

# A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels

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Brian M. Murray\*

*Abstract:* In the past decade, due to heightened interest in criminal law reform, several states have enacted specific laws attempting to expand the range of expungement remedies available to individuals with publicly available criminal records. This article evaluates these efforts. It begins with a discussion of the pervasive availability of arrest and conviction records, both publicly and privately. It then surveys the myriad collateral consequences that enmesh individuals who have made contact with the criminal justice system and details how jurisdictions have responded with somewhat unambitious expungement regimes. It notes that while these remedies were crafted with good intentions, they were often limited by skepticism of the soundness of their legal basis. The article proceeds to evaluate a few legislative efforts at the state level that are geared towards increasing relief, discussing the texts of the laws in depth and comparing them with previously existing remedies. The article also evaluates recent federal legislative efforts and efforts in the federal courts to allow for expungement at the federal level. The piece concludes by situating these recent reforms within a broader discussion about how to alleviate the effects and collateral consequences of criminal records.

## INTRODUCTION

Expungement law seems to sit at the place where good intentions confront legislative realities. Recent expungement law efforts at the state level include attempts at drastic reforms as well as piecemeal tinkering, both of which impliedly recognize the insufficiency of existing relief mechanisms. Some have lauded these efforts,<sup>1</sup> while others consider them an attempt to address complicated problems with outdated tools.<sup>2</sup> It is probably too soon to determine the cumulative long-term effects of such efforts, especially in terms of changing attitudes regarding the availability of criminal records. However, given that expungement is but one piece of overall efforts to comprehensively address the effects of collateral consequences, comparing the

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\* Abraham Freedman Fellow and Lecturer-in-Law, Temple University, Beasley School of Law; J.D. 2011, *magna cum laude*, Notre Dame Law School; B.A. Philosophy and Political Science, *summa cum laude*, Villanova University, 2008. I would like to thank my wife Katherine for her unyielding support, my daughters Elizabeth and Eleanor for their inspiring wonder and curiosity in all things, and my entire family for their unconditional love, continuous patience, and enduring encouragement.

<sup>1</sup> Lesley Weidenbener, *Indiana Gov. Mike Pence Signs Sentencing, Expungement Bills into Law*, EVANSVILLE COURIER & PRESS (May 6, 2013), <http://www.courierpress.com/news/state/indiana-gov-mike-pence-signs-sentencing-expungement-bills-into-law-ep-443184841-327221091.html> [<https://perma.cc/MQ24-TPDE>] (quoting Governor Pence as stating, “Indiana should be the worst place in America to commit a serious crime and the best place, once you’ve done your time, to get a second chance”).

<sup>2</sup> The Editorial Bd., *Job Hunting with a Criminal Record*, N.Y. TIMES (Mar. 19, 2015), [http://www.nytimes.com/2015/03/19/opinion/job-hunting-with-a-criminal-record.html?ref=opinion&\\_r=1](http://www.nytimes.com/2015/03/19/opinion/job-hunting-with-a-criminal-record.html?ref=opinion&_r=1) [<https://perma.cc/WRU9-RELC>].

new expungement regimes with that which they replaced is a worthwhile endeavor.

Expungement is the erasure or elimination of criminal record history information by rendering the information inaccessible, either because it has been destroyed or sealed from the view of certain individuals. Until recently, expungement was restricted, for the most part, to nonconviction information. The available remedies at the state level were the product of judicial decisions tinkering with the meaning of statutes. Some of these remedies were the grandchildren of due process decisions made by state courts after legislatures failed to appreciate shortcomings in how state law addressed individuals with arrest and conviction records.<sup>3</sup> But in the past decade, due to heightened interest in criminal law reform—especially the perceived injustice of certain collateral consequences inhibiting reentry, the effects of mass criminalization,<sup>4</sup> and the technology-driven inability of ex-offenders to move on<sup>5</sup>—several states have enacted specific laws providing for expungement or sealing remedies.<sup>6</sup> While late to the game, even some members of Congress have followed suit, proposing legislation that would allow expungement of federal conviction information under certain circumstances.<sup>7</sup>

This article evaluates the recent flurry of state-level legislation relating to expungement remedies for publicly available criminal record information, including both conviction and arrest records. Such legislation aims to address the reentry difficulties facing ex-offenders with criminal records. Arrest and conviction records implicate a myriad of collateral consequences that enmesh individuals trying to rebuild their lives after contact with the criminal justice system. Those consequences—which touch nearly every aspect of life, from employment to housing to family law—present everyday challenges for the ex-offender. It is the hope that broadening expungement remedies will provide some relief down the road.

The article proceeds in three parts. First, it discusses the widespread availability and effect of criminal record information. Part I surveys how criminal record information is maintained and disseminated, and how the availability of that information can exacerbate the already crushing effect of

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<sup>3</sup> See, e.g., *Commonwealth v. Wexler*, 431 A.2d 877, 880 (Pa. 1981) (citing several lower appellate court decisions in Pennsylvania that recognized right of expungement in certain situations).

<sup>4</sup> Mass criminalization refers to the incredible expansion and enforcement of the criminal code at the state and federal level. For a detailed analysis supplemented with real world anecdotes, see generally HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2011).

<sup>5</sup> Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 Wis. L. REV. 321, 325 (2015).

<sup>6</sup> See generally Ram Subramanian et al., *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009–2014*, VERA INST. FOR JUSTICE (2014), <http://www.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v3.pdf> [https://perma.cc/3VDC-VGZX].

<sup>7</sup> In spring 2015, Senators Rand Paul and Cory Booker sponsored the “REDEEM Act” which would amend the federal criminal code to provide sealing and expungement remedies for nonviolent criminal and juvenile offenses. See S. 675, 114th Cong. (2015).

collateral consequences, especially if individuals or entities, including employers, use that information inappropriately. Part II provides a brief history of expungement remedies at the state level and discusses recent statutory reforms in a few states. Part III situates these efforts within a broader discussion about mitigating the effects of criminal records and the practical realities of expungement law's efficacy. The article concludes by noting that expungement remedies are only one piece of a larger puzzle related to alleviating the negative effects of criminal records on full reentry.

## I: THE EXISTENCE AND EFFECT OF CRIMINAL RECORD HISTORY INFORMATION

It is estimated that between twenty-five and thirty-five percent of the adult population of the United States has a criminal record.<sup>8</sup> As Jenny Roberts has noted elsewhere, while mass incarceration gets the most press, mass criminalization is probably a more serious problem given the effect of a criminal record following contact with the criminal justice system, even if only once.<sup>9</sup> Given this reality, expungement should be a priority.

The numbers are staggering. The FBI adds over ten thousand names to its database each day.<sup>10</sup> Roughly one-third of adults have been arrested by age twenty-three. Collectively, law enforcement agencies are approaching two hundred and fifty million arrests, resulting in close to eighty million individuals in the FBI criminal database.<sup>11</sup> The FBI retains this information

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<sup>8</sup> See, e.g., Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, THE NAT'L EMP'T LAW PROJECT 1 (2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf) [<https://perma.cc/P229-BHXA>] (noting that over twenty-five percent of the adult population has a criminal record); Jo Craven McGinty, *How Many Americans Have a Police Record? Probably More Than You Think*, WALL ST. J. (Aug. 7, 2015), <http://www.wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802> [<https://perma.cc/T5EH-2QMW>]; Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> [<https://perma.cc/MN4U-F2EY>] (stating that "America has a rap sheet").

<sup>9</sup> Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090–94 (2013); see also Roberts, *supra* note 5, at 325 ("The problem is thus better characterized as one of mass criminalization.").

Interaction with the criminal justice system can become a vicious, dysfunctional cycle. James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 388 (2006) ("The longer and more serious the defendant's criminal record, the more severely the defendant will be treated at every stage of the criminal justice process."). Professor Jacobs notes that the police are more likely to investigate individuals with rap sheets and prosecutors are more likely to seek pre-trial detention for individuals with records. *Id.* at 388–89.

<sup>10</sup> Fields & Emshwiller, *supra* note 8.

