sup>41</sup>

There was great debate over repeal of mandatory minimum sentences and some other reforms, but limited opposition to reducing the sealing waiting period and CORI-related reforms.<sup>42</sup> Massachusetts Bar Association (MBA) representatives, community coalitions, legal services programs, faith-based groups, social service providers, previously incarcerated individuals, and other groups and people across the state lobbied for changes to reduce barriers to jobs and other opportunities.<sup>43</sup> The final bill also reflected compromises, including warrantless arrest provisions, employer and landlord liability protections, and some increased criminal penalties aimed at

courts to examine racial disparities in imprisonment rates,” MASS LIVE (Oct. 20, 2016), [https://www.masslive.com/politics/2016/10/mass\\_courts\\_to\\_examine\\_dispari.html](https://www.masslive.com/politics/2016/10/mass_courts_to_examine_dispari.html).

39. “Jobs not Jails Coalition Says: Let’s Finish the Job of Criminal Justice Reform,” JOBS NOT JAILS COAL. (2017), [https://www.masslegalservices.org/system/files/library/JOBS%20NOT%20JAILS%20LIST%20OF%20PRIORITY%20BILLS.sept%206\\_0.pdf](https://www.masslegalservices.org/system/files/library/JOBS%20NOT%20JAILS%20LIST%20OF%20PRIORITY%20BILLS.sept%206_0.pdf); Julie Pattison-Gordon, State hears criminal justice reform advocates, Bay State Banner (June 7, 2017), <https://www.bay-statebanner.com/2017/06/07/state-hears-criminal-justice-reform-advocates/>.

40. H.3084, 190th Gen. Ct. (Mass. 2017–2018); H.2359, 190th Gen. Ct. (Mass. 2017–2018); H.2308, 190th Gen. Ct. (Mass. 2017–2018); S.791, 190th Gen. Ct. (Mass. 2017–2018); S.777, 190th Gen. Ct. (Mass. 2017–2018).

41. See *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69.

42. Opposition appeared to be limited primarily to retailers concerned about liability for possible misconduct by workers with sealed records. Greg Ryan, “AIM says Senate bill could back fire on job-seeking felons,” BOS. BUS. J., (Oct. 25, 2017), <https://www.bizjournals.com/boston/news/2017/10/25/aim-says-senate-bill-could-backfire-on-job-seeking.html?s=print>. The BBA, however, recommended an even shorter waiting period of five years for felonies to better align with recidivism studies. See, BBA REPORT, *supra* note 40, at 73.

43. See “MBA Testifies on Criminal Justice Reform Proposals,” MBA EJOURNAL, (June 8, 2017), [https://www.massbar.org/publications/ejournal/ejournal-article/ejournal-2017-june-06-08/mba-testifies-on-criminal-justice-reform-proposals#https://www.massbar.org/search; see Pauline Quirion, “Why All Attorneys Should Advocate for Criminal Justice Reform” MBA SECTION REVIEW, \(Sep. 2017\), https://www.massbar.org/publications/section-review/section-review-article/section-review-2017-september-october/section-review-why-all-attorneys-should-advocate-for-criminal-justice-reform](https://www.massbar.org/publications/ejournal/ejournal-article/ejournal-2017-june-06-08/mba-testifies-on-criminal-justice-reform-proposals#https://www.massbar.org/search; see Pauline Quirion, “Why All Attorneys Should Advocate for Criminal Justice Reform” MBA SECTION REVIEW, (Sep. 2017), https://www.massbar.org/publications/section-review/section-review-article/section-review-2017-september-october/section-review-why-all-attorneys-should-advocate-for-criminal-justice-reform).

garnering broader support for the legislation.<sup>44</sup> Gov. Baker, in the signing of the bill, stated: “[t]his was a true group effort to enhance public safety and provide opportunities to people who have paid their debt to society and help them find their way back into positive participation in our communities.”<sup>45</sup>

### A. Reduced Waiting Periods to Seal Records

The most significant change related to criminal record sealing took effect on Oct. 13, 2018, and reduced waiting periods to seal a case through the Commissioner of Probation from 10 years to seven years for a felony, and from five years to three years for a misdemeanor.<sup>46</sup> This change was consistent with studies that show as time passes, the risk of re-offending for people with a criminal history approaches the same risk as that for people without records offending in the first instance, with the risk of a new offense typically peaking within one or two years after a crime, and declining thereafter.<sup>47</sup>

### B. CORI Protections for Employers and Landlords

The bill added a provision protecting any employer or landlord who relies on a CORI report obtained from Department of Criminal Justice Information Services (DCJIS) from negligence claims.

In a claim for negligence, an employer or landlord shall be presumed to have no notice or ability to know of a record that: (i) has been sealed or expunged; (ii) the employer is prohibited from inquiring about pursuant to subsection 9 of section 4 of chapter 151B; or (iii) concerns crimes that the department of criminal justice information services cannot lawfully disclose to an employer or landlord.<sup>48</sup>

This addressed liability concerns raised by retail groups related to hiring more job applicants with criminal histories.<sup>49</sup> Nevertheless,

there is a dearth of research linking past criminal records to poor performance in the workplace.<sup>50</sup> Notably, a study limited to Army enlistees showed that individuals with felony records received promotions more quickly and were more likely to move into higher ranks.<sup>51</sup> They had no higher attrition rates due to poor performance than their peers without past criminal records.<sup>52</sup> A study of workers at call centers also showed that workers with past criminal records were more productive than workers who had no past records.<sup>53</sup>

### C. Resisting Arrest Convictions

Resisting arrest convictions, which previously were never sealable offenses and gave individuals a lifetime CORI, became sealable for the first time after enactment of criminal justice reform in 2018.<sup>54</sup> Until the change, Massachusetts was an outlier because no other state singles out resisting arrest as a never sealable criminal offense.

### D. Occupational Licensing and Housing Applications

The CORI sealing statute has long mandated that employment applications instruct job applicants that they may say that they have “no record” if their past records are sealed.<sup>55</sup> Job applicants with sealed records also can affirmatively state they have “no record” at job interviews.<sup>56</sup> Job interviews, however, are not the only setting where a right to state “I have no record” is important. In the 1950s, five percent of workers needed an occupational license, but an estimated 30 percent of the workforce now need such licenses.<sup>57</sup> If individuals are unable to obtain occupational licenses, they cannot work in many trades.<sup>58</sup> Criminal records also affect a person’s ability to obtain housing because both private and public housing screeners often conduct background checks on tenants.<sup>59</sup>

The enacted legislation permits individuals with sealed records to say they have “no record” when they apply for housing and occupational licenses.<sup>60</sup> It also requires that housing and occupational

44. Colin A. Young, “Major Criminal Justice Reform Bill Clears Mass. Legislature With Little Opposition,” *NEW ENGLAND PUB. RADIO* (April 4, 2018), <http://www.nepr.net/post/major-criminal-justice-reform-bill-clears-mass-legislature-little-opposition#stream/0> (The final bill passed the Senate unanimously and the House vote was 148 in favor with only five votes in opposition).

45. Yawu Miller, “Gov. Baker Signs Criminal Justice Reform into Law,” *BAY STATE BANNER* (April 13, 2018), <https://www.baystatebanner.com/2018/04/18/governor-baker-signs-criminal-justice-reforms-into-law/>.

46. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69, §§ 186–188 (codified at MASS. GEN. LAWS c. 276, § 100A (2019)). Employers, who rely on CORI reports, also receive protection from certain negligent hiring claims due to CORI reform enacted in 2010. MASS. GEN. LAWS c. 6, § 172(e) (2019).

47. Megan C. Kurlychek et al., “Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?,” 5 *CRIMINOLOGY & PUB. POL’Y* 483, 498–500 (2006). Most recidivism occurs within three years of the last criminal occurrence. Alfred Blumstein & Kiminori Nakamura, “‘Redemption’ in an Era of Widespread Criminal Background Checks,” 263 *NAT’L INST. OF JUSTICE J.* 10, 11 (2009).

48. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69, § 195 (codified at MASS. GEN. LAWS c. 276, § 100S (2019)). Negligent hiring lawsuits, however, tend to be infrequent. Barry Nixon, “The Dirty Little Secret About Negligent Hiring That Private Investigators Need to Know About!,” *PREEMPLOYMENTDIRECTORY.COM*, Aug. 11, 2018, <http://preemploymentdirectory.com/the-dirty-little-secret-about-negligent-hiring/#axzz5WTqrHoXU>.

49. See Ryan, *supra* note 42.

50. See Jennifer Lundquist et al., “Does a Criminal Past Predict Worker Performance? Evidence from One of America’s Largest Employer” 1 (*NAT’L INST.*

OF CORRECTIONS, 2016), <https://nicic.gov/does-criminal-past-predict-worker-performance-evidence-america-s-largest-employer-2016>.

51. *Id.* at 10.

52. *Id.*

53. Vivian Giang, “Why Criminals Might Make Better Employees,” *BUS. INSIDER*, (Dec. 4, 2012), <https://www.businessinsider.com/a-criminal-record-might-increase-productivity-2012-12>.

54. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69, §§ 186–188 (codified at MASS. GEN. LAWS c. 276, § 100A (2019)).

55. MASS. GEN. LAWS c. 276, § 100A (2019).

56. *Id.* The original version of the statute limited the ability to say “no record” to individuals with sealed cases over 10 years old. *An Act Relative to Files in the Office of the Commissioner of Probation*, St. 1971, c. 686, § 1. The legislature removed this restriction in 1974, the same year that waiting periods to seal felonies increased to 15 years, and some non-convictions became sealable without a waiting period. *An Act Relative to the Sealing of Files*, St. 1974, c. 525, § 1.

57. Brad Hershbein et al., “Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It Is Time to Examine Occupational Licensing Practices,” *BROOKINGS* (Jan. 27, 2015), <https://www.brookings.edu/blog/up-front/2015/01/27/nearly-30-percent-of-workers-in-the-u-s-need-a-license-to-perform-their-job-it-is-time-to-examine-occupational-licensing-practices/>.

58. *Id.*

59. Rebecaa Oyama, “Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act,” 15 *MICH. J. OF RACE & LAW* 181, 188 (2009).

60. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69, § 189–194 (codified at MASS. GEN. LAWS c. 276, § 100A (2019)).

licensing applications with inquiries about criminal histories inform applicants that they can say that they have “no record” if their records are sealed.<sup>61</sup>

Before this change, housing and licensing applicants were in limbo.<sup>62</sup> Although CORI reports that housing and most trade licensing screeners receive do not include information about sealed criminal records,<sup>63</sup> past silence in the law about what one could say about a criminal history after sealing of records led to inadvertent disclosures of sealed records, or awkwardness at interviews that undermined the benefits of sealing.<sup>64</sup> Lawyers also were uncertain as to what advice to give clients with sealed records seeking to respond to CORI inquiries when applying for housing or occupational licenses.<sup>65</sup>

The ability to state “I have no record” after sealing a record also is consistent with another provision in the CORI law that provides that sealed records are not admissible at hearings before boards or commissions and shall not operate to disqualify a person in “any examination, appointment or application for public service.”<sup>66</sup> At the same time, the new law retains provisions that permit access to sealed records by agencies such as the Department of Youth Services, the Department of Children and Families, and the Department of Early Education and Care that serve vulnerable populations.<sup>67</sup>

### E. Occupational Licensing Exclusion Lists

The criminal justice reform bill added a new provision requiring state and political subdivision licensing authorities, agencies, examining and credentialing boards, and commissions to create a list of specific criminal convictions that may disqualify an applicant from eligibility for an occupational license.<sup>68</sup> A disqualification based on a conviction that is included on such a list must be “directly related to the duties and responsibilities of the licensed occupation.”<sup>69</sup>

The U.S. Equal Employment Opportunity Commission (EEOC) indicates that most hiring policies that reject any worker with a criminal record violate Title VII of the Civil Rights Act of

1964 because of the disparate impact on blacks and Hispanics, who are disproportionately involved in the criminal justice system.<sup>70</sup> There are exceptions, however, if the employer can show a business necessity or a statute makes an applicant ineligible for the job based on the type of conviction.<sup>71</sup>

These new lists of disqualifying convictions directly related to duties and responsibilities of the licensed occupations will be of great interest to employment lawyers, labor unions, trade and professional groups, individuals working in certain occupations, and especially communities of color given racially disparate rates of incarceration.<sup>72</sup> If carefully drawn, these lists could reduce overbroad discrimination against people with criminal records while protecting vulnerable populations.<sup>73</sup>

### F. Sealing of FBI Records

Massachusetts law permits applicants for jobs, housing and occupational licenses to say they have “no record” after sealing their cases, but Massachusetts records are not the only records of a criminal case.<sup>74</sup> If a person with a sealed record applies for a job with the federal government, a background check involves a review of Federal Bureau of Investigation (FBI) criminal records.<sup>75</sup> FBI records often include information about cases from state courts even if the cases were sealed.<sup>76</sup> If a person was fingerprinted, the FBI record usually has information that a case was filed, but no information about the outcome of the case.<sup>77</sup> This is especially disconcerting to a job applicant when the case ended in a not guilty finding, a dismissal, or some other favorable outcome.<sup>78</sup>

Criminal justice reform enacted in 2018 has new requirements that should begin to address gaps in FBI records. As of July 1, 2019, DCJIS is required to transmit both juvenile court and adult criminal dispositions after submission of any juvenile or adult fingerprints to the FBI and the Department of Justice (DOJ).<sup>79</sup> If a Massachusetts court ordered sealing and/or expungement, the DCJIS must provide the order to seal or expunge and request that the FBI

61. *Id.* The new law requires that an application for employment, housing or an occupational or professional license state: “An applicant for employment or for housing or an occupational or professional license with a sealed record on file with the commissioner of probation may answer ‘no record’ with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions.”

62. See Michelle Natividad & Beth Avery, “Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records,” NAT’L EMP’ LAW PROJECT (2016). This report discussed flaws in occupational licensing statutes across the country and noted that the Massachusetts sealing statute was not explicit that the same protections provided to job applicants applied to occupational license applicants.

63. MASS. GEN. LAWS c. 6, § 172(a)(3) (2019).

64. *An Act to Reduce the Criminalization of Poverty, An Act for Justice Reinvention, and An Act Promoting Community Prosperity by Further Reforming Criminal Offender Record Information: Hearing before the Joint Comm. on the Judiciary on S.B. 777, H.B. 2308, S.B.791, H.B. 967, and H.B. 3084, 190th Gen. Court (2017)* (written statements of Martin Healy for the MBA and Pauline Quirion for Greater Boston Legal Services).

65. *Id.*

66. MASS. GEN. LAWS c. 276, § 100A (2019).

67. MASS. GEN. LAWS c. 6, §§ 172B, 172F (2019).

68. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69, § 8 (codified at

MASS. GEN. LAWS c. 6, § 172N (2019)).

69. *Id.*

70. See “U.S. Equal Emp’t Opportunity Comm’n, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” (Apr. 25, 2012).

71. *See id.*

72. *See id.*

73. *See id.* The EEOC advises screeners to conduct an individualized assessment to avoid discriminatory results. The EEOC suggests use of additional factors beyond the relationship between the type of offense and the job. Other factors are the age of the offense, nature and seriousness of the offense, person’s age at the time of the offense and completion of the sentence, rehabilitation efforts, and success in the same type of job without incident after the offense.

74. See Greater Bos. Legal Serv. CORI & Re-entry Project, “Know Your CORI Rights: Sealing an Expungement of Criminal Offender Record Information (CORI)” 21–22 (Oct. 15, 2018).

75. *Id.*

76. *Id.*

77. *See id.*

78. *See id.*

79. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69, § 18 (codified at MASS. GEN. LAWS c. 22C § 36 (2019)).

and the DOJ seal or expunge their own records in accordance with the order.<sup>80</sup> A provision in the new expungement law also requires that DCJIS notify the FBI and the DOJ of sealing or expungement orders and request that the FBI and DOJ expunge or seal records that correspond to the cases sealed or expunged in Massachusetts.<sup>81</sup> We will learn the extent to which the FBI will honor all requests from Massachusetts to seal or destroy its records, once the system for relay of data becomes operational in 2019. However, cooperation from the FBI is expected.<sup>82</sup>

### G. CORI Reports and Cases Dismissed Before Arraignment

The legislation addressed gaps in the CORI law. Cases dismissed before arraignment often appeared on CORI reports because of inconsistent data entry practices across the state. Many employers have a level of CORI access that includes access to information about dismissed cases, which meant these cases were listed on CORI reports.<sup>83</sup> This, in turn, creates barriers to jobs and other opportunities.<sup>84</sup> The Boston Bar Association, in its report on justice reform, recommended automatic sealing of all cases dismissed before arraignment.<sup>85</sup> The enacted legislation reflects a different approach and excludes the cases from the definition of CORI.<sup>86</sup> The result is that cases dismissed before arraignment are no longer listed as criminal cases on a CORI report.<sup>87</sup>