<sup>11</sup> *Id.*

to classify defendants,<sup>12</sup> despite the fact that many arrests never even lead to convictions due to volume pressures on prosecutors, uncooperative witnesses, or insufficient evidence. And this information is not just in FBI databases. Due largely to the conversion to electronic formats of criminal record information that once resided in boxes on shelves<sup>13</sup> and an under-regulated criminal background check market that exists on the Internet, the days of chasing a criminal record on paper are over.<sup>14</sup> Executive branch agencies, courts, administrative offices related to the justice system, and commercial databases all contain this information.<sup>15</sup>

Nearly every state has publicly available criminal record history information in electronic format, funded by the state and federal government.<sup>16</sup> Many of those state agencies willingly sell the information to private vendors<sup>17</sup> and are required or authorized to disseminate the information to other government agencies.<sup>18</sup> This information includes “rap sheets,” which chronicle all of the criminal justice system’s actions related to an individual defendant.<sup>19</sup> These sheets begin at the booking and arrest phase and usually proceed to a state records electronic repository that tracks future progress in

<sup>12</sup> Jacobs, *supra* note 9, at 388 (“Criminal justice personnel are strongly motivated to collect criminal history information, understandably, aiming to classify defendants into categories like ‘dangerous,’ ‘recidivist,’ ‘persistent offender,’ and ‘sexual predator.’”).

<sup>13</sup> See *id.* at 401–02 (explaining how states followed federal legislation that required agencies and courts to make records available electronically); Roberts, *supra* note 5, at 328 (“Just 15 or 20 years ago, an employer, landlord, or neighbor who wanted to know about someone’s criminal record had to go to the local courthouse to view the physical file (and different courthouses if there were files in other jurisdictions.)”); *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information*, THE NAT’L CONSORTIUM FOR JUSTICE INFO. & STATISTICS 46 (2005), <http://www.search.org/files/pdf/RNTFCSCJRI.pdf> [<https://perma.cc/6DK5-B54R>].

<sup>14</sup> See Jacobs, *supra* note 9, at 388 (listing a few private companies in the business of furnishing criminal record history information); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 186 (2008) (“An internet search for ‘criminal records’ yields dozens of companies offering, for a modest fee, to carry out criminal background checks for employment, housing, and other purposes. These companies are somewhat regulated by the federal Fair Credit Reporting Act (FCRA).”).

<sup>15</sup> Jacobs & Crepet, *supra* note 14, at 179.

<sup>16</sup> William Rafferty, *Privacy/Public Access to Court Records: State Links*, NAT’L CTR. FOR STATE CTS., <http://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-links.aspx> [<https://perma.cc/W7YF-NQRX>]; *Justice Statistics Improvement Programs*, BUREAU OF JUSTICE STATISTICS, OFF. OF JUSTICE PROGRAMS, <http://www.bjs.gov/content/jrip.cfm> [<https://perma.cc/R5RJ-EWF6>]. The Brady Handgun Violence Prevention Act increased federal funding for state record keeping. 18 U.S.C. § 921 (2012).

<sup>17</sup> Jacobs, *supra* note 9, at 401 (“Some private information brokers obtain court records *en masse*. Credit bureaus have always obtained information on individual criminal history from court records.”); see also Jacobs & Crepet, *supra* note 14, 180–81 (offering a brief history of federal involvement in state record keeping efforts). Jacobs and Crepet also catalog how commercial vendors purchase this information, in bulk, from state record repositories. *Id.* at 185–87.

<sup>18</sup> Jacobs, *supra* note 9, at 395.

<sup>19</sup> *Id.* at 400 (noting how court records, mostly electronic and publicly available, contain indictment information, trial transcripts, and other court documents).

particular cases.<sup>20</sup> However, many of these records are not easily understood by the average member of the public (or interested party) who is not well-versed in the various phases of criminal litigation. Worse, they may even contain information that does not present the full picture.<sup>21</sup>

While criminal record history information is unquestionably available,<sup>22</sup> that would not matter, and expungement reforms would not be considered, if the information did not have a negative effect on reentry for the incarcerated or on returning to life as normal for someone who was arrested but not convicted. But having even a minor criminal history now carries lifelong barriers that can block successful reentry and participation in society.<sup>23</sup> This is largely because of the range of collateral consequences that inhibit full reentry and because regulations and statutes, like the Fair Credit Reporting Act (FCRA), allow consumer reporting agencies to share arrest and conviction information.<sup>24</sup> Having a criminal record, whether it consists of a conviction or an arrest, can affect an individual's ability to find employment<sup>25</sup> and housing,<sup>26</sup> obtain public assistance or enroll in educational programs, and maintain custody or other domestic rights.<sup>27</sup>

Employment barriers are perhaps the most damaging. As mentioned elsewhere,<sup>28</sup> states have statutes barring the hiring of—and regulations prohibiting licensing of—those with criminal convictions for certain positions.<sup>29</sup> The loss of public benefits and privileges is also common, including

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<sup>20</sup> *Id.* at 392–93 (detailing how state databases acquire and keep information).

<sup>21</sup> *See, e.g.*, Fields & Emshwiller, *supra* note 8 (giving examples of the lingering impact of arrest records, even when charges were ultimately dropped). *But see* Jacobs, *supra* note 9, at 400 (“[O]f course, these instruments confirm that a particular individual has faced or is facing particular criminal charges, which may be all the information that the requester wants to know and all that is necessary to negatively impact the individual’s current and future opportunities.”).

<sup>22</sup> *See generally* Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records Over the Internet*, 79 WASH. L. REV. 175 (2004).

<sup>23</sup> Rebecca Vallas & Sharon Dietrich, *One Strike and You’re Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, CTR. FOR AM. PROGRESS 1 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf> [<https://perma.cc/VW69-Y37T>].

<sup>24</sup> 15 U.S.C. § 1681(c) (2012).

<sup>25</sup> Jacobs, *supra* note 9, at 389–90 (“Just as a good education and strong employment record have always been a [sic] great advantages in obtaining employment, a criminal record has always been a disadvantage in obtaining employment.”).

<sup>26</sup> *Id.* at 395 (“[M]any landlords want confirmation that they are not renting to a dangerous or disreputable person.”).

<sup>27</sup> *See* Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25 CRIM. JUST. 22, 28 (2010) (“Based on conviction of a serious crime, a person loses civil rights, including political, property, and family rights, temporarily or permanently.”).

<sup>28</sup> *See generally* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 287 nn.40–45 (2011); Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1150 (2015).

<sup>29</sup> *See, e.g.*, 35 PA. STAT. AND CONS. STAT. ANN. § 10225.503(a) (West, Westlaw through 2016 Reg. Sess. Act 4). Under the statute, workers in nursing homes, home health care agen-

ineligibility for unemployment benefits<sup>30</sup> and disqualification from welfare, cash assistance, and medical benefits.<sup>31</sup> When one considers the combined effects of barriers to economic mobility, including the lack of employment opportunity, it is obvious why many ex-offenders struggle to fully return to their communities. And these consequences are not going anywhere anytime soon; legislatively mandated collateral consequences are the product of years of political will despite mainstream efforts to question their legitimacy.<sup>32</sup> Whereas legislatures have shown some willingness to broaden the available expungement remedies for certain types of criminal history information, such action comes after decades of expanding the range of adverse consequences resulting from a conviction.

Most importantly, despite being designed to affect individuals with convictions generally considered too serious for expungement, these consequences apply, or are sometimes mistakenly applied, to individuals with only arrests or minor convictions. Many former defendants with only arrest records face barriers to employment due to the appearance of the arrest on a background check conducted by an employer. While many states possess laws restricting discrimination on the basis of a criminal record to relevant convictions, these laws are remarkably under-enforced.<sup>33</sup> As a result, some

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cies, and other long-term care facilities, even if not having direct contact with patients, cannot have any theft convictions at any time. *See id.* (defining “FACILITY” as including the following: “[a] domiciliary care home[,] . . . [a] home health care agency[,] . . . [a] long-term care nursing facility[,] . . . [a]n older adult daily living center[,] . . . [a] personal care home . . .”). This law was struck down as a violation of the Pennsylvania Constitution in *Nixon v. Commonwealth*, 839 A.2d 277, 279 (Pa. 2003). At this time, however, the law has not been amended and enforcement remains subject to the priorities of state agencies. 35 PA. STAT. AND CONS. STAT. ANN. § 10225.503(a) (West, Westlaw through 2016 Reg. Sess. Act 4); *see Legal Remedies and Limitations on the Employment of People with Criminal Records in Pennsylvania*, CMTY. LEGAL SERV., INC. 6–10 (updated Aug. 2015), [http://www.realcostofprisons.org/materials/PA\\_employment\\_of\\_people\\_with\\_criminal\\_records.pdf](http://www.realcostofprisons.org/materials/PA_employment_of_people_with_criminal_records.pdf) [<https://perma.cc/F796-6KBB>] (noting that individuals with certain types of convictions cannot seek employment as airport, bank, or insurance company employees, in long-term care facilities, in certain security positions, and at schools, even for custodial positions).