### H. Juvenile Records Listed on CORI Reports

The criminal justice reform bill put to rest a dispute about correct interpretation of the CORI statute by clarifying that the phrase “adjudicated as an adult” as used in Section 167 of chapter 6 of the General Laws, does not include a juvenile court case absent a transfer of the case to an adult court.<sup>88</sup> Previously, the DCJIS interpreted the phrase “adjudicated as an adult” to create an exception to the general exclusion of juvenile court cases from CORI reports if the

juvenile case involved probation or other conditions that extended past age 21, or a sentence to incarceration. Groups advocating for the change argued that treating a juvenile court adjudication the same as an adult conviction was at odds with well-established case law and statutes that provide that juvenile adjudications are not convictions. Massachusetts General Laws (G.L.) chapter 119, section 53 provides that proceedings brought against children under the statute governing delinquency and youthful offender cases “shall not be deemed criminal proceedings.”<sup>89</sup> As a result of the legislation, any juvenile court case falls outside the definition of CORI used to delineate what charges appear on CORI reports, except when there was a transfer of the case to adult court.<sup>90</sup>

### I. Felony Larceny Threshold Effect on Sealing

The criminal justice reform bill raised the Massachusetts felony-larceny threshold from \$250 to \$1,200.<sup>91</sup> Larceny for any amount above the threshold constitutes a felony while larceny in the same amount as the threshold, or any lower amount, is a misdemeanor.<sup>92</sup> Massachusetts was previously an outlier with the lowest threshold in New England, and the third lowest threshold in the entire country.<sup>93</sup> The increase in the felony threshold to \$1,200 has the effect of reducing sealing waiting periods for cases disposed of before as well as after the new threshold took effect on April 13, 2018. The sealing statute provides that for purposes of sealing a case, “[a]ny recorded offense which was a felony when committed and has since become a misdemeanor shall be treated as a misdemeanor.”<sup>94</sup>

### III. EXPUNGEMENT AFTER CRIMINAL JUSTICE REFORM

Massachusetts, for the first time, has an expungement statute due to passage of criminal justice reform in 2018.<sup>95</sup> The right to expunge a record is of great importance because it is the only way to wipe the slate clean. Criminal record sealing in Massachusetts only limits who has access to a record whereas expungement is “the

80. *Id.*

81. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69, § 195 (codified at MASS. GEN. LAWS c. 276, §100T (2019)).

82. Ava Callender, “Concepcion, “Collateral Consequences,” WILL BROWNSBERGER, (Jun. 20, 2018), <https://willbrownsberger.com/collateral-consequences/>.

83. *See, e.g.*, MASS. GEN. LAWS c. 6, § 167 (2019) (defining “all available criminal offender record information” to include “non-convictions” such as dismissed cases); MASS. GEN. LAWS c. 6, § 172 (a)(33) (2019) (“all available criminal offender record information” is used to determine the suitability of transportation network drivers).

84. Sixty percent or more of employers say they would never hire a so called “ex-offender.” Even dismissed cases reduce call-backs from employers. A study showed that people with no record receive three times as many offers as people with dismissed minor offenses. *See* Harry J. Holzer et al., “Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers,” 49 J. L. & ECON. 451 (2006); Richard D. Schwartz & Jerome H. Skolnick, “Two Studies of Legal Stigma,” 10 SOCIAL PROBLEMS 133, 133–142 (1962).

85. BBA Report, *supra* n. 38, at 74.

86. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69, § 3 (codified at MASS. GEN. LAWS c. 6, § 167 (2019)).

87. *See id.*

88. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69, § 4 (codified at MASS. GEN. LAWS c. 6, § 167 (2019)). This change does not affect access to

juvenile records by criminal justice agencies, the Department of Youth Services, the Department of Children and Families, and the Department of Early Education. MASS. GEN. LAWS c. 276, § 100D (2018); MASS. GEN. LAWS c. 6, §§ 172B, 172F (2018).

89. *See* MBA and Greater Boston Legal Services legislative testimony, *supra* at note 32. Case law makes it clear that if the juvenile court finds a juvenile to be delinquent, the “adjudication concerning a juvenile is not, of course, a conviction of crime.” *Dep’t of Youth Serv. v. A Juvenile*, 384 Mass. 784, 786 (1981). “Moreover, even as to the category of children adjudicated ‘youthful offenders,’ the statute does not label a ‘youthful offender’ proceeding as ‘criminal.’” *Commonwealth v. Conner C.*, 432 Mass. 635, 641–42 (2000). “The 1996 amendments [adding a youth offender category] did not alter that fundamental policy determination by the Legislature.” Roderick L. Ireland & Paula Kilcoyne, 44 MASS. PRACTICE SERIES JUVENILE L. § 1.3 (2d ed. 2019).

90. MASS. GEN. LAWS c. 6, § 167 (2019).

91. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69, § 136 (codified at MASS. GEN. LAWS c. 266, § 30, (2019)); §141 (codified at § 37B); § 143 (codified at § 37C); § 146 (codified at § 60); § 154 (codified at § 127).

92. *Id.*

93. Greater Boston Legal Services, “Felony Larceny Thresholds from Lowest to Highest,” MASS LEGAL SERVICES (2017), <https://www.masslegalservices.org/content/felony-larceny-thresholds-lowest-highest>.

94. MASS. GEN. LAWS c. 276, § 100A (2018).

95. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69, § 195 (codified at MASS. GEN. LAWS c. 276, §§ 100E–100U (effective Oct. 13, 2018)).

permanent erasure or destruction of a record so that the record is no longer accessible to, or maintained by, the court, any criminal justice agencies or any other state agency, municipal agency or county agency.”<sup>96</sup> As the Supreme Judicial Court (SJC) has acknowledged, a “cloud of prosecution” remains even if a case ends favorably if law enforcement, employers or others can gain access to information about the case.<sup>97</sup>

Conversely, law enforcement will have a greater interest in petitions to expunge records. The utility of records to law enforcement is not a consideration in sealing cases because the law provides for immediate access to sealed records by all criminal justice agencies.<sup>98</sup> Expungement, however, destroys court, agency and other records that may be viewed by police and prosecutors as integral to the investigative, prosecutorial, and dispositional phases of the criminal justice system.<sup>99</sup>

Attorneys assisting clients with expungement also must consider the harm as well as the benefits of expunging records. Expungement can pose serious problems for people who are not citizens, and there may be situations where destruction of records will interfere with exercise of other legal rights. For example, a conviction, a continuance without a finding or other criminal record can be grounds for deportation or exclusion of a person who is not yet a citizen. FBI records are often incomplete and do not always include the outcome of a case. After expungement, a person may not be able to show that his or her case ended favorably and therefore, has no adverse immigration consequences. It also may be impossible to gauge how many certified copies of docket sheets or other documents a person might need over a lifetime, or whether such copies will be legally sufficient in all contexts should a need for such documentation arise after expungement.<sup>100</sup>

### A. Legislative History and Background

Many legislators filed expungement bills over the years that languished before Gov. Baker signed the criminal justice reform bill in 2018.<sup>101</sup> This led to some harsh results. Judges have the power to expunge records as a “necessary adjunct” to exercise of their judicial

power, but the SJC limited the circumstances where judges could expunge cases to avoid crossing the line into legislative functions.<sup>102</sup> The SJC carved out only a few exceptions permitting expungement of cases involving impersonation of a named defendant or identity fraud, issuance of a complaint in error where the police did not intend to prosecute the named defendant, or situations involving fraud on the court.<sup>103</sup> In *Commonwealth v. Boe*, the police filed a complaint against a woman although they knew a man had committed the crime.<sup>104</sup> The SJC explained that although Ms. Boe should not have been charged with the offense in the first place, “this does not render the information in the record inaccurate or misleading, and, in such circumstances, the legislature has concluded that the appropriate remedy is the sealing of her record.”<sup>105</sup>

The 2017 to 2018 legislative session was a banner year for expungement and began with the filing of 16 or more expungement bills by Sens. William Brownsberger, Joseph Boncore, James Eldridge, Adam Hinds, Patricia Jehlen, Jason Lewis and Karen Spilka, as well as Reps. Claire Cronin, Josh Cutler, Kay Khan, Carolyn Dykema, Chynah Tyler, and others.<sup>106</sup> Numerous organizations such as Citizens for Juvenile Justice, ROCA (young adult program), the MBA, Greater Boston Legal Services, and many other groups and individuals lobbied for expungement remedies during the last legislative session.<sup>107</sup> The Senate ultimately passed a bill that provided for adult and juvenile expungement without capping the number of juvenile cases, but the House passed a bill that limited juvenile court record expungement to only one case.<sup>108</sup> However, the House bill permitted expungement of any juvenile or criminal case that ended in a not guilty finding, was *not proseed*, dismissed for want of prosecution or with prejudice, or involved a conviction overturned on appeal.<sup>109</sup> The House bill also provided for expungement of a first and only criminal adult criminal case if the defendant was under age 21 at the time of the offense.<sup>110</sup> The final expungement legislation approved by the legislature and signed by Gov. Baker incorporated some expungement provisions from both bills, but was more limited in its scope regarding both juvenile and adult cases.<sup>111</sup>

The expungement provisions included in the criminal justice

96. MASS. GEN. LAWS c. 276, § 100E (2019).

97. See *Police Com’r of Bos. v. Mun. Court of Dorchester Dist.*, 374 Mass. 640, 659 (1978).

98. MASS. GEN. LAWS c. 276, § 100D (2018); see *Commonwealth v. Pon*, 469 Mass. 296, 318 n. 31 (2014) (“It is no longer necessary . . . to consider the value to law enforcement of keeping the record open to the public” in sealing cases).