<sup>30</sup> *See, e.g.*, 43 PA. STAT. AND CONS. STAT. ANN. §§ 802(g), 871(b) (West, Westlaw through 2016 Reg. Sess. Act 4).

<sup>31</sup> 21 U.S.C. § 862a(A) (2012); *see* 55 PA. CODE § 141.21(t) (West, Westlaw through Pa. Bull., Vol. 46, Num. 8, dated Feb. 20, 2016).

<sup>32</sup> *See* Brian M. Murray, *Prosecutorial Responsibility and Collateral Consequences*, 12 STAN. J. CIV. R. & CIV. L. (forthcoming 2016) (manuscript at 15 n.75) (on file with author) (“There was a time when the majority of commentators thought that collateral consequences were a thing of the past. This sentiment reached its high-water mark in 1983, when the ABA Criminal Justice Standards on the Legal Status of Prisoners announced that the ‘era of collateral consequences was drawing to a close.’”); Chin & Love, *supra* note 27, at 31. Specifically, the comment to Standard 23-8.2 announced: “[a]s the number of disabilities diminishes and their imposition becomes more rationally based and restricted in coverage, the need for expungement and nullification statutes decreases.” AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS ON THE LEGAL STATUS OF PRISONERS, Standard 23-8.2 (1983); *see also* Chin & Love, *supra* note 27, at 30–32 (discussing the roller coaster ride with respect to heightened and diminished collateral consequences from the 1950s to the 2000s).

<sup>33</sup> *See, e.g.*, 18 PA. STAT. AND CONS. STAT. ANN. § 9125 (West, Westlaw through 2016 Reg. Sess. Act 4). *See* notes of decisions on Westlaw for the very little published litigation under this statute.

municipalities have adopted ban-the-box ordinances, which prevent employers from asking about arrest or conviction information until later in the hiring process.<sup>34</sup> But these mitigation remedies, while sometimes useful in reducing the stigma associated with criminal records and creating pathways to employment, do not help ex-offenders come out fully from behind the shadows of their past.

## II: EXPUNGEMENT LAW REMEDIES: HISTORY AND RECENT ACTIVITY AT THE STATE AND FEDERAL LEVEL

Traditionally, states have restricted expungement remedies to nonconviction information—which, for most petitioners, meant arrest information—and occasionally to low-grade criminal convictions.<sup>35</sup> Many states allowed for the expungement of this information via an authorizing statute,<sup>36</sup> common law judicial authority,<sup>37</sup> or some combination of both.<sup>38</sup>

In hindsight, these remedies were not terribly ambitious, although approaches varied with respect to timelines and the scope of the expungement. Some states adhered to near-automatic deletion of arrest records that did not progress to the trial phase.<sup>39</sup> The vast majority of jurisdictions authorized expungement of non-conviction information in the event of a favorable dis-

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<sup>34</sup> Michelle Natividad Rodriguez & Beth Avery, *Ban the Box: U.S. Cities, States, and Counties Adopt Fair Hiring Policies to Advance Employment Opportunities for People with Past Convictions*, NAT'L EMP'T LAW PROJECT 1 (2016), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> [<https://perma.cc/WQ4R-BEDQ>].

<sup>35</sup> See, e.g., IND. CODE § 35-38-5-1(a) (repealed 2014); Joseph C. Dugan, *I Did My Time: The Transformation of Indiana's Expungement Law*, 90 IND. L.J. 1321, 1335 (2015) (noting "individuals could petition for expungement if they were arrested and released without charge or if the charges filed against them were dropped due to mistaken identity, no offense in fact, or absence of probable cause"); see also MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 113–24 (2006) (chart noting which states did not allow for expungement of conviction as well as what states generally allowed). For example, as of 2006, Wisconsin only allowed expungement of misdemeanor convictions if they had occurred before age twenty-one. *Id.* at 124.

<sup>36</sup> See, e.g., ARK. CODE ANN. § 16-93-1207(b)(1) (West, Westlaw through 2015 Reg. Sess. and 2015 1st Ex. Sess. of the 90th Ark. Gen. Assemb., including changes made by the Ark. Code Rev. Comm. received through Nov. 1, 2015); ARK. CODE ANN. § 16-90-901-05 (repealed 2014).

<sup>37</sup> See Kristin K. Henson, *Can You Make This Go Away: Alabama's Inconsistent Approach to Expunging Criminal Records*, 35 CUMB. L. REV. 385, 387 (2005) (discussing common law authority exercised by municipal courts). As of July 6, 2014, Alabama maintains a statute authorizing expungement in limited circumstances. ALA. CODE § 15-27-2(a)(5) (West, Westlaw through Act 2016-18 of the 2016 Reg. Sess.).

<sup>38</sup> For example, Pennsylvania maintains an expungement statute that has been interpreted for decades by the Pennsylvania appellate courts. The statute was inspired by judicial decisions outlining the theory behind expungement and even holding that expungement of arrest information was protected by the state constitution. See, e.g., *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Pa. 1981). The regime in Minnesota was similar. See *State v. S.L.H.*, 755 N.W.2d 271, 274 (Minn. 2008).

<sup>39</sup> See, e.g., MD. CODE ANN., CRIM. PROC., § 10-105(a)(5) (West, Westlaw through Ch. 1 to 6 of the 2016 Reg. Sess. of the Gen. Assemb.) (allowing automatic expungement of non-conviction records).

position to the accused, such as an acquittal<sup>40</sup> or dismissal of the charges,<sup>41</sup> but there were no guarantees that expungement requests would be granted.<sup>42</sup> Expungement of serious conviction information was usually out of the question.<sup>43</sup>

Typical expungement regimes were not unlike those in Pennsylvania or Minnesota,<sup>44</sup> namely a combination of statutory requirements and judicial discretion.<sup>45</sup> Statutes tended to confirm that nonconviction information was eligible for expungement and outline the procedures by which expungement could occur.<sup>46</sup> Trial courts might be tasked with balancing state and private interests when determining whether expungement was appropriate.<sup>47</sup> Ample judicial discretion existed under these frameworks, and receiving an expungement hinged on convincing the court that the petitioner was worthy (due to rehabilitation) and in need (due to life circumstances) of an erased record.<sup>48</sup> The burden rested squarely on the petitioner, as record keeping was considered presumptively useful.<sup>49</sup>

As such, expungement remedies have historically been quite limited. The ability to expunge arrest information in non-conviction situations and lower-level convictions could only do so much for the average ex-offender.<sup>50</sup>

<sup>40</sup> See, e.g., *Commonwealth v. D.M.*, 695 A.2d 770, 773 (Pa. 1997) (granting automatic expungement of charges resulting in acquittal).

<sup>41</sup> See, e.g., CONN. GEN. STAT. § 54-142(a) (repealed 1976) (providing authority for “erasure” of dismissed, nulled, or acquittal charges).

<sup>42</sup> See LOVE, *supra* note 35 (noting such regimes in Arkansas, California, Colorado, Delaware, Washington, D.C., Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Washington).

<sup>43</sup> See Dugan, *supra* note 35, at 1335; see also LOVE, *supra* note 35, at 113–24 (indicating that few states allowed for expungement of serious conviction information as of 2006, with only Massachusetts, Nevada, Puerto Rico, Utah, and Washington going beyond low-level misdemeanors).

<sup>44</sup> See generally Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota*—*State v. Schultz*, 31 WM. MITCHELL L. REV. 1331, 1344 (2005) (describing the history of expungement law in Minnesota).

<sup>45</sup> See *id.* at 1345 (discussing history of common law expungement in Minnesota). In 1977, the Minnesota Supreme Court acknowledged that expungement was an equitable remedy under the state constitution. In *re R.L.F.*, 256 N.W.2d 803, 807–08 (Minn. 1977). Four years later, it legitimized trial court expungement. *State v. C.A.*, 304 N.W.2d 353, 357 (Minn. 1981).

<sup>46</sup> See, e.g., MINN. STAT. ANN. § 13.01, subd. 3 (West, Westlaw through the end of the 2015 1st Spec. Sess.).

<sup>47</sup> See, e.g., *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Pa. 1981).