99. *Police Com’r of Bos.*, 374 Mass. at 656.

100. See, e.g., Greater Bos. Legal Serv. CORI & Re-entry Project, *supra* note 79 at 11-13. Greater Boston Legal Services takes the position that non-citizens should not expunge records until they consult with an attorney who is an immigration specialist and receive advice on the effect of such action. *Id.* Similarly, a person trying to recover fees in a case that was dismissed with prejudice may not be able to prove what was paid if the records are expunged. See *infra* note 170.

101. See S.725, 188 Gen. Ct. (Mass. 2013-2014); H.717, 184 Gen. Ct. (Mass. 2005-2006); H.2462, 183 Gen. Ct. (Mass. 2003-2004).

102. *Police Com’r of Boston v. Mun. Court of Dorchester Dist.*, 374 Mass. 640, 661 (1978).

103. See *Commonwealth v. Moe*, 463 Mass. 370 (2012) (there was no fraud on the court where the police filed a complaint based on erroneous statements not made under oath or in court); *Commonwealth v. S.M.F.*, 40 Mass. App. Ct. 42, 43 (1996) (courts may invoke their inherent authority to expunge criminal records when an innocent party is named as a defendant because an imposter provided the police with another person’s information); *Commonwealth v. Alves*,

86 Mass. App. Ct. 210 (2014) (expungement was proper remedy for a clerical error that resulted in the issuance of a criminal complaint against a person who did not commit the crime and was never the intended target of the police).

104. *Commonwealth v. Boe*, 456 Mass. 337 (2010).

105. *Id.* at 346-47.

106. H.3126, 190th Gen. Ct. (Mass. 2017-2018); H.3079, 190th Gen. Ct. (Mass. 2017-2018); H.2785, 190th Gen. Ct. (Mass. 2017-2018); H.2359, 190th Gen. Ct. (Mass. 2017-2018); H.2309, 190th Gen. Ct. (Mass. 2017-2018); H.2297, 190th Gen. Ct. (Mass. 2017-2018); H.2261, 190th Gen. Ct. (Mass. 2017-2018); H.760, 190th Gen. Ct. (Mass. 2017-2018); H.756, 190th Gen. Ct. (Mass. 2017-2018); H.755, 190th Gen. Ct. (Mass. 2017-2018); S.1075, 190th Gen. Ct. (Mass. 2017-2018); S.1063, 190th Gen. Ct. (Mass. 2017-2018); S.944, 190th Gen. Ct. (Mass. 2017-2018); S.871, 190th Gen. Ct. (Mass. 2017-2018); S.845, 190th Gen. Ct. (Mass. 2017-2018); S.777, 190th Gen. Ct. (Mass. 2017-2018); S.758, 190th Gen. Ct. (Mass. 2017-2018); S.757, 190th Gen. Ct. (Mass. 2017-2018).

107. See, e.g., Quirion, *supra* n.43

108. S.2200, §§ 303-304, 190 Gen. Ct. (Mass. 2017-2018); H.4043, § 87, 190 Gen. Ct. (Mass. 2017-2018)

109. H.4043, § 87, 119th Gen. Ct. (Mass. 2017-2018).

110. *Id.*

111. *An Act Relative to Criminal Justice Reform*, St. 2018, c. 69, § 195 (codified at MASS. GEN. LAWS c. 276, §§ 100E-100U (2019)).

reform bill signed by Gov. Baker fall into two categories. The first category applies only to a first and only offense from the juvenile court, or a first and only offense from an adult court that occurred before age 21.<sup>112</sup> The second category applies to both adult and juvenile cases involving decriminalized offenses and cases that resulted due to misuse of a person's identity, errors by witnesses, law enforcement or court employees, and fraud on the court.<sup>113</sup>

### **B. Expungement of Cases Involving Juveniles and Young Adults Under Age 21**

This first type of expungement permitting expungement of juvenile court cases and adult cases that involved young adults under age 21 is very limited. A person can file a petition to expunge with the Commissioner of Probation, but there are many criteria for eligibility and even more exclusions.<sup>114</sup>

First, the juvenile court case or adult criminal case involving an incident before age 21 must be the first and only case of the person requesting expungement. The petitioner cannot have any subsequent juvenile or criminal cases, except for motor vehicle charges where the penalty did not exceed a fine of \$50. The petitioner also cannot be the subject of an active criminal investigation and the Commissioner of Probation certifies this fact.<sup>115</sup>

Second, a waiting period precedes expungement. If the case is a felony, the waiting period is seven years after the disposition or release from incarceration, whichever is later.<sup>116</sup> If the charge is a misdemeanor, the waiting period is three years after the disposition or release from incarceration, whichever is later.<sup>117</sup>

Third, the charge must not fall within 20 categories of offenses. Section 100J of G.L. c. 276 specifies that:

No criminal record resulting from a disposition of the following offenses shall be eligible for expungement pursuant to section 100F, section 100G or section 100H:

- (1) any offense resulting in death or serious bodily injury;
- (2) any offense committed with the intent to cause death or serious bodily injury;
- (3) any offense committed while armed with a dangerous weapon;
- (4) any offense against an elderly person;
- (5) any offense against a disabled person;
- (6) any sex offense as defined in section 178C of chapter 6;

(7) any sex offense involving a child as defined in section 178C of chapter 6;

(8) any sexually violent offense as defined in section 178C of chapter 6;

(9) any offense in violation of section 24 of chapter 90;

(10) any sexual offense as defined in section 1 of chapter 123A;

(11) any offense in violation of sections 121 to 131Q of chapter 140;

(12) any offense in violation of an order issued pursuant to section 18 or 34B of chapter 208;

(13) any offense in violation of an order issued pursuant to section 32 of chapter 209;

(14) any offense in violation of an order issued pursuant to chapter 209A;

(15) any offense in violation of an order issued pursuant to section 15 of chapter 209C;

(16) any offense in violation of an order issued pursuant to chapter 258E;

(17) any offense in violation of section 13M of chapter 265;

(18) any felony offense in violation of chapter 265;

(19) any offense in violation of paragraph (a), (b), (c) or (d) of section 10 of chapter 269; or

(20) any offense in violation of section 10E of chapter 269.<sup>118</sup>

The statute bars expungement of over 150 offenses, and in particular, assault and battery with a dangerous weapon; felony offenses involving interpersonal violence; sex offenses; offenses involving vulnerable populations such as elders, children and the disabled; reckless driving or operating under the influence; abuse prevention and harassment prevention order violations; offenses while armed with a dangerous weapon; and firearms offenses.<sup>119</sup> Examples of offenses that are eligible for expungement are not specified in the statute, but larceny, disorderly conduct, drug offenses such as possession or distribution, trespass, prostitution, tagging, and misdemeanor assault and battery (excluding assault or assault and battery against a family or household member under Mass. G.L. ch. 265, § 13M),<sup>120</sup> and indecent exposure, are common offenses that are not disqualified.<sup>121</sup>

112. MASS. GEN. LAWS c. 276, § 100I(a)(3)

113. MASS. GEN. LAWS c. 276, § 100K (2019).

114. MASS. GEN. LAWS c. 276, §§ 100F–100J.

115. MASS. GEN. LAWS c. 276 § 100I(a).

116. MASS. GEN. LAWS c. 276, § 100I(a)(3).

117. *Id.*

118. MASS. GEN. LAWS c. 276 § 100J (2019).

119. *Id.*

120. *See* MASS. GEN. LAWS c. 94C, §34 (2019) (possession of a controlled

substance); MASS. GEN. LAWS c. 94C, §§32, 32A, 32B, 32C, 32D (2019) (distribution of a controlled substance); MASS. GEN. LAWS c. 266, § 120 (2019) (trespassing); MASS. GEN. LAWS c. 272, § 53(a)-(b) (2019) (nightwalking or disorderly conduct); MASS. GEN. LAWS c. 272, § 53A (2019) (prostitution); MASS. GEN. LAWS c. 266, § 12B (2019) (tagging); MASS. GEN. LAWS c. 265, § 13A (2019) (assault and battery).

121. MASS. GEN. LAWS c. 272, § 53 (2019). This offense is common among people who are homeless and lack their own restroom facilities. Corinne A. Carey, "No Second Chance: People with Criminal Records Denied Access to Public Housing," 36 U. TOLEDO L. REV. 545, 580 (2005).