<sup>48</sup> See Dugan, *supra* note 35, at 1335 (“Case law confirms the harsh and sometimes arbitrary limitations imposed by the original expungement statute. . . . [For example,] the petitioner sought to expunge his arrest record after he was acquitted of a Class A misdemeanor charge for public indecency. . . . [He] did not qualify for expungement because the state did not drop all charges against him.” *Id.* (footnote omitted)).

<sup>49</sup> See Geffen & Letze, *supra* note 44, at 1344 (noting how statutory procedures in Minnesota were “intentionally created to be somewhat cumbersome to help protect the presumption that criminal records remain publicly available”).

<sup>50</sup> Of course, plenty of entities use arrest records to the disadvantage of the formerly accused. See *id.* at 1348 (“Shocking, arrest-only records are routinely used to deny individuals housing and employment.”).



In short, approaches to expungement did not go a long way towards alleviating the effect of the full range of collateral consequences.

But over the last decade there has been a flurry of activity regarding expungement and criminal record reform at the state level.<sup>51</sup> Between 2009 and 2014, over sixty percent of states attempted to broaden their expungement laws.<sup>52</sup> These changes involve various intersecting objectives: extending eligibility for expungement,<sup>53</sup> including by shortening waiting periods;<sup>54</sup> clarifying the legal effect of an expungement,<sup>55</sup> including in statements made by ex-offenders and with respect to the restoration of rights;<sup>56</sup> authorizing private remedies; and modifying the burden of proof for petitioners seeking expungement.<sup>57</sup> Most significantly, many of these statutes have authorized expungement of conviction information.<sup>58</sup> While some laud these efforts, others consider them far too conservative.

### A. Case Studies of State Statutes

Recent reforms at the state level are sometimes divided into two camps that capture the broad objectives of the particular law: (1) “forgetting” statutes, which aim to expunge or seal various forms of criminal records; and (2) “forgiving” statutes, which are focused less on expungement and more on how to alleviate the effect of a criminal record. Although “forgiving” statutes, which have given rise to certificates of rehabilitation and relief granted by courts following the completion of sentences, are promising measures,<sup>59</sup> this section will devote most of its space to cataloging new developments in the formal expungement area. Specifically, it surveys the varying

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<sup>51</sup> Subramanian et al., *supra* note 6, at 12 (map showing where reforms related to expungement, collateral consequences, certificates of recovery, and access to information have occurred).

<sup>52</sup> *Id.* at 13.

<sup>53</sup> *Id.* (“At least 23 states and the District of Columbia have enacted 37 laws that increase the scope of expungement and sealing remedies. Some accomplished this by extending these remedies to those with prior convictions (as distinct from first-time offenders) or who received certain types of sentences.”).

<sup>54</sup> *Id.* at 14 (“Many states have recognized that overly long waiting periods place a burden on those simply trying to move on with their lives.”).

<sup>55</sup> *Id.* at 15 (explaining that “[e]ven when a state has an expungement or sealing remedy in place, its legal effect can remain unclear or ambiguous to individuals with criminal histories”). As stated in the report, between 2009 and 2014, eight states clarified the effects of expungement. *Id.*

<sup>56</sup> *Id.* at 15–16.

<sup>57</sup> *See id.* at 17 (noting how some states have removed judicial discretion from the process and instead automatically provide for expungement if the petitioner meets certain criteria).

<sup>58</sup> Since 2011, the following states have made some changes to their expungement law to allow for expungement of conviction information: California, Colorado, Idaho (certain sex offenders), Indiana, Louisiana, Maryland, Massachusetts (lowered waiting periods), Minnesota, North Dakota (change grading), Ohio, Tennessee, Utah (lowered waiting period), Vermont, and Wyoming. *Jurisdiction Profiles*, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, <https://www.nacdl.org/ResourceCenter.aspx?id=25091> [<https://perma.cc/HKS4-SZA2>].

<sup>59</sup> *See, e.g.*, CAL. PENAL CODE § 4852.01 (West, Westlaw through Ch. 1 of 2016 Reg. Sess. and Ch. 1 of 2015–2016 2nd Ex. Sess.).

degrees of legislative action in four states, which resemble the spectrum of expungement reforms during the past decade: Maryland, Louisiana, Minnesota, and Indiana.

Maryland and Louisiana recently enacted expungement reforms aimed at increasing the type of information that is eligible for expungement. Maryland's Second Chance Act of 2015,<sup>60</sup> which became effective on October 1, 2015, is the classic case of good intentions accompanied by piecemeal reform that was the product of significant political compromise. Generally, the law allows those who are eligible for expungement to "shield" or "seal" certain misdemeanor conviction records.<sup>61</sup> This is groundbreaking in Maryland; the Second Chance Act is the first limitation on public access to conviction records ever enacted by the state.

Under the statute, only certain nonviolent misdemeanor offenses are eligible for shielding.<sup>62</sup> Although the list is small, it does include the possession of controlled substances, including *all* illegal drugs.<sup>63</sup> But access to the courts is limited; petitioners may only seek expungement *once a lifetime*, and only for multiple convictions at the same time in one petition if those convictions occurred in the same county.<sup>64</sup> And they may only petition after a three-year waiting period following completion of the last sentence.<sup>65</sup> However, if a petitioner makes it through those hurdles, thereby demonstrating eligibility, the court does not have discretion to deny the petition.<sup>66</sup>

The practical effect of the statute is difficult to ascertain: a "shielded" record may not be accessed by the public but the information is not formally expunged in the sense that it disappears from databases. The law also does not affirmatively prevent private reporting agencies from disclosing *shielded convictions*, which, in the information age, could be catastrophic. But authorities cannot use the information to object to the expungement of non-conviction information.<sup>67</sup>

Perhaps most importantly in terms of reentry, employers can request disclosure of a shielded conviction if authorized by law to do so,<sup>68</sup> which might be the exception that swallows the rule, undermining the good intentions behind the law. This provision, which enables employers to circumvent

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<sup>60</sup> Maryland Second Chance Act of 2015, MD. CODE ANN., CRIM. PROC. §§ 10-301–10-306 (West, Westlaw through Ch. 1 to 6 of the 2016 Reg. Sess. of the Gen. Assemb.).

<sup>61</sup> *Id.* § 10-301. Different jurisdictions use different language to describe restricting access to criminal record history information. "Expungement" often refers to elimination or erasing of the record. In contrast, "sealing" or "shielding" restricts access. Some "expunged" information may be retained for the same purposes that "sealed" or "shielded" information remains accessible to certain parties. The difference *in effect* based on the terminology used is jurisdiction and statute specific.

<sup>62</sup> *See id.* § 10-301(f)(1)–(12) (listing "shieldable convictions," including but not limited to disorderly conduct, possession of a controlled substance or drug paraphernalia, and driving without a license).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* § 10-303(E)(4).

<sup>65</sup> *Id.* § 10-303(A).

<sup>66</sup> *Id.* § 10-303(E)(2).

<sup>67</sup> *Id.* § 10-305.

<sup>68</sup> *Id.* § 10-302(B)(2).

the law, and the absence of any anti-discrimination or restoration of rights provisions, will likely render it ineffective at reducing barriers to employment.<sup>69</sup>

Louisiana is another state with a statute that resembles good intentions confronting realities within the criminal justice system.<sup>70</sup> Louisiana's statute extends existing remedies for misdemeanors and nonconviction records to some nonviolent felonies, including Possession with Intent to Deliver drug convictions.<sup>71</sup> Like Maryland's statute, the Louisiana statute limits judicial discretion: expungement is automatic if the eligibility requirements are met.

The major drawback of the law is the waiting period before someone can petition for relief: five years for misdemeanors and ten years for felonies.<sup>72</sup> Comparatively, that period is incredibly long. In practice, it might severely undermine the efficacy of the law given that even one arrest that does not result in a conviction restarts the clock.<sup>73</sup>

With respect to collateral consequences, Louisiana's efforts resemble those in Maryland: restoration of rights is generally not part of the legislative package. However, the law does prohibit state entities from disclosing expunged records to the general public<sup>74</sup> and relieves the individual from any obligation to disclose prior convictions that have been expunged.<sup>75</sup> But, like Maryland's disclosure rules, which have very little teeth, Louisiana's law allows disclosure to licensing boards, effectively mitigating the advantage gained from the individual's freedom not to disclose.<sup>76</sup> Further, the law does not contain detailed provisions regulating how private entities may or may not use expunged or sealed records. Instead, third parties are only restricted from disseminating expunged information if the recipient of the expungement notifies the provider of the expungement, *even if the provider knows of*

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<sup>69</sup> See Joshua Gaines, *New Maryland Law Allows "Shielding" of Some Misdemeanor Convictions*, COLLATERAL CONSEQUENCES RES. CTR. (May 28, 2015), <http://ccresourcecenter.org/2015/05/28/new-maryland-law-allows-shielding-of-some-misdemeanors-convictions/> [https://perma.cc/HV2K-46XX].