If a person meets the above requirements, he or she is eligible to submit a petition to expunge to the Office of the Commissioner of Probation, who will send copy of the petition to the local district attorney. If the district attorney objects, the court holds a hearing within 21 days after receiving notice from the commissioner of the objection. If there is no objection, the court can allow the petition on the papers.<sup>122</sup>

A judge has to make written findings of fact to determine whether expunging the record is in “the best interest of justice.”<sup>123</sup> The expungement statute does not define this phrase, but the legal standard set forth in the sealing statute for sealing non-convictions through the court process is similar, and based on whether “substantial justice would best be served” by sealing the record.<sup>124</sup> A judge, therefore, would likely consider factors reviewed in sealing cases. These factors include the time elapsed between the arrest and the petition, disadvantages if the record is left open, the petitioner’s age at the time of the offense, seriousness of the offense, stigma related to the offense, treatment or rehabilitation efforts, community contributions, and “the nature of and reasons for the particular disposition.”<sup>125</sup>

Prosecutors will have concerns related to the commonwealth’s need to retain court and related agency records because unlike sealing, expungement eliminates all law enforcement access to the records. Before computers were widely available, the SJC said the power to expunge records is properly “exercised where the utility of the records for law enforcement purposes is likely to be minimal or nonexistent.”<sup>126</sup> The court suggested a balancing test.<sup>127</sup>

What is evident then is that there are situations where the maintenance of criminal records of a particular individual cannot be said to serve any valid law enforcement purpose because the events whose happening they reflect are of little or no relevance to the individual’s likelihood of participation in future criminal activities or necessary to the achievement of other ancillary goals of the criminal justice system. The nature and extent of the interest of the state in the maintenance of such records in such circumstances must be weighed against the harm that may befall the individual from their existence.<sup>128</sup>

Expungement under sections 100F through 100H of Mass. G.L. ch. 276, however, is limited to first and only offenses, excludes most serious offenses, and follows a waiting period of three to seven years.<sup>129</sup> Thus, the pool of petitioners who can request expungement under these provisions will be small, but they will be in a better

position to request expungement based on recidivism studies and their lack of prior or subsequent offenses.<sup>130</sup>

The Office of the Commissioner of Probation has indicated that very few people have expunged their records under the new law.<sup>131</sup> Legislators have already filed bills to eliminate the cap on the number of offenses that can be expunged and the restrictions on what offenses can be expunged under sections 100F through 100H of the Mass. G.L. ch. 276.<sup>132</sup>

### C. Expungement of Cases Under Section 100K

A second type of expungement is available for any adult and juvenile case under section 100K of Mass. G.L. ch. 276. This section addresses circumstances where an innocent person was prosecuted or a similar miscarriage of justice occurred. There are no age limits or caps on the number of charges eligible for expungement. The new statute provides that

a court may order the expungement of a record created as a result of criminal court appearance, juvenile court appearance or dispositions if the court determines based on clear and convincing evidence that the record was created as a result of:

- (1) false identification of the petitioner or the unauthorized use or theft of the petitioner’s identity;
- (2) an offense at the time of the creation of the record which at the time of expungement is no longer a crime, except in cases where the elements of the original criminal offense continue to be a crime under a different designation.
- (3) demonstrable errors by law enforcement;
- (4) demonstrable errors by civilian or expert witnesses;
- (5) demonstrable errors by court employees; or
- (6) demonstrable fraud perpetrated upon the court.<sup>133</sup>

As with the first type of expungement limited to juvenile and young adult cases, the court must enter findings of fact and may only order expungement if it is “in interests of justice.”<sup>134</sup>

The first category of expungement for records created due to false identification, identity theft or unauthorized use of a person’s identity, codifies an exception carved out by the SJC for expungement of records related to people whose identities were stolen or misused.<sup>135</sup> The second category of expungement applies to decriminalized

122. MASS. GEN. LAWS c. 276, § 100F (a)-(d) (2019); MASS. GEN. LAWS c. 276, § 100G (a)-(d) (2019); MASS. GEN. LAWS c. 276, § 100H (a)-(c) (2019).

123. MASS. GEN. LAWS c. 276, § 100F(d) (2019); MASS. GEN. LAWS c. 276, § 100G(c) (2019); MASS. GEN. LAWS c. 276, § 100H(c) (2019).

124. *Id.*; MASS. GEN. LAWS c. 276, § 100C.

125. *See* Commonwealth v. Pon, 469 Mass. 296, 316 (2014).

126. Police Comm’r of Bos. v. Mun. Court of Dorchester, 374 Mass. 640, 661 (1978).

127. *See id.* at 658.

128. *Id.*

129. MASS. GEN. LAWS c. 276, §§ 100F–100H, 100I, 100J (2019).

130. *See* Kurlychek and Blumstein, n. 49, *supra*.

131. *See* Christian M. Wade, “State sees surge in requests to seal records,” GLOUCESTER DAILY TIMES, July 5, 2019.

132. *See* H.1386, An Act relative to expungement, sealing and criminal record provisions; S.900, An Act relative to expungement.

133. MASS. GEN. LAWS c. 276, § 100K (a) (2019).

134. MASS. GEN. LAWS c. 276, § 100K (b) (2019).

135. *See* Commonwealth v. S.M.F., 40 Mass. App. Ct. 42, 43 (1996).

offenses.<sup>136</sup> For example, this includes decriminalized offenses such as possession of two ounces or less of marijuana in public, being in the presence of heroin, disorderly conduct or disruption of an assembly at a school by a secondary or elementary school student, or fathering a child outside of marriage.<sup>137</sup>

The third, fourth and fifth categories of expungement permit expungement of records created due to “demonstrable errors” by law enforcement, civilian or expert witnesses, or court employees.<sup>138</sup> The statute does not define “demonstrable error.” The general rule of statutory construction is that a statute is interpreted according to

the intent of the legislature ascertained from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.<sup>139</sup>

Thus, the phrase “demonstrable errors” is broad enough to encompass obvious mistakes, such as complaints issued against the wrong person as in the *Boe* case,<sup>140</sup> or without probable cause.<sup>141</sup>

Individuals with vacated cases related to the Annie Dookhan or Sonia Farak drug lab scandals<sup>142</sup> are in a good position to request expungement because otherwise the stigma of a guilty finding and any sentence of incarceration will remain on the CORI report, even if the same report indicates that the court vacated the convictions and dismissed the charges with prejudice. However, when a court has not vacated a conviction, prosecutors may object to expungement as

premature, or argue there is too much controversy over the facts to meet the petitioner’s burden of “clear and convincing evidence” of a demonstrable error. Petitioners also may argue that “demonstrable error” includes a mistake or error of judgment that led to issuance of a complaint related to implicit or explicit racial bias, racial profiling, or drug, alcohol or other impairment or misconduct of witnesses, police or others.<sup>143</sup> Case law will develop over time on the parameters of the phrase “demonstrable errors.”

The last category of expungement under section 100K is “demonstrable fraud perpetrated upon the court.”<sup>144</sup> “Courts have narrowly construed what constitutes “fraud on the court” to involve much more than misstatements or omissions.<sup>145</sup> Fraud on the court involves proof of “the most egregious conduct involving a corruption of the judicial process itself.”<sup>146</sup> Some examples of fraud on the court are “bribery of judges, employment of counsel to ‘influence’ the court, bribery of the jury, and the involvement of an attorney (an officer of the court) in the perpetration of fraud.”<sup>147</sup> A false statement given to police, by itself, is not fraud on the court.<sup>148</sup> In *B.C. v. F.C.*, the Appeals Court held there was no fraud on the court despite false statements made in an affidavit where the witness did not intend to harass the other party, and her actions were not part of an “unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter.”<sup>149</sup> Section 100K permits expungement based on witness errors so it may be easier to proceed on that basis, rather than relying solely on a claim based on fraud on the court.<sup>150</sup>

136. MASS. GEN. LAWS c. 276, § 100K (a) (2) (2019).

137. MASS. GEN. LAWS c. 273, § 11 (repealed 1977) (decriminalizing fathering a child outside marriage); MASS. GEN. LAWS c. 94C, § 35 (repealed 2018) (being in presence of heroin is no longer a crime); MASS. GEN. LAWS c. 94G, § 11 (2019) (more than one ounce but not more than two ounces of marijuana “shall be subject only to a civil penalty”); MASS. GEN. LAWS c. 272, § 40 (2019) (disrupting a school assembly at a school is no longer a crime if the offense is at the school and committed by an elementary or secondary school student); MASS. GEN. LAWS c. 272, § 53 (2019) (disorderly conduct or disturbing the peace at a school is no longer a crime if the offense is at the school and committed by an elementary or secondary school student).