<sup>70</sup> LA. CODE CRIM. PROC. ANN. art. 971(4) (West, Westlaw through 2015 Reg. Sess.) ("The inability to obtain an expungement can prevent certain individuals from obtaining gainful employment."); see also *id.* at art. 971(6) ("It is the intention of the legislature that this Title will provide opportunities to break the cycle of criminal recidivism, increase public safety, and assist the growing population of criminal offenders reentering the community to establish a self-sustaining life through opportunities in employment.").

<sup>71</sup> *Id.* at art. 977; see also *id.* at art. 978 (certain misdemeanor and felony convictions eligible for expungement).

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

<sup>73</sup> *Id.* at art. 978(A)(2).

<sup>74</sup> *Id.* at art. 974(A) ("A private third-party entity, excluding a news-gathering organization, that compiles and disseminates criminal history information for compensation shall not disseminate any information in its possession regarding an arrest, conviction, or other disposition after it has received notice of an issuance of a court order to expunge the record of any such arrest or conviction.").

<sup>75</sup> *Id.* at art. 973(C) ("[N]o person whose record of arrest or conviction has been expunged shall be required to disclose to any person that he was arrested or convicted of the subject offense, or that the record of the arrest or conviction has been expunged.").

<sup>76</sup> *Id.* at art. 973(A-B) (allowing for disclosure, upon request, to entities such as the Board of Nursing and other licensing agencies).

*the expungement itself*, presumably through acquiring the data itself, or from another provider.<sup>77</sup> Like Maryland's law, Louisiana's experiment, while noble, is not likely to result in a sea change.

Other states have been more ambitious in their legislative efforts. Indiana has perhaps the most progressive of the "forgetting" statutes. Indiana's law empowers courts to expunge most criminal records, including convictions,<sup>78</sup> after waiting periods that are tied to the seriousness of the offense.<sup>79</sup> In other words, there is no blanket waiting period and the law attempts to link eligibility to prior blameworthiness,<sup>80</sup> because in theory more serious offenses are less deserving of prompt expungements.

All convictions—except those related to serious violence, corruption, or sexual offenses—are eventually eligible for expungement following variable waiting periods. Indiana paid special attention to the actual records being expunged, correlating the availability of and access to expunged records to the seriousness of the offense; expungement of conviction information, except for the most serious offenses, prevents access to records unless a court order exists.<sup>81</sup> Serious convictions remain visible to the public but are clearly marked as expunged.<sup>82</sup> Multiple convictions can be expunged at the same time, although the waiting periods for each conviction must coincide.

In perhaps the most useful provisions, the law categorically defines the refusal of employment or a license on the basis of an expunged conviction or arrest as unlawful discrimination,<sup>83</sup> prevents employers from asking about expunged convictions,<sup>84</sup> and "makes clear that a person's civil rights are restored after expungement, including the rights to vote, hold public office, serve as a juror, and own a firearm."<sup>85</sup> Interestingly, the law also prohibits prosecutors from requiring defendants to bargain away their expungement rights during plea negotiations.<sup>86</sup> The breadth of the provisions in Indiana's law is unparalleled.

Minnesota's recently passed statute occupies the middle ground between the conservative approaches in Maryland and Louisiana and the progressive approach in Indiana. Crafted in response to judicial decisions eroding judicially created expungement remedies, Minnesota's law autho-

<sup>77</sup> *Id.* at art. 974.

<sup>78</sup> IND. CODE ANN. § 35-38-9-2(d) (West, Westlaw through the 2016 2d Reg. Sess. of the 119th Gen. Assemb.).

<sup>79</sup> *Id.* § 35-38-9-2(b); *see also id.* § 35-38-9-2(d)(4).

<sup>80</sup> *See* Subramanian et al., *supra* note 6, at 15 (explaining Indiana's waiting period provisions); *see also* Dugan, *supra* note 35, at 1339 nn.122–28 (describing the waiting period provisions related to mandatory and discretionary expungement of convictions).

<sup>81</sup> IND. CODE ANN. § 35-38-9-6(a)(1) (West, Westlaw through the 2016 2d Reg. Sess. of the 119th Gen. Assemb.); *see also* Dugan, *supra* note 35, at 1341–42, nn.129–37.

<sup>82</sup> IND. CODE ANN. § 35-38-9-7(b) (West, Westlaw through the 2016 2d Reg. Sess. of the 119th Gen. Assemb.).

<sup>83</sup> *Id.* § 35-38-9-10(b) (disallowing suspension, expulsion, refusal to hire, admit, or license, and any other discrimination on the basis of expunged records).

<sup>84</sup> *Id.* § 35-38-9-10(d).

<sup>85</sup> Subramanian et al., *supra* note 6, at 16.

<sup>86</sup> IND. CODE ANN. § 35-38-9-11 (West, Westlaw through the 2016 2d Reg. Sess. of the 119th Gen. Assemb.).

rizes expungement and sealing of certain records, including those that reside in executive agencies. Individuals eligible for expungement include those who have completed diversionary programs, as well as those who have been convicted of petty, regular, and gross misdemeanors, or low-level, nonviolent felonies.<sup>87</sup> The length of the waiting period before petitioning is, in theory, linked to the grade of the offense.<sup>88</sup>

But Minnesota's law, unlike some of the others, does not provide for automatic expungement upon eligibility. Instead, the law tasks courts with balancing the public interests related to the private interests of a particular petitioner.<sup>89</sup> Those considerations resemble the judicially-crafted regime that preceded the statute. The petitioner must demonstrate, with clear and convincing evidence, a benefit that is at least equal to the possible disadvantages to the public, law enforcement, and courts should the information disappear.<sup>90</sup> Other states have opted to dispense with this heightened standard, lowering it to a "preponderance of the evidence" standard.<sup>91</sup> Thus, ample judicial discretion remains, and it is difficult to determine the practical import of the law at this time. The law does require data companies to observe expungements by updating their records.<sup>92</sup>

### B. Federal Legislative Efforts

Although it is impossible to fully credit state-level reforms with inspiring action at the federal level, Congress may be moving in the same direction, with the federal judiciary chiming in as well. In spring 2015, bipartisan partners Senators Cory Booker and Rand Paul sponsored the REDEEM Act, which presented comprehensive expungement reform at the federal level.<sup>93</sup> According to the Congressional Research Service, the bill would allow for the expungement or sealing of records "relating to nonviolent criminal or juvenile offenses."<sup>94</sup> Although the bill is not law, a few observations bear mentioning. First, the bill allows for the expungement of *serious conviction information*, which, until recently, was not typical at the state level.<sup>95</sup> This is an important recognition that expungement remedies restricted to nonconviction and low-grade conviction information did not do enough. Second, the bill contains provisions aimed at enforcing expungement. The bill has

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<sup>87</sup> See generally MINN. STAT. ANN. § 609A.02 (West, Westlaw through the end of the 2015 1st Spec. Sess. (2015)).

<sup>88</sup> *Id.* § 609A.02(3)(a)(3).

<sup>89</sup> See *id.* § 609A.03(5)(a)(1)–(12).

<sup>90</sup> *Id.*

<sup>91</sup> Subramanian et al., *supra* note 6, at 17 (noting that Arkansas and Indiana have lowered the burden of proof).

<sup>92</sup> MINN. STAT. ANN. § 609A.01 (West, Westlaw through the end of the 2015 1st Spec. Sess. (2015)).

<sup>93</sup> REDEEM Act, S. 675, 114th Cong. (2015).

<sup>94</sup> Cong. Research Serv., *Summaries for the Record Expungement Designed to Enhance Employment Act of 2015*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/114/s675/summary> [<https://perma.cc/6XQ6-YTF6>].