138. MASS. GEN. LAWS c. 276, § 100K (a)(3)-(5) (2019).

139. *Hanlon v. Rollins*, 286 Mass. 444, 447 (1934).

140. *See* *Commonwealth v. Boe*, 456 Mass. 337 (2010). The Oxford Dictionary defines demonstrable as “clearly apparent or capable of being logically proved.” Demonstrable, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/demonstrable> (last visited Nov. 18, 2018).

141. *See, e.g., Commonwealth v. Alves*, 86 Mass. App. Ct. 210, 215 (2014) (the Appeals Court also held that expungement was the proper remedy for a clerical error that resulted in issuance of a criminal complaint against a person who not only did not commit the crime, but also was never the intended target of the

police).

142. “Misconduct by former drug lab chemists,” Annie Dookhan and Sonja Farak, resulted in close to 28,000 drug case dismissals, and vacating of convictions in the same cases. *See, e.g.,* Danny McDonald, “State could pay ‘north of \$10 million’ to reimburse defendants in drug lab scandals,” BOSTON GLOBE (Sept 12, 2018), <https://www.bostonglobe.com/metro/2018/09/11/state-could-pay-north-million-reimburse-dookhan-farak-defendants/VQOuBSFg0iQZsO-oCOZoKkN/story.html>.

143. *See* MASS. GEN. LAWS c. 276, § 100K (a)(3)-(5) (2019) (“demonstrable errors” by police, witnesses, or court staff as grounds for expungement).

144. MASS. GEN. LAWS c. 276, § 100K (2019).

145. *Paternity of Cheryl*, 434 Mass. 23, 35–36 (2001).

146. *Id.* at 36.

147. *Id.*

148. *Commonwealth v. Moe*, 463 Mass. 370, 375–76 (2012).

149. *B.C. v. F.C.*, 90 Mass. App. Ct. 345, 350, (2016); *see* *Comm’r of Prob. v. Adams*, 65 Mass. App. Ct. 725, 230 (2006) (false statements under oath to retaliate against an abuse victim seeking an abuse prevention order and use of the court as a mechanism to perpetrate the fraud, were fraud on the court).

150. MASS. GEN. LAWS c. 276, § 100K(a)(4) (2019).

#### D. Rights After Expungement

After an expungement order, the law provides that no person with an expunged record “shall be held guilty of perjury or giving a false statement” due to a failure to acknowledge such record in response to any inquiry, made for any purpose.<sup>151</sup> A petitioner can say that he or she has “no record” after expungement of the record. However, there is no equivalent federal law pertaining to applications for employment with a federal agency.<sup>152</sup>

#### IV. CONCLUSION

A criminal case is never too old or too minor to trigger barriers to employment, housing, and other opportunities. The availability of expungement and sealing are an indispensable part of the system for

administration of criminal justice given the nature of and far reaching consequences of a criminal history. Sen. Brownsberger, past co-chair of the Joint Committee on the Judiciary and a lead sponsor of the legislation, said the criminal justice reform bill was “about lifting people up instead of locking people up.”<sup>153</sup> He added that, “It’s about cutting the chains that hold people down from trying to get back on their feet, and it’s about protecting public safety.”<sup>154</sup> Work is a pathway to a better life and reduced recidivism.<sup>155</sup> This legislation reflects greater support for changes to the justice system that are data driven, more cost effective, and smarter on crime. The momentum that led to passage of this landmark legislation was significant, and hopefully, will remain a catalyst for continued progress on criminal justice reform and collateral consequence issues.

151. MASS. GEN. LAWS c. 276, § 100M.

152. MASS. GEN. LAWS c. 276, §§ 100M–100N (2018).

153. Michael Jonas, “Criminal Justice Bill Reaches Finish Line,” COMMONWEALTH MAGAZINE (April 13, 2018), <https://commonwealthmagazine.org/criminal-justice/criminal-justice-bill-reaches-finish-line/>.

154. *Id.*

155. Kaplan, *supra* note 5, at 5, 22.

# BOOK REVIEW

## *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*

By Emily Bazelon (Random House) 2019, 409 pages

The prison population of the United States remained stable for the first 200 years of the nation's existence. Then, beginning in the 1970s, in one of the great social experiments in American history, it soared upwards sevenfold from approximately 300,000 persons incarcerated to more than 2.2 million.<sup>1</sup> Today, the United States stands as the greatest incarcerator in the world with a level of imprisonment five to 10 times higher than any other democracy.<sup>2</sup> In fact, not even any dictatorship or totalitarian police state on earth can rival the United States in the percentage of its population that is jailed.<sup>3</sup>

*New York Times Magazine* writer and legal commentator Emily Bazelon, with a decidedly polemic point of view, argues passionately that this “scourge of mass incarceration” that “long ago passed the level required for public safety” has had disastrous results in breaking up families and communities by unnecessarily locking up too many people and diverting money that could be better spent preventing crime.<sup>4</sup>

In her book, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*, Bazelon squarely blames what she refers to as the “unfettered power” of prosecutors who have relatively recently amassed more power than the system was designed for as the missing link to explain the explosion in increased numbers of locked-up Americans. Throughout this work of advocacy journalism, Bazelon argues that the theory that the American judicial system exists on a level playing field, where the prosecutor and the criminal defense attorney are evenly matched adversaries while a neutral arbiter determines the ultimate result, is a myth. She prefaces her arguments by recounting the principle that, at least theoretically, “the prosecutor’s job is not to exact the greatest possible punishment. It is not to win at all costs. It’s to offer mercy in equal measure to justice.” She asserts, however, that, all too often, the prosecutor’s algorithm to measure accomplishment is the number of people that can successfully be put behind bars. Every step of the way, Bazelon asserts, the prosecutor is the real “decider” who determines whether to charge, what to charge, whether to seek bail, and what the sentence should be.

Bazelon begins with the obvious example: when a prosecutor, in his or her discretion, decides to charge a person with a crime that carries a mandatory minimum sentence. If the defendant is found guilty of such a charge, the prosecutor also effectively becomes the sentencer, as the judge has absolutely no power to use judicial

discretion and sentence that individual to less than the mandatory minimum sentence. This dynamic is the equivalent of two athletes competing against each other in a sporting event where one of them also has the final say in declaring the outcome.

Bazelon strongly argues that prosecutors use their discretion to charge an offense that, upon conviction, will determine the sentence in order to wring defendants into guilty pleas. When a prosecutor approaches a defendant with an offer of a light sentence to a lesser charge, but threatens to increase the charge to something that would ensure a draconian sentence if the defendant is convicted at trial, Bazelon purports that even factually innocent people have taken the deal and pleaded guilty out of fear of the much harsher sentence.

An example of this all-too-common occurrence is the case of *Bordenkircher v. Hayes*,<sup>5</sup> in which the defendant, Paul Hayes, was eventually found guilty of stealing a check from a Lexington, Kentucky business and using it to pay for \$88.30 worth of groceries. Prior to being convicted, Hayes lived with his diabetic mother and four of her 15 children. The prosecutor offered Hayes a plea deal in which he would serve five years in prison for the bad check “to save the court the inconvenience and necessity of a trial.” However, the prosecutor also informed him that, since there were two convictions on his record from when he was a teenager and in his early 20s, if he did not take the offered deal, a charge would be added under the state’s three-strikes law that carried with it a mandatory life sentence. Hayes turned down the plea bargain, took the case to trial and, when found guilty, the prosecutor made good on the promise: the judge was powerless to give him anything less than the life sentence. Hayes’ conviction was upheld by the United States Supreme Court, which rejected the argument that this case represented “a vindictive exercise of a prosecutor’s discretion” and instead, in an enormously consequential ruling, stated that “this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.”<sup>6</sup>

The *Hayes* case is no exception, says Bazelon. It is rather one illustration of a systemic issue in light of the fact that 95 percent of criminal cases are resolved through pleas rather than trial. Bazelon quotes Jed Rakoff, a former federal judge and prosecutor, as saying that, of the 2.2 million people incarcerated in America, more than two million of them are there “as the result of plea bargains

1. Carson, E.A., “Prisoners in 2016, U.S. Dept. of Justice: Bureau of Justice Statistics” (2018), available at <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

2. Jeremy Travis, Bruce Western & Steve Redburn, eds., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 13 (National Academics Press 2014); see also Michelle Ye Hee Lee, “Yes, U.S. Locks Up People at a Higher Rate Than Any Other Country,” WASH. POST, July 7, 2015, available at [https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm\\_term=.0e5ebf07d9b1](https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.0e5ebf07d9b1).

3. Roy Walmsley, “World Prison Population List (12th edition),” INST. FOR CRIM. POL’Y RES. (2019), <http://www.prisonstudies.org/sites/default/files/resources/downloads/wpp12.pdf>.