<sup>95</sup> S. 675 § 2.

teeth in this regard: it prevents access to a sealed record without a court order, requires courts to send copies of the sealing order to agencies with the record, criminalizes breaking a sealed record, and requires a sealed record to be treated “as if it never occurred.”<sup>96</sup>

The bill also addresses the substantial challenges presented by the collateral consequences of a criminal record. In addition to expungement remedies, the bill would remove certain offenses related to controlled substances from the list of offenses that render an individual ineligible for Temporary Assistance for Needy Families (TANF) relief under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and food stamps under the Food and Nutrition Act of 2008.<sup>97</sup> As such, the REDEEM Act contains expungement and collateral consequences reforms. With that said, it does not restore any rights in particular and does not address discrimination on the basis of a conviction or arrest record.

With respect to expungement eligibility, the devil is in the details. Much of the confusion over the phrase “nonviolent crime” in other statutory contexts is present in this Act as well. The problem is that the bill does not clarify how its language relates to the federal code’s definition of “crime of violence” in 18 U.S.C. § 16, a provision that is repeatedly litigated. The bill also does not clarify how it classifies non-federal violent crimes.

In terms of procedure, the REDEEM Act would import a balancing test that resembles what has existed at the state level in variety of jurisdictions. Specifically, the bill would require courts to balance the governmental interest in public knowledge and safety, as well as the maintenance of accurate records related to licensure, permits, and employment, against the petitioner’s rehabilitation and interest in having the information sealed in order to secure and maintain employment.<sup>98</sup> Interestingly, courts would not be allowed to consider non-federal, nonviolent offenses when making decisions whether to expunge records.<sup>99</sup>

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<sup>96</sup> *Id.* § 2(a).

<sup>97</sup> *Id.* § 5.

<sup>98</sup> *Id.* § 3(d)(1) (“Basis for decision. The court shall determine whether to grant an expungement petition after considering—(i) the petition and any documents in the possession of the court; (ii) all the evidence and testimony presented at the expungement hearing, if such a hearing is conducted; (iii) the best interests of the petitioner; (iv) the age of the petitioner during his or her contact with the court or any law enforcement agency; (v) the nature of the juvenile nonviolent offense; (vi) the disposition of the case; (vii) the manner in which the petitioner participated in any court-ordered rehabilitative programming or supervised services; (viii) the length of the time period during which the petitioner has been without contact with any court or any law enforcement agency; (ix) whether the petitioner has had any criminal or juvenile delinquency involvement since the disposition of the juvenile delinquency proceeding; and (x) the adverse consequences the petitioner may suffer if the petition is not granted.”).

<sup>99</sup> This sounds like a minor provision, but it could be crucial for low-level drug offenders who may have played minor roles in federal drug conspiracies.

*C. Federal Judicial Activity*

In addition to the REDEEM Act's proposals that resemble some state-level legislative reforms, perhaps the most interesting federal activity at this moment is occurring in the courts. Last year marked the first time a federal district court claimed inherent authority to expunge a federal criminal conviction.<sup>100</sup> District Judge John Gleeson rested his decision on the notion that the public has a strong interest in "Doe being an employed, contributing member of society."<sup>101</sup> That interest outweighed the government's proffered interest in record keeping.<sup>102</sup>

Notably, the decision contained many of the justifications for expungement relief that are mentioned above. Judge Gleeson referenced how even minor federal felonies "can have wide-ranging effects on, among other things, a defendant's employment, housing, and educational opportunities."<sup>103</sup> Judge Gleeson reasoned that, "simply put, the public safety is better served when people with criminal convictions are able to participate as productive members of society by working and paying taxes."<sup>104</sup>

In a move that has provoked scholarly discussion beyond the scope of this paper,<sup>105</sup> Judge Gleeson claimed that the federal district courts have "ancillary jurisdiction over applications for orders expunging convictions."<sup>106</sup> Judge Gleeson imported a standard of review involving "balancing the equities."<sup>107</sup> Like some of the state-level standards, Judge Gleeson sought to balance "'the government's need to maintain arrest records . . . against the harm' that the maintenance of arrest records can cause citizens."<sup>108</sup>

Judge Gleeson also acknowledged that actions like his are only warranted when "extraordinary circumstances are present."<sup>109</sup> This appears to be a nod to the counterarguments to expungement, especially at the federal level: federal crimes are serious, and actors within the community should be able to obtain information about ex-offenders that might be relevant to an important decision, especially related to hiring. But those circumstances existed in a case involving a convicted felon who demonstrated full completion of the terms of her probation without problems and who demonstrated consistent examples of an inability to maintain employment in her field due to

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<sup>100</sup> See *Doe v. United States*, 110 F. Supp. 3d 448, 449 (E.D.N.Y. 2015).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 452.

<sup>104</sup> *Id.*

<sup>105</sup> See generally Case Comment, *Doe v. United States: District Court Grants Motion to Expunge Conviction for Equitable Reasons*, 129 HARV. L. REV. 582 (2015).

<sup>106</sup> *Doe*, 110 F. Supp. 3d at 454 (citing *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977)). Notably, Judge Gleeson found consensus at the federal circuit level regarding jurisdiction to expunge unlawful convictions and arrests while recognizing a circuit split regarding expungement of lawful convictions.

<sup>107</sup> *Id.* (quoting *Schnitzer*, 567 F.2d at 539–40).

<sup>108</sup> *Id.* at 454–55 (quoting *United States v. Doe*, No. 71-CR-892 (CBM), 2004 WL 1124687, at \*2 (S.D.N.Y. May 20, 2004)).

<sup>109</sup> *Id.* at 455 (quoting *United States v. Doe*, 935 F. Supp. 478, 480–81 (S.D.N.Y. 1996)).

her criminal record.<sup>110</sup> Her rehabilitation<sup>111</sup> and the effect of her conviction were unquestionable.<sup>112</sup> Most forcefully, Judge Gleeson countered the government's arguments by emphasizing the punishment-like nature of collateral consequences: "I sentenced her to five years of probation supervision, not to a lifetime of unemployment."<sup>113</sup> Finally, for Judge Gleeson, "[Doe's] case highlights the need to take a fresh look at policies that shut people out from the social, economic, and educational opportunities they desperately need in order to reenter society successfully."<sup>114</sup> In short, Judge Gleeson recognized the punitive effect that criminal records can have during an offender's lifetime. He was also willing to use judicial authority to fill any currently existing legislative shortcomings as to relief. In that regard, Judge Gleeson's action mirrors some of the early state expungement decisions that inspired legislative reform with respect to expungement and collateral consequences.

### III: THE FUTURE OF REMEDIES FOR CRIMINAL RECORD HISTORY INFORMATION

Expungement law has come a long way in the past fifty years. But many of the reforms touted by jurisdictions have been more piecemeal than revolutionary. While an increasing number of jurisdictions embrace the notion of expungement, the range of remedies, and their practical effect, remain limited. Jurisdictions generally remain conservative when it comes to which types of information should be eligible for expungement. Perhaps more importantly, the information age arguably renders expungement an outdated solution due to the difficulty with removing information from the Internet.<sup>115</sup> Skepticism regarding the benefits of expungement in the information age, coupled with the incremental nature of legislative reform, leads to the conclusion that expungement law must continue to develop as one piece in a larger puzzle.

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<sup>110</sup> *See id.*

<sup>111</sup> *See id.* at 455 ("That she has not engaged in any criminal activity since the conduct that brought her before me helps to prove that point; a long period of law-abiding conduct after a conviction lowers the risk of recidivism to the same level as someone who has never committed a crime." *Id.* (citing Alfred Blumenstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47.2 *CRIMINOLOGY* 327, 339 (2009))).

<sup>112</sup> *See id.* (noting how the petitioner "has been terminated from half a dozen jobs because of the record of her conviction").

<sup>113</sup> *Id.* at 457.

<sup>114</sup> *Id.*

<sup>115</sup> *See* Weidenbener, *supra* note 1; The Editorial Bd., *supra* note 2. In this sense, both Governor Pence and *The New York Times* editorial page are onto something. Yes, legislatures and executives should continue to take action in the realm of expungement and with respect to alleviating the effect of collateral consequences. At the same time, expungement can accomplish only so much, especially without a broader change in attitudes regarding how to treat individuals with a criminal record (or who had a criminal record) as they attempt to reenter society.



### A. *Systemic Challenges in the Information Age*

Skepticism about the efficacy of expungement remedies in the information age is abundant and legitimate. Criminal records are, in some sense, eternal.<sup>116</sup> The Internet is a near-bottomless repository of information, impossible to fully clean. As such, hiding an arrest or conviction record even after it has been expunged from official records may be futile.<sup>117</sup> As Jenny Roberts has said elsewhere, “[a] common practical critique of sealing and expungement laws is that they are essentially useless in our current information environment.”<sup>118</sup>

The problem revolves around two realities: the informational infrastructure is ever-growing<sup>119</sup> and intertwined, and it is impossible to reach all of the possible holders of the information. The number of private data companies has grown exponentially and many of those companies do not solely utilize public sources of information when compiling data.<sup>120</sup> Thus, restricting the availability of public information—through expungement or sealing—will only achieve so much.<sup>121</sup> The information might be expunged from public records in an official court database. “However, the background check company that fails to update its data might still continue to report the information with few repercussions. This company may also or thereby sell its services for a lower price than the government, enhancing the risk that companies will receive outdated information.”<sup>122</sup>

One can imagine the type of situation that this puts a job applicant in when deciding whether to disclose a prior mistake. If the applicant has had the record expunged from official databases, but is unaware whether *all* private companies are up to date, should the applicant still disclose the record? Or should the applicant take the risk and not disclose, only to be labeled

<sup>116</sup> See generally JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015).

<sup>117</sup> Roberts, *supra* note 5, at 335 (“The major critiques are . . . sealing and expungement are useless because once a record is on the Internet, it is impossible to truly hide it . . .”).

<sup>118</sup> *Id.* at 341; see also Jeffrey Rosen, *Free Speech, Privacy, and the Web That Never Forgets*, 9 J. ON TELECOMM. & HIGH TECH. L. 345, 345 (2011).

<sup>119</sup> Jacobs & Crepet, *supra* note 14, at 211 (“The information infrastructure is too large, too entrenched, and too useful to too many people to make its contraction even a remote possibility.”).

<sup>120</sup> Jacobs, *supra* note 9, at 411 (“Because of the proliferation of private information brokers with criminal record databases, it is difficult to ensure the expunged record has been deleted from *all* databases.”).

<sup>121</sup> Jacobs & Crepet, *supra* note 14, at 212 (“[R]estricting access to the federal NCIC and the state-level criminal records repositories would achieve little, if anything, if court records were still open to commercial information vendors and the general public.”).

<sup>122</sup> Roberts, *supra* note 5, at 345 (“[N]ot all [credit reporting agencies] use reliable sources for their reports, and they certainly do not always update expunged records from their databases through removal. Thus the potential for, and indeed incidents of, error can be high.”); *id.* at 341 (“While an expunged or sealed conviction will not show up in a public search of an official court database, a background checking company may have gathered the data before the expungement and failed to update it afterwards.”). And the federal Fair Credit Reporting Act only regulates so much. See Vallas & Dietrich, *supra* note 23, at 14 (explaining the common mishaps of background check agencies, including mismatched cases, confused identities, and improper reporting of dispositional data).

untruthful when the private data company that the employer enlists for its background checking discovers the expunged information? One might respond by stating that the individual could challenge the accuracy of the report under a law like the FCRA. Although FCRA does provide equitable remedies, is that going to provide the type of immediate relief that the job seeker needs? In short, the eternal information problem can present a lose-lose proposition for applicants for jobs, housing, or other public benefits.<sup>123</sup>

Another systemic issue that threatens the viability of expungement reform is that the political will that is necessary for substantial reform has never existed. Some argue that “there are some types of convictions or even arrests that should never be expunged or sealed . . . .”<sup>124</sup> That argument is unlikely to leave political debates anytime soon, and perhaps rightfully so.

Finally, some have argued that while expungement remedies can be helpful in limited circumstances, there are other measures that can be more useful to an ex-offender. There has been a recent movement in favor of expanding “forgiveness” remedies, such as certificates of relief or rehabilitation that suspend applicability of certain collateral consequences to an ex-offender’s unique situation<sup>125</sup> and the management of collateral consequences during sentencing in order to accomplish similar objectives.<sup>126</sup> Whereas expungement might erase the past incompletely, these remedies affirmatively help the individual reenter a particular part of society by restricting the applicability of collateral consequences. With that said, they do not allow ex-offenders to start with a clean slate.

### B. *Expungement Is Not Enough*

The reality is that the efficacy of expungement remedies is linked to the reforms that occur in other areas as well. While state-level action has inspired reforms in other states, those reforms are only one piece of a larger puzzle related to collateral consequences, rehabilitation, and other aspects of criminal justice. Jurisdictions have to be mindful of the multi-layered nature of the problem, which includes the accessibility of data, the social stigma that comes with a criminal record, attitudes towards ex-offenders, the regulatory nature of collateral consequences as well as the breadth of such consequences, and the actions of many of the players involved, including

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<sup>123</sup> Roberts, *supra* note 5, at 342 (noting that it is tough to advise the applicant whether he or she should “disclose and fail to get the job because of the record or deny and fail to get the job for being untruthful”).

<sup>124</sup> See, e.g., *id.* at 335.

<sup>125</sup> See, e.g., N.C. GEN. STAT. ANN. § 15A-173.4 (West, Westlaw through the end of the 2015 Reg. Sess. of the Gen. Assemb.) (describing procedure for issuance of certificate of relief); see also John Rubin, *Relief from a Criminal Conviction, Certificates of Relief*, U.N.C. SCH. OF GOV'T, <https://www.sog.unc.edu/resources/microsites/relief-criminal-conviction/certificates-relief> [https://perma.cc/B99V-ZULB] (offering a detailed discussion of a range of remedies related to expungement under North Carolina law).

<sup>126</sup> See Margaret Colgate Love, *Collateral Consequences and the Revised Model Penal Code: From Punishment to Regulation*, 2015 WIS. L. REV. 247, 265–77 (2015).

prosecutors, defense attorneys, and judges. But the difficulty that comes with mitigating the effect of a criminal record on positive reentry is not a reason, alone, to forget the usefulness of expungement.<sup>127</sup> After all, properly carried out expungements can help ex-offenders fully start over.

Moving forward, jurisdictions will need to focus on a few issues to comprehensively address the effect of criminal records. First, jurisdictions should continue to consider expanding the types of criminal record information that are eligible for expungement. Indiana's broad eligibility provisions are not the norm, but are a good starting place for a new approach. Many states that do allow for the expungement and sealing of conviction information have chosen to restrict the eligible offenses to relatively minor convictions. Further, extensive waiting periods *after completion of the full sentence* undermine positive reentry given that the particular offender has been fully compliant with his or her obligations to the justice system. These twin realities—restrictions on which convictions are eligible and delayed relief—operate to inhibit reentry on a timely basis when it is possible and very well might contribute to recidivism.<sup>128</sup>

Second, the sheer number of private background check and data companies that exist without clear standards for accuracy, or enforcement of existing standards, warrants oversight. As mentioned earlier, the FCRA only reaches so many companies and its scope is somewhat limited. Measures that require data companies, who often supply information to reporting agencies, to update their records constantly have the potential to mitigate the eternality associated with a criminal record.<sup>129</sup> Perhaps the place to start is the FBI, which houses massive amounts of records and has been criticized in the past for failing to “clean up its notoriously inaccurate master criminal records database.”<sup>130</sup> Similar issues exist at the state level where public reporting agencies, like state police entities and court administrative offices, fail to update data that is accessible either freely or by contract to data companies and reporting agencies.<sup>131</sup> But it is not enough that the law regulate accuracy by clarifying standards; enforcement of those standards must follow, whether it is through litigation initiated by the government or non-oner-

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<sup>127</sup> Roberts, *supra* note 5, at 343 (“The complexity of the information environment and the fact that not everyone is able to move beyond an expunged record are not reasons to deny the mechanism to the many individuals who do benefit from sealing and expungement.”).

<sup>128</sup> See *Research on Recidivism and Employment*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/topics/corrections/reentry/pages/employment.aspx> [<https://perma.cc/NF9B-WBST>].

<sup>129</sup> Roberts, *supra* note 5, at 342 (“In particular, tighter regulation of data brokers—especially measures to ensure that brokers update their databases often so as to purge them of expunged records—will offer more people relief from a record.”).

<sup>130</sup> *Id.* at 344.