4. Emily Bazelon, *Charged: The New Movement To Transform American Prosecution And End Mass Incarceration* XXV (2019).

5. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

6. *Id.* at 364.

dictated by the government's prosecutors, who effectively dictate the sentences as well.<sup>7</sup> For example, when a gun court was established in one New York county, in the first year and a half, 250 cases were disposed of by guilty pleas and nine cases were disposed of by trial.<sup>8</sup> Rakoff made clear the severe penalty for taking a chance on going to trial: "In 2012, the average sentence for federal narcotic defendants who entered into any kind of a plea bargain was five years and four months, while the average sentence for defendants who went to trial was 16 years."<sup>9</sup>

Bazon argues that, although such tactics as obtaining an unreliable coerced confession by beating it out of the defendant has long been illegal, the catastrophic consequences that can befall an accused person if he or she chooses not to plead guilty and takes the case to trial exert similar forceful pressures of coercion and encourages the accused, innocent or not, to plead guilty. This might partially explain why 18 percent of those exonerated as factually blameless by the Innocence Project had, in fact, previously pleaded guilty to crimes they had not committed.<sup>10</sup>

Bazon also argues that such disproportionate power is not limited to charging decisions, but is pervasive at every step of the process. In one section, Bazon rolls out a plethora of research on the issue of bail immediately following the arrest, writing, "[b]ail is the first domino in a series of decisions affecting guilty pleas and penalties, so it's not an exaggeration to say that whether it's affordable or not can shape the outcome of a criminal case — and even the rest of a defendant's life."<sup>11</sup> Bazon cites studies that show that the prosecution's bail request is the most important factor for the judge when setting bail, as it sets a baseline.<sup>12</sup> Judges often fear a backlash so, more often than not, go along with the prosecutor's recommendation.

Bazon supports her premise with statistics showing that setting a bail that cannot be met causes a multitude of problems. People held on bail are 25 percent more likely to plead guilty than those charged with similar offenses who make bail.<sup>13</sup> For a defendant faced with the possibility of being held on bail for months waiting for the case to make its way through the courts, the option to plead guilty and possibly be released frequently seals the deal for making

the defendant plead guilty. Bazon writes, "[i]n the end, it's not complicated. Jails serve as plea mills."<sup>14</sup>

According to Bazon, astonishingly two-thirds of people sitting in jail in the United States at any given time are merely awaiting trial but cannot afford to post bail.<sup>15</sup> In federal court, 60 percent of those charged are detained awaiting trial.<sup>16</sup> They have not been found guilty of anything and are purported to be clothed with the presumption of innocence, yet punishment has already begun.

The irony is that research shows that not only does abandoning the use of cash bail have little effect on the rate of a defendant's re-appearance in court,<sup>17</sup> but holding people on unnecessarily high bail makes them more likely to commit crimes in the future. They lose jobs, housing and stability. Moreover, some held in jail come into contact with criminals for the first time in their lives and become influenced by them to enter the world of crime once released as so many options have been lost to them. Bazon argues that the bottom line is that bail does not make the public safer and does not better ensure that the accused will return to court.

It is not just bail. Bazon's meticulously researched scholarly work is chock-full of research, studies, and science showing that there are an abundance of methods, programs, and alternatives to incarceration that, perhaps unexpectedly and often counterintuitively, yield dramatically better results for the public in reducing crime than relying solely on the reflexive handing out of a jail sentence.

Yet, a towering strength of this book is that although it is a meticulously researched, scholarly work, it also is a work of compelling storytelling, as the author adds a human face to the statistics. She follows the cases of two young people caught in the system in step-by-step painstaking detail — a female teenager in Shelby County, Tennessee, and a male in the Brownsville neighborhood of Brooklyn, New York.

The female, 18-year old Noura Jackson of Memphis, was convicted of murdering her mother. After serving nine out of the 20 years to which she was sentenced, Jackson was granted a new trial by an appellate court that, in scathing language, determined that her conviction had been infected by prosecutorial misconduct.<sup>18</sup>

7. Bazon, *supra* note 4, at 134.

8. *Id.* at 135-36.

9. Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE NY REV. OF BOOKS (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

10. James S. Liebman et al., "A Broken System, Part II: Why There Is So Much Error In Capital Cases, And What Can Be Done About It," COLUMBIA LAW SCHOOL 167, (2002), <http://www2.law.columbia.edu/brokensystem2/report.pdf>.

11. Bazon, *supra* note 4, at 37.

12. Mary T. Phillips, "Prosecutors' Bail Request and the CJA Release Recommendation: What Do They Tell the Judge?," NEW YORK CITY CRIM. JUST. AGENCY 2, 7, (August 2005), <http://www.ncjrs.gov/App/publications/abstract.aspx?ID=238340>.

13. Paul Heaton, Sandra Mayson & Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," U. OF PA. INST. FOR LAW

AND ECON. 22, (July, 2016), <https://www.law.upenn.edu/live/files/5693-harriscountybail>.

14. Bazon, *supra* note 4, at 37.

15. Zhen Zeng, "Jail Inmates in 2016," U.S. DEPT. OF JUSTICE: NATIONAL BUREAU OF JUSTICE STATISTICS 1, 4 (February, 2018), available at <https://www.bjs.gov/content/pub/pdf/ji16.pdf>.

16. Amaryllis Austin, "The Presumption for Detention Statute's Relationship to Release Rates," U.S. CTS. 53, 60 (Sept., 2017), available at [https://www.uscourts.gov/sites/default/files/81\\_2\\_7\\_0.pdf](https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf).

17. Clifford T. Keenan, "We Need More Bail Reform," PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA (Sept., 2013) <https://www.psa.gov/?q=node/390>; Matthew DeMichele, et al., "The Public Safety Assessment: A Re-Validation and Assessment of Predictive Utility and Differential Prediction by Race and Gender in Kentucky," Laura and John Arnold Found. 21 (April 25, 2018), available at <https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/3-Predictive-Utility-Study.pdf>.

18. Bazon, *supra* note 4, at 185-86.

Bazon portrays the main Shelby County prosecutor, Amy Weirich, as the villain in this book. She notes that Weirich was singled out along with several other prosecutors in research published by Harvard's Fair Punishment Project as having such a lengthy history of prosecutorial misconduct that they were referred to as "recidivists who are repeatedly abusing their power."<sup>19</sup> In one case cited by Bazon, Weirich was alleged to have withheld evidence where a note attached to a thick file in an envelope initialed by her, which said "Do not turn over to the defense," was found years after the defendant in that case was convicted of murder.<sup>20</sup> In 2015, the Tennessee Board of Professional Responsibility recommended that the Tennessee Supreme Court issue a public censure against Weirich and also filed a petition for discipline<sup>21</sup> that it later dismissed in favor of issuing a private reprimand against her.<sup>22</sup>

Bazon alleged that in Jackson's case, Weirich remorselessly ran roughshod over what may have been an innocent person's right to due process. Bazon describes how, without any physical evidence, the prosecution built a case against the college-bound Jackson with highly inflammatory language about her partying lifestyle in which the Tennessee Supreme Court wrote, "[t]he prejudicial effect of this evidence may well have outweighed its probative value."<sup>23</sup> More importantly, the court found that material exculpatory evidence known to the prosecution was withheld or, as the prosecutor who found it later said, just forgotten to be handed over to the defense. The evidence concerned a major prosecution witness who, among other things, said that he was asked by Jackson to assist in a cover-up of the murder. However, he was revealed to be out of state and admittedly "rolling" on a hallucinogen on the night in question.<sup>24</sup>

But the most outrageous act of prosecutorial misconduct, according to the court, was when Weirich, in her closing argument, essentially excoriated Jackson for exercising her right to remain silent and not testify at her trial: "Just tell us where you were!" Weirich had bellowed. "That's all we're asking, Noura!"<sup>25</sup> Addressing that issue, the decision of the Tennessee Supreme Court ruled that, "[g]iven that the impropriety of any comment upon a defendant's exercise of the Fifth Amendment right not to testify is so well settled as to require little discussion, it is not at all clear why any prosecutor would venture into this forbidden territory."<sup>26</sup>

The apparent reason that Bazon included this case in her book, however, is what happened after Jackson was granted a new trial. She was held in custody for another year because she was not granted bail while the prosecution insisted on retrying the case and the original trial judge kept postponing the new trial date. Knowing that she faced even more time in prison before the trial would

proceed and having difficulty understanding why she was still behind bars long after her conviction had been overturned, this woman, who was taken into custody at age 18, could not bear entering her 30s still locked up.<sup>27</sup> As part of a plea bargain, she entered a plea of guilty under the *Alford* doctrine<sup>28</sup> where the defendant admits that the evidence would likely persuade a fact finder, but does not admit to the criminal act and asserts innocence, as the fastest possible way to finally get home. Thus, she became yet another statistic demonstrating Bazon's premise that, more often than it should, prosecutorial excess results in people pleading guilty to crimes they may not have committed while the genuinely guilty person continues to go free.

The other young person whose case Bazon follows in minute detail is Kevin, a 20-year old African-American growing up impoverished in gang-controlled projects with a single mother in Brooklyn.

Kevin, who had a relatively clean record, was at a friend's apartment when the police came looking for the friend. Kevin had never possessed a gun before, but he had seen one earlier at that apartment. When the police entered, in an act of horrendously foolish misjudgment, he grabbed it, with the idea that he could run and hide it for his friend.<sup>29</sup>

It is from this point that Bazon follows Kevin's circuitous, obstacle-laden route through the bewildering chaotic system where a lawyer and social worker see him at a crossroads: will he go to prison and, with this felony conviction, lose public housing and be turned down for jobs and schools? Or he can spend many months trying to get approved by the District Attorney's office for a diversion program, where he can come out on the other side with a future ahead of him with college, employment and a family? As the book painstakingly follows Kevin's odyssey through what can almost be viewed as a trip through Dante's nine stages of hell, Kevin found himself "subject to whims and judgment calls and unwritten rules. . . . As he sensed, what happened next wasn't really up to the judge or what anyone said in open court. His fate lay in the behind the scenes decisions of the . . . Brooklyn D.A.'s office."<sup>30</sup>

Highlighting Kevin's case is characteristic for Bazon: she does not always choose the less nuanced, least complicated storyline of only portraying defendants who are factually innocent. She points to those who may not have been pristinely blameless, yet who could have been handled through much more effective consequential procedures in order to ensure both their future contributions to society and public safety itself. She also argues that the severity of punishments, particularly those meted out to defendants who turned down

19. "The Recidivists: New Report On Rates of Prosecutorial Misconduct," FAIR PUNISHMENT PROJECT, (July 13, 2017), <http://fairpunishment.org/new-report-on-rates-of-prosecutorial-misconduct/>.

20. *Braswell v. Tennessee*, Court of Criminal Appeals of Tennessee W2016-00912-CCA-R3-PC (2017).

21. *In re Amy P. Weirich*, No. 2016-2523-9-KH (La. Jan. 25, 2016); Supplemental Petition for Discipline, *In re Amy P. Weirich*, No. 2016-2523-9-KH (La. Oct. 28, 2016).

22. Adrian Sainz, "Disciplinary Charges Dropped Against Tennessee Prosecutor," THE ASSOCIATED PRESS (Mar. 20, 2017), <https://www.apnews.com/>

e9c2cba9252a41bc8a1c8351d9af93bb.

23. Bazon, *supra* note 4, at 186.

24. *Id.* at 119-21.

25. *Id.* at 118.

26. *Id.* at 185.

27. *Id.* at 236.

28. *North Carolina v. Alford*, 400 U.S. 25 (1970).

29. Bazon, *supra* note 4, at XVIII-XX.

30. *Id.* at XXIV-XXV.

plea deals and went to trial, too often result in an absurd overkill of a sanction. She mentions one of Jackson's prison mates, Octavia Cartwright, who, as an abused and neglected teenager reeling from a rape and assaults, became addicted and, following an older man in search of drugs, helped him severely beat another woman. Cartwright was offered a 25-year sentence, but she went to trial, lost, and was given a 91-year sentence. Certainly, Cartwright's one intoxicated violent assault merits consequences, but Bazelon questions whether incarcerating a 19-year old in a cell for the next 91 years is proportionate or good for society.<sup>31</sup>

Her study of Kevin's case, after following him through a lengthy, circuitous maze through the criminal justice system replete with numerous setbacks, does result in a somewhat satisfactory ending to Bazelon. Kevin was accepted to a diversion program<sup>32</sup> where he reportedly flourishes. He got a job, stayed out of trouble, passed all drug screens to indicate he is no longer using marijuana and, when the case is finally dismissed, he was hopeful about starting classes at a community college.<sup>33</sup>

What was most fortuitous for Kevin was the election of Eric Gonzalez as Brooklyn's district attorney. District Attorney Gonzalez began using evidence-based research to determine the most effective methods of dealing with offenders to lower their recidivism rate. Although Gonzalez believes that incarceration is most certainly the only appropriate sanction for some cases, he argued the common sense use of alternative sanctions and diversion programs for others because, sometimes, "[y]ou're asking us to take this person out of treatment and cause him to lose his job and maybe his housing. You're asking us to set him up to do the next crime."<sup>34</sup>

Still, Gonzalez apparently understood why many other prosecutors are reluctant to emphasize rehabilitation and instead, seek the harshest of punishments regardless of its consequences on public safety in the long term through increased recidivism rates. Gonzalez says, "I read every day nationally in the paper about how much time people get, and it seems excessive to me. But if I do something different, then eventually someone will get out and do something horrible, and that's when I need advocates."<sup>35</sup>

According to Bazelon, these political considerations became even more pronounced during the late 1960s as more prosecutors were using their positions as springboards for higher office, using the law and order platforms as espoused by such sources as the Nixon administration.<sup>36</sup> The modern approach to prosecution, and political accountability that comes with it, is in contrast to the earlier eras

in American history when prosecutor positions were not particularly sought after — beginning with George Washington having to persuade his first attorney general, Edmund Randolph, to take the half-time post "by dangling the prospect of higher private fees to be earned on the side."<sup>37</sup>

Bazelon has reason for optimism, however. There is a sea change underway, where the shortcomings of the mass incarceration policy of "lock 'em up" has given way to what she considers to be the more effective approach: evidence-based, smart-on-crime sentencing. This movement has rare, surprising bipartisan support that is not viewed through the prism of conservative versus liberal or Democrat versus Republican. Indeed, common ground seems to have been reached by such diverse organizations as the American Civil Liberties Union and the Conservative Political Action Committee and has been funded equally between such diverse financiers as George Soros, long considered a "bogyman to the right," and the Koch Brothers who have been similarly regarded by the left.<sup>38</sup> The First Step Act of 2018, a package of federal sentencing reductions and improvements to prison conditions proposed by the Republican administration of Donald Trump, was passed with overwhelming support of Democrats.<sup>39</sup>

Indeed, prison populations have been declining nationwide<sup>40</sup> and there are a number of individual states, such as Mississippi and South Carolina, that have introduced policies specifically designed to try to lower their prison populations.<sup>41</sup> Bazelon credits a number of prosecutors across the country, including Philadelphia District Attorney Larry Krasner and Kansas City District Attorney Mark Dupree, who, like Gonzalez, have tried to use evidence-based, smart-on-crime approaches rather than solely determining their success rate by the numbers they incarcerate.<sup>42</sup>

To this end, Bazelon offers a comprehensive set of solutions titled, "21 Principles for the 21<sup>st</sup> Century Prosecutors." These principles detail the changes she advocates in the culture and practice of law so that fewer innocent people are convicted and those who are guilty are met with proportionate punishment that may serve to rehabilitate the offender which, in the long run, will make the public safer.<sup>43</sup> Emily Bazelon's work, backed by an almost encyclopedic body of research, inarguably fomented a decidedly passionate line of reasoning that, regardless of one's point of view, should be regarded as a welcome addition in the nation's marketplace of ideas on how best to ensure justice in America.

— Peter Elikann

31. *Id.* at 179-80.

32. *Id.* at 146.

33. *Id.* at 248-49.

34. *Id.* at 278.

35. Bazelon, *supra* note 4, at 32.

36. *Id.* at 80.

37. *Id.* at 79.

38. *Id.* at 87-88.

39. Jamiles Lartey, "Trump Signs Bipartisan Criminal Justice Overhaul First Step Act Into Law," *THE GUARDIAN* (Dec. 21, 2018, 2:12 PM), <https://www.theguardian.com/us-news/2018/dec/21/trump-prison-reform-first-step-act-signed-law>.

40. Mark Berman, "Prison Populations Decline Again, Justice Department Report Shows," *WASH. POST* (Apr. 25, 2019), [https://www.washingtonpost.com/national/prison-and-jail-populations-declined-again-justice-dept-report-shows/2019/04/25/7a678c7a-6779-11e9-8985-4cf30147bdca\\_story.html](https://www.washingtonpost.com/national/prison-and-jail-populations-declined-again-justice-dept-report-shows/2019/04/25/7a678c7a-6779-11e9-8985-4cf30147bdca_story.html).

41. Dennis Schrantz, Stephen DeBor & Marc Mauer, "Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions," *THE SENTENCING PROJECT* (Sept. 5, 2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/>.

42. Bazelon, *supra* note 4, at 147-73.

43. *Id.* at 315-35.

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