<sup>131</sup> Jacobs, *supra* note 9, at 416–17 (“[R]ap sheets are still often incomplete, especially on account of missing dispositional data . . . [and] may contain blatant errors.”). The author is reminded of his time as a legal aid attorney in Pennsylvania working on expungement matters. Receiving rap sheets from the state police or court databases, without dispositions for charges, was too commonplace.

ous private rights of action.<sup>132</sup> Accuracy standards are useless without credible oversight.<sup>133</sup>

While measures related to data accuracy directly relate to the expungement of criminal record history information, jurisdictions also need to consider further restrictions on the use of expunged records and those that are not expunged. Where expungement of a record is available, the corollary should be that the law bars decision makers from asking about and considering expunged records.<sup>134</sup> Otherwise, “expungement,” or its analog in a particular jurisdiction, is a legal fiction pursued at too great a cost to individuals and the system, especially considering that the pursuit of relief is not always free, even for low-income ex-offenders.<sup>135</sup> Of course, there will and should be exceptions to this rule, especially for the most sensitive positions. But states should consider reforms that make consideration of expunged information the exception in limited circumstances, such as in the case of serious felonies, rather than the rule. Finally, sanctioned discrimination on the basis of expunged records should be extremely limited.<sup>136</sup>

Other, broader criminal justice reforms are important as well. While attitudes towards ex-offenders seem to be shifting, the pace of that shift remains slow. As such, jurisdictions should consider incentivizing decision makers and private actors to not discriminate on the basis of criminal records.<sup>137</sup> While others have addressed possible measures to achieve this goal, as well as the possible pushback, further consideration is worthwhile given the number of citizens who have had some contact with the criminal justice system and continue to struggle economically.

Perhaps the best way to limit the effect of criminal record history information is to prevent its systematic creation in the first place, even after an individual encounters the system. Arrest and conviction records attach scarlet letters to individuals.<sup>138</sup> However, not all arrests have to result in convic-

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<sup>132</sup> Notably, given the combined effect of collateral consequences and the availability of information on the Internet, the time might be ripe to reconsider the doctrine in *Paul v. Davis*, 424 U.S. 693 (1976).

<sup>133</sup> See Jacobs, *supra* note 9, at 418 (“It is therefore imperative that states provide fair and effective procedures for obtaining one’s own criminal record, challenging its accuracy, and having it corrected.”).

<sup>134</sup> See Roberts, *supra* note 5, at 344–45.

<sup>135</sup> The cost of an expungement varies from jurisdiction to jurisdiction and depends on factors such as the decision whether to retain private counsel. A simple Google search for expungement attorneys confirms this reality. Search for Expungement Attorneys, GOOGLE, <http://www.google.com/> (search “cost of expungement”). Further, the author recalls his time as a legal aid attorney and public defender. While clients of the legal aid clinic were granted automatic *in forma pauperis* status for filing purposes, non-clients were not. Court filing fees can add up for the unrepresented.

<sup>136</sup> See Jacobs, *supra* note 9, at 412 (“An obvious strategy for ameliorating the negative effect of criminal records is to prohibit employment, housing, and other discrimination based on criminal records. This would require reversing a great deal of current law that affirmatively authorizes and even mandates such discrimination.”).

<sup>137</sup> See Jacobs & Crepet, *supra* note 14, at 212 (mentioning possible tax incentives for employers who hire ex-offenders).

<sup>138</sup> See generally NATHANIEL HAWTHORNE, THE SCARLET LETTER AND SELECTED PROSE WORKS (1949).

tion; instead, prosecutors and courts could be more mindful of the long-term value of diversionary programs that allow for automatic and timely expungement under current legal regimes.<sup>139</sup> Prioritizing rehabilitation-like measures in lieu of negotiated convictions could allow for the pursuit of multiple objectives at the same time: disposition of the case at hand, redress for the offense, rehabilitation of the offender, and a brighter road to reentry with a lower chance of recidivism.<sup>140</sup> From an expungement perspective, such programs prevent imposition of the scarlet letter that results from a conviction, thereby rendering the shortcomings of a particular jurisdiction's expungement law less significant.<sup>141</sup>

Perhaps the most important piece of the puzzle relates to awareness of the limits of expungement and how those shortcomings relate to the effect of collateral consequences. Other articles have detailed the significant knowledge gap regarding collateral consequences in the overall criminal justice system.<sup>142</sup> While many defense attorneys, informed of this issue, acknowledge these consequences in their practice, prosecutors and judges remain somewhat on the sidelines.<sup>143</sup> Many of the players within the system fail to fully comprehend the range of consequences facing an offender after conviction and how existing remedies related to the existence of a criminal record are grossly insufficient.<sup>144</sup> Heightening that knowledge might alter outcomes in a mutually beneficial fashion that cumulatively lessens the immediate need for expungement.

#### CONCLUSION

Expungement law is at a crossroads. One path leads to the way of the obsolete, emphasizing that the information age and political realities manifested in piecemeal legislation are permanent guarantors of minimalist expungement regimes that are likely to persist for years to come. The other road is more optimistic, pointing to the systemic and individual benefits that can come from an effective expungement, such as changing attitudes towards employees with criminal records and the role that a clean slate can play in positive reentry. While the first avenue views expungement as a relic of the past, the second is more hopeful. And the third option, of course, is for nothing to happen at all.

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<sup>139</sup> Many states have statutes that create diversionary programs and allow for favorable dispositions to the accused, as well as the chance to expunge the information. *See, e.g.*, 35 PA. STAT. ANN. § 780-117 (West, Westlaw through 2016 Reg. Sess. Act 4 (2016)).

<sup>140</sup> *See Jacobs, supra* note 9.

<sup>141</sup> *Id.* at 406.

<sup>142</sup> *See generally Murray, supra* note 28; *see also Murray, supra* note 32 (detailing prosecutorial role during plea bargaining with respect to collateral consequences).

<sup>143</sup> *See Alec C. Ewald & Marnie Smith, Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUST. SYS. J. 145, 152–56 (2008) (discussing the results of a survey of state judges).

<sup>144</sup> *See id.*

So what should be the future of expungement law based on the recent experiments at the state level? The reality is that expungement should be viewed as one piece of a larger puzzle aimed at alleviating the plight of those with criminal records. Such records often come with a penalty worse than incarceration or the direct effects of encountering the criminal justice system. Criminal records, while justified for a host of reasons, have the capacity to cripple individuals and entire communities if they are proliferated unjustifiably. Expungement offers the promise of a new beginning to the ex-offender who has served his or her time.

States should strongly consider following Indiana's lead by modifying their expungement laws to broaden the available remedies to ex-offenders. Indiana's law is by no means perfect, but it represents a reasonable effort to legislate new beginnings for ex-offenders. By allowing for near-universal eligibility for expungement, except for individuals who commit the most serious offenses, Indiana has offered numerous low-level offenders a chance at redemption. Indiana's recognition that expungement should be available relatively quickly after completion of one's sentence should enable ex-offenders to land on their feet more easily. Finally, Indiana's decision to situate expungement remedies aside anti-discrimination measures within the same law has the capacity to fundamentally alter attitudes towards the usage of criminal records. Jurisdictions would be wise to use Indiana's law as inspiration for legislative action.

With that said, expungement never will be a panacea for all of the illnesses afflicting the administration of justice, especially those related to the effects of criminal record keeping. Criminal records, in some form and for good reason, must and always will exist. As such, expungement regimes should be viewed as primarily vehicles for individual relief. Again, Indiana's law does well in this regard, containing detailed provisions related to the form of expungement relief available to an individual based on the nature of the offense. Attempting to shoehorn broader criminal justice policy objectives, beyond simple anti-discrimination measures, into expungement regimes is likely to disappoint even the most fervent supporters of expungement.

Other systemic remedies must be part of an overall effort to mitigate the effect of the bright scarlet letter that comes with having a record attached to one's name. For example, all of the parties within the criminal system, whether involved in investigating, arresting, charging, prosecuting and defending, or sentencing, must be made aware of the deleterious effects of record keeping processes and records themselves, however well-intentioned those processes may be. This is especially important for law enforcement personnel given the tremendous, life-altering effect of an arrest and charges, even if they do not result in conviction. Similarly, prosecutors and defense attorneys should do their best to negotiate plea bargains and alternative dispositions that leave room for new beginnings for ex-offenders, especially in states with broader expungement regimes. Prosecutors and public defenders should be made aware of the expungement regimes in their state. Finally,

judges should recognize, when making sentencing decisions, that the aspects of a direct sentence are often minor compared to the perpetual rain that falls from the cloud of a criminal record.

In the end, expungement has a role to play as the criminal justice system continues to evolve. While it may be true that carrying out an expungement has become more difficult, reformers must remain mindful that the ultimate reward of a clean slate justifies the extra work associated with completing an expungement. There are few aspects of the criminal justice system that can lead to a pure second chance. That is reason enough to begin the work of a new era for expungement.

